The Australian High Court recently found that the common law could allow parents to claim tortious damages when medical negligence was proven to have led to the birth of an unplanned, but healthy, baby (Cattanach v Melchior (2003) 215 CLR 1). In Harriton v Stephens (2006) 80 ALJR 791; [2006] HCA 15 and Waller v James; Waller v Hoolahan (2006) 80 ALJR 846; [2006] HCA 16 the High Court in a six-to-one decision (Kirby J dissenting) decided that no such claim could be made by a child when medical negligence in failing to order an in utero genetic test caused the child severe disability. In an era when almost all pregnancies will soon require patented fetal genetic tests as part of the professional standard of care, the High Court, by barring so-called “wrongful life” (better termed “wrongful suffering”) claims, may have created a partial immunity from suit for their corporate manufacturers and the doctors who administer them. What lessons can be learnt from this case about how the Australian High Court is, or should be, approaching medical negligence cases and its role as guardian of the Australian common law?

INTRODUCTION

The facts of Harriton v Stephens (2006) 80 ALJR 791; [2006] HCA 15 and Waller v James; Waller v Hoolahan (2006) 80 ALJR 846; [2006] HCA 16 have been already set out, along with a commentary on the reasoning of the New South Wales Court of Appeal, in a case note in this journal. This analysis considers some jurisprudential implications of their outcome in the Australian High Court. In summary, both cases concerned children who were born profoundly disabled, and requiring lifelong, 24-hours-per-day care, as a result of medical conduct that breached the prevailing standard of care but was held not to have resulted in actionable damage.

In brief summary, Alexia Harriton was born with catastrophic disabilities (blindness, deafness, mental retardation and spasticity) as a result of her mother accidentally contracting rubella during pregnancy, coupled with the mother’s doctor not correctly interpreting, ordering and advising upon diagnostic tests for rubella. The recommended purpose of such tests, which are routinely made available and funded as part of the ante-natal professional standard of care (given current limitations in relevant therapies), is to give the parents the option of arranging an early term abortion.

Keeden Waller was conceived via in vitro fertilisation (IVF). His father was known to be suffering from a blood disorder (anti-thrombin 3 deficiency (AT3)) which increased his propensity to clot in veins and arteries. Although Keeden could have been genetically tested for the disorder, he was not. After birth, Keeden suffered a cerebral thrombosis and consequently suffers from cerebral palsy with uncontrollable seizures. He was found to have inherited the blood deficiency disorder from his father.

The actions were brought in the New South Wales Supreme Court in the name of Alexia Harriton against Dr Paul Stephens, and in the name of Keeden Waller against Dr James, Sydney IVF Pty Ltd and Dr Hoolahan. In contrast to Keeden, Alexia’s parents were unable to commence a wrongful birth
action in their own names to recover the costs of her disability, due to the expiration of the statutory limitation period.\(^2\) Alexia’s and Keeden’s claims for damages included special damages for past and future medical and care costs and general damages for pain and suffering: *Harriton v Stephens* (2006) 80 ALJR 791; [2006] HCA 15 at [212] (Crennan J).

Studdert J at first instance found against the plaintiff children on the basis that the medical negligence only deprived their parents of the opportunity to arrange for their abortions, a form of damage he held was not known to the law. The appeal by Alexia Harriton and Keeden Waller failed. Spigelman CJ and Ipp JA found in favour of the respondents, while Mason P dissented. Their reasons were critically analysed by Young.\(^3\)

### THE HIGH COURT MAJORITY


For the majority (Crennan J, Gleeson CJ, Gummow, Heydon, Callinan and Hayne JJ), the issues raised were as follows (at [219], Crennan J):

- whether a duty of care was owed by the defendants to the plaintiffs (as fetuses) to diagnose rubella and advise Mrs Harriton of the disabilities caused by exposure to rubella and to recommend termination (and in the case of the Wallers to warn of the inheritable nature of Mr Waller’s AT3 deficiency); and

- whether, if calculation of damages according to compensatory principles was virtually impossible (due to the problematic comparison of life with disabilities and non-existence), the damage could be treated as actionable.

