CES AND ANOTHER

v.

SUPERCLINICS (AUSTRALIA) PTY LTD AND OTHERS[*]

New South Wales Supreme Court
Court of Appeal
22 September 1995
(1995) 38 NSWLR 47; (1995) Aust Torts Reports 81-360

Court of Appeal: Kirby A-CJ, Priestley JA and Meagher JA

KIRBY A-CJ. This appeal comes from a decision of Newman J in an action brought in the Common Law Division of the Supreme Court.

The first plaintiff in that action claimed to recover for the damage suffered following the loss of an opportunity to terminate a pregnancy. She claimed that such loss was occasioned by the failures of the respondent medical practitioners to detect her pregnancy despite her repeated consultations with them. She alleged that, as a result of the breaches of the duty of care owed to her by the respondents, she suffered damage in the form of pain and suffering directly linked to having to bear, and give birth, to her daughter. She also claimed the economic loss already incurred and which is ongoing, arising from the expense of her confinement and rearing the child. It was in respect of this damage that the father of the child (the second plaintiff) also brought an action. The actions were brought against the proprietor of the clinic, Superclinics Australia Pty Ltd (Superclinics), in which the alleged failure competently to diagnose the pregnancy was said to have taken place. The second defendant was a medical practitioner engaged by Superclinics to employ other medical practitioners to practise at the clinic. The third, fourth and fifth defendants were engaged by the second defendant. They were the actual medical practitioners whom the plaintiff consulted at the clinic. It was they who, it was alleged, successively failed to detect her pregnancy in time.

Newman J, for reasons given on 18 April 1994, found in favour of the defendants. It is from this decision, and the judgment in the defendants' favour, that the plaintiffs now appeal to this Court. The case against the second defendant has been discontinued. However all the other parties remain in the appeal, the plaintiffs having become the appellants, and the remaining defendants the respondents.

Medical practitioners fail to detect a pregnancy:

In these reasons, as during the hearing of the trial and the appeal, the appellants and their child were referred to by initials. This course was urged upon the Court by counsel for the appellants. It was adopted by the Court, as it had been by Newman J, to protect the privacy of the appellants and the interests of the child.

Newman J, in setting out the facts of the case, indicated that the narrative "sets out the plaintiffs' allegations of fact as deposed to during the trial". He stated that some of the factual allegations made were in dispute at trial but that:

> "… in view of the conclusion of law which I have reached it is not necessary for me to resolve the factual disputes which emerged during the trial. I have decided that matter of law on the plaintiffs' case taken at its highest."

That leaves this Court, in relation to ascertaining the accuracy of the allegations, in a somewhat difficult position. It was agreed between the parties that, should the appeal on the issues of law be upheld, it would be necessary to remit the case for re-trial. This Court is not in a position to make the findings of fact necessary to establish a positive finding of negligence against the respondents, and in particular, against the fourth respondent. Accordingly, the issues of law presented by the appeal must be considered against the factual background outlined by the appellants' case, taken at its highest. This is how I took all parties to the appeal to approach the case.

The first appellant, CES, presented at Superclinics clinic on 27 November 1986. She was attended to by the second respondent, Dr Nafte. She claimed to have alerted Dr Nafte to the fact that she had missed her period. She informed him of the date of her last period, namely 19 October 1986. She said she told him that she was concerned about being pregnant. She stated that she had said that were this to be the case, she would like to have the pregnancy terminated. This evidence was disputed by Dr Nafte. He could not independently recall the consultation. However, he refreshed his memory from the record of her visit. Having done so, he stated that the appellant had only consulted him for treatment of a condition of cystitis. Certainly, he did not conduct any tests for pregnancy. The first appellant claims that Dr Nafte told her to return within a week if she had still not menstruated. This she did on 1 December 1986.

The first appellant was again attended to by Dr Nafte. As no appointments are required at Superclinics, it was not inevitable that she would have been attended by the same medical practitioner. In fact she was. She claimed that she told Dr Nafte that she had still not menstruated. She stated that she again expressed her wish to terminate the pregnancy if she were found to be pregnant. Dr Nafte on this occasion took a blood test for the purpose of ascertaining whether or not the first appellant was pregnant. Again, it is disputed whether any further physical examination was carried out, or whether the appellant did indicate her desire for termination if the test were positive. Such a request was not, in any event, recorded by Dr Nafte in his notes of the consultation. But the test was certainly ordered.

