

Common Law Protection for Injury to a Person's Reproductive Autonomy

Wrongful conception - UK

McFarlane v Tayside Health Board (1999, HL)

- (1) A mother who became pregnant following her husband's failed vasectomy could claim general damages for the pain, suffering and inconvenience of pregnancy and childbirth and for associated expenses
- (2) The parents could not recover the costs of bringing up their child. It was contrary to public policy to treat the birth of a child as a "loss" that was compensable in damages

Wrongful conception - Australia

Cattanach v Melchior (2003, HCA)

A doctor who negligently failed to sterilise a patient was liable for upbringing costs on the application of ordinary principles of negligence. No novel head of damages was involved. The plaintiffs' loss was not the coming into existence of the parent-child relationship but simply the expenditure that the plaintiffs had incurred or would incur in the future.

Wrongful conception - UK

Rees v Darlington Memorial Hospital NHS Trust (2003, HL)

In all failed sterilisation cases the courts should make a conventional lump sum award of £15,000, in order to mark the legal wrong suffered by the mother in losing the opportunity to live her life in the way that she wished and planned.

Wrongful life – UK and Australia

McKay v Essex Area Health Authority (1982, CA)

Harrington v Stephens (2006, HCA)

Actions by disabled children alleging negligence by their mothers' medical advisers in failing to diagnose that their mothers had contracted rubella both failed. In each case, had the defendant not been negligent and given information about the disability of the foetus to the mother, she would have opted to undergo an abortion and the plaintiff would never have been born.

Wrongful fertilisation - Singapore

ACB v Thomson Medical Pte Ltd (Sing CA, 2017)

The appellant and her husband sought to conceive a child through IVF, but due to the respondent's negligence the appellant's ovum was fertilised using the sperm of an unknown third party. The appellant gave birth to a healthy child without knowing about this error, but on discovering what had happened she sought damages from the respondent in respect of her pregnancy and the cost of bringing up the child.

ACB - The cost of bringing up the child

Andrew Phang Boon Leong JA

- The obligation to maintain one's child was an obligation at the heart of parenthood and could not be a legally cognisable head of loss
- To recognise the upkeep claim would be fundamentally inconsistent with the nature of the parent-child relationship and would place the mother in a position where her personal interests as a litigant would conflict with her duties as a parent.

ACB – Loss of autonomy

The claim looked not to the cost of the child measured by its care liabilities but to the independent interests of the parents. However, the court should not take the step of recognising a loss of autonomy (without more) as an actionable injury in its own right. Such a development would pose significant problems of legal coherence and would be contrary to well-established principles on the recovery of damages.

ACB – Loss of genetic affinity

The appellant's true loss, which could and should be considered a distinct and recognisable head of damage, was a loss of genetic affinity. Her interest in maintaining the integrity of her reproductive plans in this very specific sense — where she had made a conscious decision to have a child *with her husband* to maintain an intergenerational genetic link and to preserve “affinity” — was one which the law should recognise and protect.

ACB – Loss of genetic affinity

The court would benchmark the eventual award as a percentage of the financial costs of raising the child. The financial costs were not wholly irrelevant as, absent such costs, there would be no other criterion or standard by which to assess the quantum of damages that ought to be awarded. The appellant should be awarded 30 per cent of the costs, which was an amount that properly reflected sufficiently the seriousness of the appellant's loss and was just, equitable, and proportionate in the circumstances of the case.

Deceit - Canada

PP v DD (2017, Ont CA)

The defendant embarked on a sexual relationship with the plaintiff and told him deceitfully that she was taking a contraceptive pill. She conceived and later gave birth to a healthy child. The plaintiff sought damages for emotional harm and disruption to his career and finances.

Rouleau JA - The reasoning of the House of Lords in *McFarlane* had particular force in the instant circumstances, where the claim was made by one parent against the other with whom he shared the legal and moral responsibility of raising the child. Damages also would be inconsistent with Ontario's no-fault child support legislation.

Injury to reproductive autonomy – Actionable injury

Damages for injury to reproductive autonomy may be included as an element in the damages that can be awarded under any existing cause of action, such as a personal injuries claim, without special difficulty.

In the absence of a separate cause of action, the courts need to recognise interference with or injury to reproductive autonomy in itself as an actionable head of damage.