In relation to duty of care, the majority set about determining whether the defendants could owe a duty of care to the plaintiffs, as fetuses, as a matter of principle (*Sullivan v Moody* (2001) 207 CLR 562 at [50]-[53]). Essential to such a consideration was that the complaining party should be able to prove that actual loss and damage have been suffered as a consequence of that duty (*Donoghue v Stevenson* [1932] AC 562 (Lord Macmillian)). The majority indicated that implicit in Alexia’s and Keeden’s claims was an assertion that it would have been preferable if they were not born (at [245], Crennan J).\(^4\) This raised difficult issues from the majority’s perspective, because if it were to be accepted it would create a right or interest of the fetus in its own termination, rather than the right of the fetus to be protected from physical injury while in utero (as Kirby J argued in his dissenting opinion). To create such rights or interests, the majority claimed, would place upon a doctor a further duty which has the capacity to “introduce conflict, even incoherence, into the body of relevant legal principle”.\(^5\)

On the issue of damage and comparing life with disability against non-existence, the majority considered numerous overseas authorities (at [227]-[236], Crennan J). The decision of the English Court of Appeal in *McKay v Essex Area Health Authority* [1982] QB 1166 seemed the most influential (see Harriton at [227], [228], Crennan J), as it found (at 1174; 1181) that the duty was owed to the mother, and not the child, to give the mother an opportunity to terminate the pregnancy.\(^6\) *McKay* also held (at 1181-1182) that a court could not “evaluate non-existence for the purpose of determining

\(^2\) Limitation Act 1969 (NSW), s 14(1)(b).

\(^3\) See Young, n 1.

\(^4\) Quoting Spigelman CJ from the Court of Appeal case.

\(^5\) Namely that it is only Mrs Harriton who was entitled to terminate her pregnancy lawfully in New South Wales, by reference to her physical and mental health: s 82 of the *Crimes Act 1900* (NSW); *CES v Superclinics (Aust)* Pty Ltd (1995) 38 NSWLR 47 at 53-54, 59-61. See *Harriton v Stephens* (2006) 80 ALJR 791; [2006] HCA 15 at [246] (Crennan J).

\(^6\) *McKay v Essex Area Health Authority* [1982] QB 1166 at 1178, 1180-1181 (Stephenson LJ).
whether a disabled life had lost anything by being born”.\(^7\) The High Court majority agreed that without an appropriate and tangible point of comparison, there can be no means of establishing damage which a court is capable of recognising (at [230], Crennan J).

The majority also considered the decision of Zeitsov v Katz (1986) 40 (2) PD 85 by the Supreme Court of Israel, where the court overcame the difficulties of comparing life with disability and non-existence by using, as a comparator for the assessment of damages, “life as a healthy child” (at [236], Crennan J).\(^8\) The majority justices described such a construction as an “awkward, unconvincing and unworkable legal fiction” (at [276], Crennan J).

At the end of Crennan J’s majority judgment she indicated (at [277]) that Cattanach v Melchior (2003) 215 CLR 1 “represents the present boundary drawn in Australia by the common law … in respect of claims of wrongful birth and wrongful life. Life with disabilities, like life, is not actionable.” Hayne J emphasised this point also (at [172]): “It is because the appellants [Alexia and Keeden] cannot ever have and could never have had a life free from the disabilities … that the particular and individual comparison required by the law’s conception of ‘damage’ cannot be made.” It should be noted that the majority are careful to avoid using evocatively accurate descriptions such as “suffering” when describing Alexia’s and Keeden’s disabilities. The majority instead found that the severely disabled child in these circumstances “is entitled to look for support to both the state and her devoted parents” (at [271]).

As a result of similar decisions in other jurisdictions, it could be easy to view Harriton as closing a chapter on a complex area of medical negligence law. The decision by the majority in Harriton; Waller has been applauded as a valuable step back from the “line in the sand” that was drawn by the decision in Cattanach.\(^9\) Yet some aspects of the Harriton decision raise disturbing questions about the High Court’s approach to such issues and suggest the story of wrongful life is not over in Australia yet. One of the most powerful of these is the sense that medical carelessness has contributed here to great human suffering, upon which the High Court appears to have turned its back, in denial of even more fundamental tenets of justice and basic principles of the Australian common law.

**The High Court minority**

Kirby J commenced his dissenting opinion by referring to the much-criticised label given to such cases, “wrongful life”. He referred to it as being unfortunate, ill-chosen, un instructive and misleading (at [8], [10]). He concluded that “wrongful suffering” would be a more apt description of cases such as those of the plaintiffs (at [155]). By emphasising the suffering of Alexia, Keeden and their respective families, Kirby J separated himself from the method of analysis used by the majority judgment and explicitly aligned his reasoning to more fundamental conceptions of justice and related common law principles.