Superclinics received a report from Omniman Pathology Services on 2 December 1986. It showed a negative result. This was passed to the first appellant on either 4 or 5 December 1986 when she contacted Superclinics by telephone to obtain the results of the test. She claimed that she spoke with a female employee in the "pathology" department. Superclinics denies the existence of any such department. At any rate, the negative test conveyed to the first appellant was a false negative result. She was in fact pregnant at that time.

On 30 December 1986, the appellant had still not menstruated. Anxious to discover the reason, she again attended Superclinics. She was again seen by Dr Nafte. It is common ground that she informed him that she had not had a period since 19 October 1986. In his evidence Dr Nafte disputed her having indicated

that she was anxious or that she would want a termination if she were pregnant. Newman J does not make any finding of this point. But it hardly seems necessary to say that, having returned for a third time to the clinic, not having obtained any satisfactory reason as to why she had not menstruated, the first appellant must be taken to have been concerned about the situation. Dr Nafte did not carry out another blood test. Nor did he undertake any physical or other examination of the appellant. He suggested that this was because it was agreed that the session was to be simply "informative". That explanation appears rather unconvincing in the light of the objective facts of the several visits, the original blood test, and the persisting concern of the patient. Newman J did not make any findings of fact as to why any further tests were refused by Dr Nafte.

On 6 January 1987, the first appellant again went to Superclinics, still not having menstruated. This time she was attended by Dr Cattley. She said that she told Dr Cattley when she had last menstruated and of the previous attendances at the clinic. She also allegedly suggested that the pregnancy test might have produced a false result. This was denied by Dr Cattley, who stated that the first appellant had merely requested a prescription for the contraceptive pill as she was going on holiday with her boyfriend to Queensland. The first appellant claimed that Dr Cattley reassured her, successfully dissuaded her from having another test, and conducted no physical examination. As this was the fourth time on which the first appellant had attended at the clinic within such a relatively short period of time, with a history of not having menstruated, and having already had one test performed for the purpose of detecting pregnancy, it seems objectively to be unlikely that her concern about pregnancy would not have been mentioned to Dr Cattley.

In early January 1987, the first appellant did indeed spend two to three weeks with the second appellant in Queensland. She presented again at Superclinics upon her return. She had still not menstruated. On this occasion (23 January 1987) she saw the fourth respondent, Dr Baker. She stated that she informed him of her recent and relevant medical history and of her desire to terminate the pregnancy, if she were pregnant. Dr Baker conducted an external physical examination. He took a further blood sample which was sent to Omniman Pathology Services. That test was returned positive. It indicated that the first appellant was certainly pregnant. But when the first appellant telephoned Superclinics on 30 January 1987 to obtain the results, in much the same way as she had previously, she was informed, astonishingly enough, that the test was negative. She was not contacted independently by any of the medical practitioners from Superclinics to be correctly informed of the true result. By this stage, the first appellant was approximately eleven weeks pregnant.

The pregnancy is diagnosed when it is too late for termination:

On 24 March 1987, the first appellant consulted her general medical practitioner, Dr Kok, for the purposes of a general check-up and Pap smear test.

On seeing the first appellant, Dr Kok thought that she showed external signs of being pregnant. She referred her to a clinic for an ultrasound pregnancy test. This showed her to be approximately nineteen and a half weeks pregnant. When the first appellant indicated that she wanted the pregnancy terminated, she was informed by Dr Kok that, at that stage, it was too late to perform a termination procedure safely. In this way the option of termination, which

(1995) 38 NSWLR 47 at 52

might earlier have been ordered by expert medical opinion, was lost to the first appellant.

The first appellant was referred to Dr Bradley, a gynaecologist and obstetrician. It was he who supervised the delivery. On 30 August 1987, the first appellant gave birth to a healthy child. Newman J found that the first appellant at all times from 27 October 1987 wanted an abortion if she were diagnosed as pregnant. This finding appears clearly correct.