Injury to reproductive autonomy – Actionable injury

Claims for injury to reproductive autonomy are of a kind that is truly unique. They all raise the question whether harm to the parents associated with the existence of a human being ought to be recognised in law as damage of a kind which can found an action. In this respect they are unlike any other tort actions and they stand on their own.

Injury to reproductive autonomy – Private relationships

A claim against a domestic or sexual partner arguably should be treated differently to a claim against a medical adviser, for the reasonable expectations of the parties are different. A party to a private relationship can reasonably expect an honest statement of belief by the other as to whether he or she is sterile or is using contraception. But imposing an obligation of care in respect of private and intimate communications on such a matter might be seen as inimical to candour and uninhibited communication between the parties and as opening the door to possible legal duties of potentially indeterminate scope.

Injury to reproductive autonomy – Quantifying the damages

Relevant factors are those bearing upon the significance of the loss of the autonomy in issue, concerning as it does the freedom of a person to choose to become a parent, or the freedom of unwilling parents to live their lives as they wish without a child at all, or without an extra child, or without a particular feature or features of the child they actually have. They may include (i) whether a parent's career satisfaction or other significant personal aspirations are impaired; (ii) whether the child suffers from a disability; (iii) whether a parent suffers social stigma or discredit; (iv) the level of the person's mental distress

Quantifying the damages – Personal aspirations

Impairment to career satisfaction through having an unplanned child is different from loss of earnings caused by the need to look after a child, and constitutes a highly significant part of many peoples' lives which ought to be taken into account. Significant non-career aspirations, such as sporting or musical activities, might need to be considered as well.

Quantifying the damages – Disability of the child

Treating a child's disability as relevant to a claim for injury to reproductive autonomy puts the focus on the impact on the parents rather than on the "damage" represented by the child. And while the general damages may include an element referable to the parents' disrupted lives, in this case special damages could include the costs referable to the child's disability.

Quantifying the damages – Other genetic characteristics of the child

ACB v Thomson Medical per Andrew Phang Boon Leong JA

Race as a social concept could lie at the root of real and significant harms, including unkind questions as to a wife's fidelity and the paternity of children. These points represented the social reality that the present court had to confront, even if it did not support it.

Quantifying the damages – Other genetic characteristics of the child

A line needs to be drawn, and before any claim might lie there would need to be foreseeable damage which was more than trivial and which was objectively recognisable in the circumstances of the parents. In the absence of such injury or harm the mere deprivation of the ability to choose should not suffice. So purely cosmetic choices which are not fulfilled should not qualify as actionable damage.

Quantifying the damages – Other genetic characteristics of the child

In the case of IVF treatment, parental choice of embryo is limited to the characteristics a fertility clinic is permitted to screen for pursuant to the provisions of the Human Assisted Reproductive Technology Act 2004. They are, broadly: (i) where there is a risk that the future child will suffer from a genetic disorder, or from a chromosomal disorder if the woman is of advanced reproductive age; (ii) to establish the sex of the embryo where there is a risk of a sex-linked disorder; (iii) to establish a tissue match where an existing sibling suffers from a serious medical condition. There can be no screening for anything which is simply cosmetic.

Quantifying the damages – Mental distress

- In order to be compensable in negligence, mental upset and distress needs to be consequential upon actionable damage.
- If interference with reproductive autonomy is the actionable damage then the damages can extend to injury to feelings.
- The form of the interference in autonomy in question will be relevant - whether the complaint is of an unplanned child, or an extra child, or some unwanted feature of the child.
- Seemingly *the parents' circumstances* also may bear upon the level of the parents' mental distress

Quantifying the damages – Mental injury

- In the case of mental harm standing alone, leading decisions in the UK, Australia and New Zealand require that the plaintiff be suffering from some medically identifiable psychiatric illness or injury.
- In *Saadati v Moorhead* (2017) the Supreme Court of Canada rejected this requirement. Rather, plaintiffs had to show that the disturbance was serious and prolonged and rose above the ordinary annoyances, anxieties and fears that came with living in civil society.

Conclusion

Recognising a cause of action for injury to reproductive autonomy would give effect to a principle of law with a clear purpose and with well-defined boundaries, and would represent a logical and sensible evolution from existing authorities.