Kirby J felt that it would frustrate the proper purpose of the law of negligence to deny damages to a plaintiff experiencing severe injury partly through the fault of a doctor (that same professional carelessness would have denied the plaintiff access to effective medical treatments even if they had been available), merely because of some logical difficulties associated with comparing life to non-existence (at [95]-[96]). Indeed, Kirby J indicated that the comparator contemplated by the majority in this case was “purely hypothetical – a fiction, a creature of legal reasoning only” (at [101]).

On the issue of comparing life with disabilities with non-existence, Kirby J supported Mason P’s dissent in the New South Wales Court of Appeal. He stated that the majority, who asserted the impossibility of comparing existence and non-existence, start from the mistaken proposition that the

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\(^7\) McKay v Essex Area Health Authority [1982] QB 1166 at 1181-1182 (Stephenson LJ).


source of the appellant’s complaint is that they were born. In fact, in his view, a more realistic and just characterisation of the appellant’s complaint should be directed at their present and future suffering and the needs it creates. Such an approach would also be coherent with decisions about the end of life and withdrawing or withholding treatment in the case of the terminally ill or disabled. Kirby J highlights other difficulties in the way the High Court majority approaches medical negligence cases such as this. Exploring these important issues constitutes the remainder of this analysis.

**PROBLEMS WITH NO TRIAL AND ABBREVIATED FACTS**

One major problem with the *Harriton* case was that the appellant had not yet had a trial. A consequence of this was that the facts available to the High Court justices were brief and unelaborated. This burdened the plaintiff who bore the onus of proof. Conscience in all spheres of professional life is predictably aroused by the direct proximity of educated and sensitive minds to human suffering. Deciding an appeal on abbreviated agreed facts risks further depriving the judiciary of such direct proximity and drying-up a vital spring that refreshes the evolution of common law.

Few academics or practitioners would now unequivocally support a version of positivist jurisprudence propounding that the task of the judiciary is merely to interpret existing law. The evolution of the law requires that the conscience of the judiciary periodically clothe itself with broad principles of common law justice (often calibrated against contemporary norms of bioethics and international human rights) when responding to unusual and difficult facts, gaps in legislation and altered social concerns. For a society such as Australia’s, lacking any constitutional Bill of Rights, this capacity is particularly important in relation to judicial oversight of claims made upon citizens by legislation and government policy. In such circumstances, the plastic nature of the common law may be a crucial defence against tyranny and injustice. As Kirby J put it in *Harriton* (at [35]): “Facts may present wrongs. Wrongs often cry out for a remedy. To their cry the common law may not be indifferent.”

**NARROWING COMMON LAW DUTIES?**

Kirby J noted that in Australia, unlike most common law countries, there is no settled methodology or universal test for determining the existence of a common law duty of care. Yet most tort actions fall within a recognised duty of care category and for those on the boundary, the test of reasonable foreseeability will ordinarily provide adequate guidance toward discovering the elusive additional components. In *Sullivan v Moody* (2001) 207 CLR 562 three interstitial principles that would normally count against the existence of a duty were held to be that:

- finding a duty of care would cut across or undermine other legal rules;
- the duty asserted would be incompatible with another duty; and
- to recognise a duty would expose the defendant to indeterminate liability.

Factors supporting judicial recognition of a duty of care have been held to be:

- vulnerability on the part of the plaintiff;
- special control; or
- knowledge possessed by the defendant about the circumstances that gave rise to the damage suffered by the plaintiff.

Another would be that a closely related duty category already exists.

It is not difficult to discern how principles such as these emerge from foundational social virtues like certainty, predictability, formal justice and democratic legitimacy. Given the High Court’s constitutional role as guardian of the Australian common law, it is surprising the majority in *Harriton* did not address this jurisprudential process of development more directly and systematically.

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It is now well established that health care providers owe a legal duty of care to an unborn child to take reasonable care to avoid conduct which might foreseeably cause pre-natal injury. If medical practitioners, eg, failed to order or misread a test for maternal bacterial infection (readily treatable with antibiotics), there is no doubt they would have breached a legal duty of care to the fetus, which crystallises upon its birth as a child.