The appellants claimed that the respondents had breached the duty of care which they owed to them and in particular, to the first appellant, by failing to detect and correctly diagnose her pregnancy. The particulars of the breaches of duty alleged vary slightly in respect of each of the respondents. However, generally they allege that the respondents successively failed to detect the pregnancy, and more specifically, in the cases of the first and third respondents,

- failed to accede to the first appellant's request for a serum or urine test;
- failed to conduct a full physical, including vaginal examination;
- failed to order a pelvic ultrasound test to determined pregnancy competently or at all; and
- advised her to continue taking the contraceptive pill.

On the part of Superclinics and the fourth respondent, the breaches of duty alleged included their failure correctly to inform the first appellant that the second pregnancy test was positive. Also, with respect to the fourth respondent, the appellants alleged a failure to follow up the results of the serum test which had been ordered.

In the alternative the appellants relied on breaches of the implied term of an agreement between the first appellant (on the one hand) and Superclinics and the respondent medical practitioners (on the other). It was alleged that this agreement included the term that the latter would take reasonable care in providing medical advice and treatment. It was alleged that these breaches also

resulted in loss of the opportunity to terminate the pregnancy. Newman J did not specifically address this alternative claim framed in contract. Taking the appellants' case at its highest, Newman J concluded:

> "… [i]f these were the only issues in this litigation I would, particularly relying upon the expert evidence of the late Professor Shearman, have come to the conclusion that in relation to the plaintiff's claim against the first, third and fourth defendants, that a breach of duty had occurred in each of those cases."

The evidence to which Newman J here referred was a report of Professor Rodney Shearman, Professor of Obstetrics and Gynaecology at the University of Sydney who died before the trial. In his report, Professor Shearman stated that a false negative result of a serum test conducted at six point five weeks of pregnancy, which was the estimated duration of pregnancy when the first test was taken, was extremely rare. However, more notable are his remarks concerning the clinical conduct of the respondents. He said:

> "… there is quite an extraordinary statement in the card dated 27 January 1987. This states 'LMP [last menstrual period] 19 October. Nil symptoms of pregnancy'. This is really quite remarkable. The symptom of early pregnancy is amenorrhoea [absence or suppression of menstrual dis charge]. In a young sexually active woman with previously regular periods (this patient's cycle was stated as 28-35 day interval) responsible medical
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> *(1995) 38 NSWLR 47 at 53*
>
> practice indicates that the onset of amenorrhoea is due to pregnancy until proved otherwise."

This appears to be the principal passage which, on the appellants' allegations, led Newman J to conclude that the duty of care owed to the appellant by the first, third and fourth respondent had been breached.

Newman J separated the fourth respondent from the others on the basis of the different nature of his contract with Superclinics. Dr Baker was not an employee of Superclinics. He had a contractual right to practise as a general medical practitioner in the clinic and to be paid on a percentage basis per consultation. He practised at the clinic approximately one night a week. It was argued that the test which he concluded had indeed revealed a positive result and, due to the nature of his practice at the clinic, he could not be held responsible for the clinic's failure accurately to communicate the results to the first appellant. At the trial, it was put for the appellants that there were a number of other physical examinations which could have been conducted by Dr Baker which might have detected the pregnancy, particularly given the advanced stage of gestation. Newman J concluded that, in light of his opinion on the law as to the appellants' inability to maintain an action it was not necessary for him to come for any final conclusions regarding Dr Baker's possible breach of duty. It was agreed during the hearing of the appeal that, were the appellants successful, the separate question of Dr Baker's liability would have to be decided at the re-trial.

The primary judge's holdings on the applicable law:

Section 82 and s 83 of the *Crimes Act* 1900 proscribe attempts intentionally to procure abortions by the unlawful administration of drugs or the unlawful use of any instrument or other means, both on the part of the pregnant woman

(s 82) and by a third party (s 83). On the second day of the trial, the respondents raised for the first time the potential illegality of any proposed termination of pregnancy on the part of the first appellant as a defence to any recovery for the alleged breaches of duty on their parts. The defence of illegality was not specifically pleaded by the respondents. However, in a separate judgment, dealing with the issue of whether they were precluded from relying on a defence of illegality which had not been pleaded, Newman J determined that, in the circumstances, they were not obliged to plead the illegality under the relevant *Supreme Court Rules* 1970. His Honour found that, as no illegal act had actually been performed by the first appellant, or anyone, there was no requirement that the illegality should have been specifically pleaded. With respect to Newman J, I am not convinced that this was a satisfactory disposal of the point. As it was raised in the appeal by counsel for the appellants, I shall have to deal with it.

Newman J referred to the relevant provisions of the *Crimes Act* proscribing unlawful terminations. He found that the onus of establishing the unlawfulness of any termination which the first appellant would have had, lay on the respondents, just as it would fall upon the Crown in a criminal trial.

The test by which Newman J assessed the lawfulness of any termination of the first appellant's pregnancy was that formulated in *R v Wald* (1971) 3 NSWDCR 25 at 29 by Levine DCJ. It is a test addressed to the lawfulness of an abortion conducted by a legally qualified medical practitioner. It states:

> "… for the operation to have been lawful … the accused must have had
> *(1995) 38 NSWLR 47 at 54*
> an honest belief on reasonable grounds that what they did was necessary to preserve the women involved from serious danger to their life, or physical or mental health, which the continuance of the pregnancy would entail, not merely the normal dangers of pregnancy and childbirth; and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted."

Referring to the evidence before him, Newman J commented that:

> "… it is the evidence of those who saw her at that time [when she was pregnant] which is of importance in determining the issue …
>
> In these circumstances I find that the defendants have established that the first plaintiff's pregnancy did not involve a serious danger to her mental health … the evidence in relation to her physical condition at the relevant times, demonstrates that her pregnancy was no danger to either her life or her physical well-being."

Newman J concluded that any proposed termination would have been unlawful within the terms of either s 82 or s 83 of the *Crimes Act*.

The effect of this finding was conclusive, according to Newman J, in defeating the appellants' claim to damages at law. He referred to the High Court's decisions of *Gala v Preston* (1991) 172 CLR 243 and *Smith v Jenkins* (1970) 119 CLR 397, both of which dealt with the ambit of the duty owed in situations where tortfeasors were jointly engaged with a plaintiff in illegal activities. Newman J then acknowledged that these decisions were not entirely analogous to the one before him. In this case the duty of care owed by the

respondents to the first appellant arose independently of any joint illegal enterprise which might otherwise have affected the ambit of the duty which they owed. Nonetheless, his Honour was of the opinion that:

> "… considerations of a similar type [as those expressed by the High Court in *Gala v Preston*] apply in considering whether a breach of duty which prevents a person performing an illegal act sound in damages."

Newman J adopted the analogy of an unsuccessful bank robber claiming damages against an unrelated third party who unintentionally obstructed the robbery. He concluded that an award of damages would, in this situation, as in his analogy, be grotesque. If the appellants could not establish damage *according to law*, there was no remedy in tort.

Judgment was in this way entered in favour of the respondents.

The relevance of the defendants' failure to plead illegality:

The appellants, in their notice of appeal, urged that Newman J was in error in allowing the argument of illegality to be raised when it had not been pleaded by the respondents in their defences or raised until the trial was well advanced.

Part 15, r 13 of the *Supreme Court Rules* 1970 provides:

> "(2) In a defence of subsequent pleading the party pleading shall plead specifically any matter, for example, … fraud or any fact showing illegality—
>
> - (a)
>
> which he alleges makes any claim, defence or other case of the opposite party not maintainable;
>
> - (b)
>
> which, if not pleaded specifically, may take the opposite party by surprise;
>
> - (c)
>
> which raises matters of fact not arising out of the preceding pleading."

(1995) 38 NSWLR 47 at 55

It is no answer to the requirements of this subrule to assert that, because no illegal act took place, the facts supporting the defence of illegality did not need to be pleaded. Although the act of termination remained only a proposition, it was precisely its suggested unlawfulness which defeated the appellants' claim. In fact, counsel for Dr Baker at the trial commented on the second day of the trial, when the issue of illegality was raised by Newman J, that he:

> "… would certainly wish to put the proposition to the Court — [that] so far as [his] client is concerned … it was not open to the plaintiff to obtain a termination of the pregnancy in accordance with the law …."