The High Court majority’s decision to deny the existence of any medical duty of care in Harriton practically amounts to the provision of an exceptional and unwarranted immunity to health care providers which becomes increasingly problematic and unjust as peri-natal health care increasingly involves genetic testing and gene therapy. This duty of care would not conceptually conflict with the duty the respondent owed to the appellant’s mother, as tensions between the non-mutually exclusive professional obligations to mother and fetus are an accepted and common part of obstetric practice. Will Harriton be reversed once a genetic in utero treatment for fetal rubella becomes available?

This highlights a problem with the type of narrow approach to duty of care used by the majority in Harriton. In Neindorf v Jankovic (2005) 80 ALJR 341 Kirby J gave three reasons why judicial inquiries relating to expanding the duty of care should be made at a relatively general level of abstraction. These were that

- the duty concept is already overworked and unduly complex;
- particularising the duty of care to too great a level of specificity carries with it the risk of eliding questions of law and fact; and
- making specific inquiries at the duty stage subverts the traditional structure of the cause of action in negligence, which is designed to pose increasingly specific questions as each successive element falls for decision.

Another he mentioned here was that excessively particular judicial definitions of the content of a duty of care diminish the precedential value of such decisions and again show insufficient respect for the evolution of the common law.

**WHO CLOSES THE CATEGORIES OF COMMON LAW DUTY?**

Since 2002, legislatures in all Australian jurisdictions have enacted legislation to reduce, or eliminate, the ability of plaintiffs to sue in tort, thereby aiming to reduce the cost of public liability and medical negligence insurance. In Harriton (by her tutor Harriton) v Stephens (2004) 59 NSWLR 694, Ipp JA said (at 746):

Generally speaking, at the present time, when legislatures throughout the country have legislated or have foreshadowed legislation restricting liability for negligence, it would be quite wrong to expand, by judicial fiat, the law of negligence into new areas.

This swathe of legislation intruded (but not uniformly) on the Australian common law by substantially restricting principles of reasonable foreseeability and causation. In New South Wales, eg, the “far-fetched or fanciful” formula for reasonable foreseeability stated by Mason J in Wyong Shire Council v Shirt (1980) 146 CLR 40 at 47 was replaced by one of “not insignificant”. The High Court’s decision on disclosing material medical risk in Rogers v Whitaker (1992) 175 CLR 479 was confined in some jurisdictions by statutes removing the requirement to disclose risk of particular concern to the patients (as opposed to reasonably foreseeable risks in general). The principle supporting a standard of care set by even a minority of reasonably competent members of the profession in Bolam v Friern Barnett Hospital Management Committee [1957] 1 WLR 582 has been resuscitated by parliamentary fiat. Exemplary and aggravated damages have been abolished by legislatures in personal injury cases. After the High Court’s decision in Cattanach v Melchior (2003) 215 CLR 1 to award damages to the parents of a healthy child born after a carelessly performed

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13 Civil Liability Act 2002 (NSW), s 5B(1).
14 Civil Liability Act 2002 (NSW), s 50.
15 Civil Liability Act 2002 (NSW), s 21.
sterilisation procedure, legislation preventing recovery of damages in wrongful birth cases was enacted in New South Wales, Queensland and South Australia.\textsuperscript{16}

As was held in \textit{Pilmer v Duke Group Ltd (in liq)} (2001) 207 CLR 165 at 230, courts should retain the discretion to follow statutory developments if that seems consistent and coherent with foundational equitable principles. This is quite a different proposition, however, to courts signalling that they are willing to cede leadership to statute in development of the common law. Kirby J in \textit{Harriton} agreed with Mason P’s disagreement with Ipp JA’s concern about the “keep out” signs erected by numerous State Parliaments after decisions such as \textit{Cattanach v Melchior} expanded tortious liability. He held: “I know of no principle that directs the common law to pause or go into reverse simply because of the accumulation of miscellaneous statutory overrides.”\textsuperscript{17}

At what point will the High Court cease to acquiesce in the capacity of the legislature to alter the basic principles of the common law? This is a particularly important question given the widely publicised, pre-eminent role of the common law in protecting human rights in contemporary Australia. If a legislature decided to reverse the burden of proof in criminal cases to abolish habeas corpus, it is not clear from the majority judgments of the High Court in \textit{Harriton} on what jurisprudential basis the High Court would recommend any “line” be drawn against statutory erosion of such basic common law principles and rights. If this is not correct, however, and the High Court majority in \textit{Harriton} did foresee its reaffirmation of such a judicial limit on statutory interference in basic principles of common law, then those limits should have been enunciated clearly and in accordance with a systematic jurisprudence that respects the protections the common law necessarily must offer Australian citizens against their government.

\textbf{AN ANTI-ABORTION AGENDA?}

Some of the reasoning of the majority in \textit{Harriton} suggests the possibility that what might underpin those pronouncements is a prejudice against abortion and against parents who choose it as a solution to the diagnosis of severe disability in their fetus. Abortion per se is not illegal in Australia and can never realistically be made so. There will always be a variety of circumstances, including the risk of death and severe injury to the mother, that will justify this personal choice in the minds of responsible citizens.

Contrary to the views of the majority in \textit{Harriton}, wrongful life actions do not necessarily entail a pre-natal obligation to terminate the fetus, or that the relevant medical practitioners should have compelled the expectant mother to undergo an abortion. As Kirby J pointed out in \textit{Harriton} (at [112]), a defendant in a wrongful life action will adequately discharge her or his professional duty if reasonable care is exercised in (a) detecting foreseeable risks which may befall the fetus; (b) warning of those risks; and (c) providing, referring or arranging advice and guidance to the patient.

Awarding damages in a wrongful life case is likely to empower the plaintiff to lead a more dignified existence than would be the case when (as the \textit{Harriton} majority acknowledged) the burden of care and maintenance is left by the law to fall somewhat randomly on the (blameless) disabled person’s family, on charity, or on the increasing uncertainties of social security in an increasingly privatised health care system.

As Kirby J highlighted in \textit{Harriton} (at [129]), Australian law does not recognise any principle of parental immunity in tort. Thus, actions against parents by their children are not uncommon in the context of motor vehicle accidents causing pre-natal injuries as a result of the mother’s negligent driving. There is no evidence that such proceedings have resulted in any disintegration of the family. The plaintiff in a wrongful life case is typically a profoundly disabled infant who has little, if any, personal awareness of the proceedings. It is highly unlikely that any court would conclude that a mother’s decision to decline to undergo an abortion would constitute a breach of any duty of care owed to the fetus. Denying a woman’s freedom to make unencumbered choices regarding such serious questions as procreation and abortion is not a role that the High Court should take upon itself; rather

\textsuperscript{16} \textit{Civil Liability Act 2002} (NSW), s 71; \textit{Civil Liability Act 2003} (Qld), s 49A; \textit{Civil Liability Act 1936} (SA), s 67.

\textsuperscript{17} \textit{Harriton (by her tutor Harriton) v Stephens} (2004) 59 NSWLR 694 at [164].

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it should be concerned with how the common law protects such basic liberties (like those of freedom of speech and association) against state interference.

As Kirby J stated (at [110]):

In today’s world a steady adherence to secularism in the law is more important to a mutually respectful civil society than before. Judges have no right to impose their religious convictions (if any) on others who may not share those convictions.

SPECIAL DAMAGES AND THE COMPENSATION PRINCIPLE IN WRONGFUL BIRTH CLAIMS

The principle governing the assessment of compensatory damages in tort was authoritatively stated by Lord Blackburn in *Livingstone v Rawyards Coal Co* [1880] 5 AC 25 at 39 as involving putting “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”.

Assessing damages is always a practical exercise in approximation. Courts have been willing to assign monetary values to many intangible injuries and nebulous losses. Examples are pain and suffering and loss of expectation of life for personal injury and damage to reputation and deprivation of liberty in other contexts.

In *Curlender v Bio-Science Laboratories* 165 Cal Rptr 477 (1980), the plaintiff alleged that a genetic testing laboratory had negligently performed a test for Tay-Sachs disease, an ultimately fatal degenerative neurological disorder. The consequences, she alleged, were that her parents erroneously believed that they were not carriers of the causative gene. The plaintiff was born with Tay-Sachs disease; she would now only live to the age of four, required substantial and expensive care and had no other recourse to compensation. Jefferson PJ, Lillie and Rimerman JJ stated (at 488):

The reality of the “wrongful-life” concept is that such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all.