It was argued for the respondents that the fact that the appellants were claiming damage resulting from the loss of an opportunity to have an abortion, necessarily raised the issue of illegality, relieving the respondents of their obligation to plead it separately in their defences.

This argument does not satisfactorily meet the requirement to plead any defence relying on illegality. The law relating to the specific pleading of illegality is strict, and properly so. It is required, not only by the *Supreme Court Rules*, but by the more general requirements of fair procedure. These require that the substantive issues upon which parties seek to rely for their claims or defences must be pleaded in order that the opposing party may properly address those matters in advance: see *Rawlings v General Trading Co* [1921] 1 KB 635 at 651; *Bright v Sampson and Duncan Enterprises Pty Ltd* (1985) 1 NSWLR 346 at 350, 353; *Staniland v Kentucky Homes Pty Ltd* (Court of Appeal, 2 December 1987, unreported) at 4.

In the present case, the onus was upon the respondents to prove the unlawfulness of the proposed termination in order to bar recovery for any proved negligence. The issue of illegality was not inherently raised by the plaintiff's pleading of the loss of an opportunity to have sought a termination of her pregnancy. This conclusion is reinforced by the fact that none of the medical reports, served by the respondents, appear to assert the prima facie unlawfulness or unavailability of such an operation. Nor do they allege the identity of any offender or the potential circumstances of any potential offence.

Nonetheless, inherent in the exercise of the judicial function is the discretion to give effect to a defence not pleaded. The requirements of procedural fairness, where a pleading of illegality is concerned, require very careful consideration of the prejudice which may be occasioned to a party by allowing it to be raised without notice. The issue of illegality was raised at the commencement of the second day of the trial. It was initially raised not by the parties but by Newman J himself. Counsel for the appellants clearly took the view that it ought to have been pleaded in accordance with the Rules. He stated:

> "… if the defendants are saying [that] to terminate would have been illegal at any time when she was under the care of the various clients and therefore could not have done it is a case we are not really prepared to meet, although I think I can cope with it."

No adjournment of the hearing at the trial was sought on behalf of the appellants. Newman J gave a separate judgment allowing illegality to be raised. As a matter of proper procedure, the defence (if it were to be relied upon) ought then to have been clearly pleaded by the respondents. However, given the early stage at which the point was raised at trial, and the indication by counsel for the appellants that he "thought he could cope" without seeking an adjournment, I cannot see that Newman J's decision to allow the amendment of the pleadings

resulted in any miscarriage of justice requiring relief in this appeal. Moreover, it was arguably foreseeable that, as the loss of opportunity claimed was that of an opportunity to terminate the pregnancy, the question of the lawfulness of such a procedure would be raised at some stage. Nor can there by any element

of surprise in the arguments of illegality being raised in the appeal: cf *Staniland* (at 4); *Connolly v Consumers' Cordage Co* (1903) 89 LT 347. Although a mistake occurred, and the primary judge's ruling was wrong in a material respect, no miscarriage has resulted such as would authorise, on this ground, the disturbance of the judgment that followed.

Damages for the loss of an opportunity:

Like Newman J, this Court must take the appellants' case on the facts at their highest. Assuming the claim of breach of duty to have been made out, it is not necessary to address the arguments establishing a breach of an implied term of an agreement between the first appellant and the respondents. It was not suggested that a different result would follow (or higher damages be recoverable) were the appellants to recover for negligent breach of contract as opposed to breach of the duty of care in tort.

No cause of action in negligence will accrue unless a plaintiff can point specifically to damage caused by the alleged breach of duty. Damage is an essential ingredient for recovery in tort: see, eg, J G Fleming, *The Law of Torts* (1987) Sydney, Law Book Co at 7th ed, at 171 and cases cited. The damage, allegedly incurred by the first appellant in this case, includes the injuries and economic loss in ground 22 of the further amended statement of claim, set out. It is the failure of the respondents to advise her that she was pregnant when it would still have been safe for her to seek a termination, which deprived the first applicant of the opportunity so to act. She alleges that this caused the damage which flowed from the resulting birth of her child.