The court awarded damages for pain and suffering which the plaintiff would endure while she lived, as well as any pecuniary loss resulting from her disabilities. Though the Supreme Court of California in *Turpin v Sortini* 182 Cal Rptr 337 (1982) denied general damages in a similar case (hereditary deafness), a majority affirmed the award of special damages in *Curlender* as they were “both certain and readily measurable”.

Kirby J stated (at [92]-[93]):

Criticisms of awarding special damages while denying general damages buy into a specious “all or nothing” mentality. I know of no other situation where a claim for damages is denied in totality, regardless of the fact that quantifiable damage has been sustained under certain heads, merely because objections exist to awarding damages under another head … There is no difficulty in the computation of such damage. In my view this application of basic principles of law discloses that the impediment to recovery is founded in policy considerations, not law.

The reasoning of Kirby J on the issue of special damages in wrongful life claims appears sound. It is surprising that it was not accepted by more of his colleagues on the court.

The principal reason given by the High Court majority for rejecting the appeal in *Harriton* was that it was impossible to quantify the appellant’s loss according to the compensatory principle. This, so it was said, was because one cannot compare existence with non-existence, because no one has any experience with non-existence. As Kirby J noted (at [80]), Professor John Fleming has found this argument unconvincing:

Objection [to wrongful life actions] is made on the supposedly value-free ground that it is legally and logically impossible to assess damages on a comparison between non-existence and life even in a
flawed condition. Yet such comparison is not required with respect to added (medical) expenses, which are moreover recognised in parental claims. Also symbolic awards are regularly made for pain and suffering, even for loss of expectation of life.\textsuperscript{18}

Kirby J rightly highlights that, for some time, the courts have been comparing existence with non-existence in other legal settings. Thus, they have declared lawful the withdrawal of life-sustaining medical treatment from severely disabled newborns and adults and from the terminally ill. In \textit{Re A (Children)} [2001] Fam 147 (referred to by Kirby J at [95]), the English Court of Appeal also recently authorised separation surgery on conjoined twins in order to preserve the life of one twin, although doing so would result in the death of the other. Removal of the legislative prohibition on suicide is another confirmation that government is prepared to allow individuals to chose non-existence over existence in settings that involve severe and unremitting suffering.

The appellant has unarguably suffered, and continues to suffer, significant pain and discomfort which she would not have had to endure had the respondent acted with reasonable care. Kirby J (at [96]) quoted Pollock J in \textit{Procanik v Cillo} 478 A 2d 755 at 762 (1984):

> Logical analysis, although essential to a system of ordered justice, should not become an instrument of injustice. Whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a birth-defective child, but in denying the child’s own right to recover those expenses, must yield to the injustice of that result.

**CONCLUSIONS**

The majority decision in \textit{Harriton; Waller} illustrates more than just the inability of the common law as administered by the current High Court to provide compensation in circumstances where it is clearly needed. The reasoning of the majority in these cases reveals a worrying tendency for the judiciary to become subservient to the legislature at a time when judicial administration of the common law is being promoted as such a strong protection of fundamental rights and freedoms in Australia that no constitutional Bill of Rights is required.

Has the raft of anti-compensation legislation passed since the medical indemnity crisis and the High Court’s approval of it really been a triumph for justice, or for powerful interest groups? Particularly notable in this context was lobbying by insurance funds and the Australian Medical Association for legislation to stem the “generosity” of tort law.\textsuperscript{19} Somewhere behind the rhetoric that the number of uncomfortable claims has pleasingly “dried up” is the reality that large numbers of people injured as a result of medical carelessness are now suffering in legal silence (without deserved compensation). There is much to be said for a no-fault style compensation system as exists in New Zealand, as both Alexia and Keeden would be covered under the title of medical misadventure, recently amended to “treatment error”, and not subject to the whim of the judiciary in order to find financial relief.\textsuperscript{20} The New Zealand no-fault compensation model has been subject to legislative refinement, yet it relieves the need for blame and significant legal costs and stresses in order to obtain compensation. In the realm of medical law, recent legislative changes have been particularly significant, removing the adversarial procedures necessary for a patient to make a claim and improving patient safety and overall care.\textsuperscript{21}

Alexia and Keeden are now suffering in ways that would not have happened if the doctor (or doctors) concerned had not been careless and acted in ways that fell below the accepted professional standard of care. That suffering is real. It appears that the majority have engaged in a spurious exercise of judicial pedantry to trivialise that actual suffering by reference to some hypothetical alternative


\textsuperscript{19} Note the criticism by Mason P of Ipp JA’s “extra-legal” consideration of the effects that the acceptance of the appellant’s claims would have on the common law going beyond the “keep-out” signs erected by Parliaments throughout the country in response to the supposed pressures on insurance funds and premiums paid by doctors: see \textit{Harriton (by her tutor Harriton) v Stephens} (2004) 59 NSWLR 694 at [164] (Mason P dissenting).