By the terms of the appellant's pleadings it is apparent that it was not asserted that the damage suffered as a consequence of the respondents' negligence was, as such, the loss of the opportunity to terminate the pregnancy. This is revealed by the phrase “the first plaintiff was deprived of the opportunity of terminating her pregnancy and *thereby* sustained injury” (emphasis added). This indicates that the loss of the opportunity was pleaded as the causative element in sustaining the subsequent injury, rather than as the first appellant's damage itself. In this, I agree with what Priestley JA has written about the way the case was conducted at trial.

The elements of the tort of negligence are significant for the proof of the appellants' claims. To the complications concerning standards of proof for lost opportunity must be added the fact that the opportunity of which the first appellant was deprived may, at lease in some circumstances, have amounted to an unlawful act under the relevant provision of the *Crimes Act*. Ultimately, this was the point on which the appellants failed at the trial. It was the main focus of the argument in the appeal.

Because the loss of opportunity to terminate was pleaded as the cause of the injury, rather than as the damage itself, the appellants had to establish, on the balance of probabilities, that it was the deprivation of this opportunity which was caused by the respondents' negligence, which in turn caused the damage pleaded: cf *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 353. This requires proof, according to the civil standard, that, had the fist appellant had

the chance, she would have successfully secured the termination of the pregnancy. Had the loss of the opportunity to terminate been pleaded as damage in itself, that opportunity itself being being the value to the appellants because of the possibility of her availing herself of the opportunity, the issue would have been different. The appellants would still have had to establish that loss or damage had been sustained by deprivation of the opportunity. However, that would be done by simply demonstrating that the opportunity which was lost by the respondents' negligence was of *some* value, but not negligible value, to the appellants. According to the majority of the High Court in *Sellars*, that value would then be ascertained by reference to the "degree of probabilities or possibilities" (at 355). This process was illustrated (at 355) in a business context:

> "… It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless *on the balance of probabilities* because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable." (Emphasis added.)

The same principle would apply in the present context in determining the value of the loss of opportunity *as such*. The first appellant would perhaps not have been required to prove that she could successfully have obtained a [lawful] abortion on the balance of probabilities. But the damages would then have been limited to those for the loss of the opportunity as such. For this, proof would have been required only that there would have been a "not negligible" possibility of her having a *lawful* abortion. The fact that there was only a possibility of a [lawful] abortion being obtained, rather than a definite 51 per cent chance, would not have denied recovery.

Could the patient successfully have obtained a (lawful) termination?

In the way the appellants' claim was pleaded, and the case conducted at trial, the central question in the appeal was therefore whether the first appellant could establish, on the balance of probabilities, that, if she had not been deprived of the opportunity, she would successfully have obtained a termination. The implications of the possibility that a termination might have been unlawful must be examined.

Once Newman J found that the respondents' breaches of the duty resulted in the failure to detect the first appellant's pregnancy, such breaches must be said to have deprived her at least of the opportunity to *seek* a termination. It was common ground, as Newman J found, that by the time the first appellant discovered her pregnancy at nineteen point five weeks duration, any attempted termination would have been unsafe. It was never suggested by the respondents that, by that advanced stage, the first appellant could have undergone an abortion safely and successfully.

Newman J acknowledged that one of the areas of fact-finding critical to the first appellant's claim concerned her intentions with respect to continuing with her pregnancy, or terminating it from around 17 October 1986 when she had her last period. But his Honour was not in doubt on this point. Relevantly, he found:

> "At all material times, … it was the first plaintiff's intention to have her pregnancy terminated. I accept the first plaintiff's evidence that had her

> pregnancy been diagnosed at a time when it was safe for her to have it terminated she would have taken appropriate steps to have a termination procedure carried out."
>
> *(1995) 38 NSWLR 47 at 58*

His Honour made no findings as to whether the first appellant would have been unsuccessful in fact in seeking such a termination. Rather, it was assumed that such steps would have led to an abortion in fact.