\textsuperscript{21} For example, see \url{http://www.nzma.org.nz/journal/118-1216/1516/} viewed 3 February 2007.
(non-existence). Any judge looking face-to-face at the child in Harriton would know that what she wants is a chance to be as normal as necessarily expensive treatment can now make her. By what principle can the great, historical body of the common law remain indifferent to the injustice of her suffering?

The High Court majority’s condemnation of the Israeli Supreme Court’s use of “the healthy child” as a comparison in the facts-similar Zeitsov case as being an “awkward, unconvincing and unworkable legal fiction” becomes hollow when they create their own “hypothetical” legal fiction in the unrealistic “non-existence comparator”.

As Mason P indicated in his dissenting judgment in Harriton (by her tutor Harriton) v Stephens (2004) 59 NSWLR 694 at [124], it is one of the hallmarks of a compassionate society that care and treatment are made available to the severely disabled. Such compassion, manifesting as common law principle, is even more necessary where the suffering and disability are substantially caused by manifest carelessness of a doctor and where the lives and interests of Australian citizens are increasingly vulnerable before the ideological agendas of a technologically powerful state.

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RECENT DEVELOPMENTS

PROHIBITION OF HUMAN CLONING FOR REPRODUCTION AND THE REGULATION OF HUMAN EMBRYO RESEARCH AMENDMENT ACT 2006 (Cth)


While the amendment allows for embryos to be cloned, such embryos would have to be destroyed within 14 days and cannot be implanted in a woman. Before the amendment, the law allowed stem cells to be harvested from surplus IVF embryos but prevented them from being cloned.

Last-minute changes to the legislation, proposed by the Australian Democrats, increased from 10 to 15 years the prison sentence for flouting safeguards designed to prevent abuse of embryonic cloning.

The amendment prevents the National Health and Medical Research Council from granting licences for human-animal hybrid embryos.

INTELLECTUAL PROPERTY LAWS AMENDMENT BILL 2006 (Cth)

In the intellectual property laws amendment to the Patents Act 1990 (Cth) passed on 14 September 2006,2 the narrow “springboarding” exemption (which applied only to the extended term of a patent for an active pharmaceutical ingredient (API)) was replaced with a general exemption to infringement of a “brand-name” pharmaceutical patent (defined broadly as including APIs, methods, uses and products), for a generic seeking to develop a product prior to placing it on the market. This springboarding amendment did not apply to medical devices.

The major outcome of the broadened springboarding exemption will be that generic companies in Australia will be free to conduct the research and development required to obtain pharmaceutical regulatory approval in Australia or overseas. This change will particularly benefit Australian-based generic companies and may encourage foreign companies to conduct research in Australia. As it stands, the amended springboarding exemption is still sufficiently limited to prevent generic companies from gaining any further significant commercial advantage during the patent term.

**KABOURAKIS v MEDICAL PRACTITIONERS BOARD VIC**

Dr Kabourakis, the appellant, was the treating doctor for a patient who died. A notification was made to the Medical Practitioners Board of Victoria, and an informal hearing was organised pursuant to s 41 of the *Medical Practice Act 1994* (Vic). The informal hearing found that Dr Kabourakis had not engaged in unprofessional conduct.

It later came to light that the informal hearing panel had not been provided with a medical report obtained by the board that was relevant to its decision. The board attempted to organise a second informal hearing under s 41 of the Act. Dr Kabourakis commenced legal proceedings to prevent the second hearing.

In *Kabourakis v Medical Practitioners Board (Vic)* [2006] VSCA 301 Warren CJ, Chernov and Nettle JJA found that the decision of the informal hearing was formal and binding so long as it did not involve jurisdictional error. The decision could only be overturned or set aside on appeal or judicial review. It was not possible, due to the wording of the statute, for the decision to be considered for a second time as a preliminary hearing.

*TF and SJ*