The evidence of Dr Weisberg, Medical Director of Family Planning in this State, suggested that, had the appellant presented to her in October 1986, on the information with which she was provided (concerning particularly the appellant's economical and psychological situation) she would have referred her to one of the freestanding clinics to which the Family Planning Service refers patients in such a predicament. Further, Dr Weisberg went on in her statement:

> "On the basis of my experience both in general practice and at Family Planning during the past 23 years, I cannot recall an occasion when a termination of pregnancy did not take place following a referral from me."

Similarly, the evidence of Dr Kok, also suggested that, given the first appellant's"anxious state of mind" and her insistence on not wanting to carry the pregnancy to full term, Dr Kok would have recommended that she undergo the termination. She would have referred her to a clinic where such operations were safely performed, with as little risk to the patient as possible.

This evidence, affecting whether or not the first appellant would *in fact* have successfully sought and undergone a termination had her pregnancy been detected in time, was not rejected by Newman J. Instead it was found to be insufficient to allow recovery because of his Honour's view that any such termination would not have been *lawful*.

For the purposes of determining whether the first appellant would have taken the appropriate steps to seek an abortion, had she been alerted by the respondents at a time when medically it was still safe to do so, the evidence establishes that the first appellant would have successfully sought and obtained a termination. Therefore, taking the appellants' case at its highest, as this Court must, and assuming the respondents' breaches of duty to have been made out, the causal connection between that negligence (in failing to detect her pregnancy) and depriving her of the opportunity to terminate has been successfully established. With it is established the appellants' cause of action, subject to the defence of illegality.

It is therefore necessary to address the obstacles to recovery on the part of the appellants posed both by the suggested illegality of a termination of the pregnancy in her case, and by the public policy considerations generally affecting the recovery of money damages in proceedings such as these.

Would a termination of the pregnancy necessarily have been unlawful?

Newman J's findings as to the illegality of a proposed termination of the appellant's pregnancy have been set out above. An examination as to the hypothetical legality of a termination procedure (which because of the

respondents' breaches could not even be considered still less performed) is not the most satisfactory way of dealing with the issue before the Court. However, I will address Newman J's conclusions and the arguments of the parties, if only to underline their unsatisfactory features. Preferable, to my mind, is the approach taken by de Jersey J in *Veivers v Connolly* (1994) Aust Torts Reports

¶81-309, when evaluating the possible unlawfullness of the hypothetical termination procedure in issue in that case.

The relevant provisions of the *Crimes Act* 1900 must be set out. Under the subheading,"Attempts to procure abortion", s 82 provides:

> "Whosoever, being a woman with child, unlawfully administers to herself any drug or noxious thing; or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to penal servitude for ten years."

Section 83 provides:

> "Whosoever: unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious thing; or unlawfully uses any instrument or other means, with intent in any such case to procure her miscarriage, shall be liable to penal servitude for 10 years."

For the purposes of the present proceedings, s 83 is the relevant section. There is no suggestion that the first appellant would have attempted terminating her pregnancy by her own hand. At all times she was seeking expert medical advice and assistance.

The critical elements of the offence involve the use of an "instrument or other means" which is *unlawful*. The accused must *intend* to procure the miscarriage by so acting. Newman J assessed the supposed unlawfulness of the proposed termination by reference to the test by Levine DCJ in *Wald*. Although apparently regularly applied in medical practice and accepted by Helsham CJ in Equity in *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311, that test has not previously come before an appellate court of this State for consideration. The test adopted by Levine DCJ in *Wald* resembles, for the most part, that earlier propounded by Menhennitt J in the Supreme Court of Victoria in*R v Davidson* [1969] VR 667. Menhennitt J was there dealing with a statutory provision identically worded. His Honour determined in *R v Davidson* (at 672) that in order to establish the unlawfulness of an attempt to procure a miscarriage:

> "… the Crown must establish either (a) that the accused did not honestly believe on reasonable grounds that the act done by him was necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; or (b) that the accused did not honestly believe on reasonable grounds that the act done by him was in the circumstances proportionate to the need to preserve the woman from a *serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth)* which the continuance of the pregnancy would entail." (Emphasis added.)

Substantially the same test was adopted in *Wald*. However, Levine DCJ broadened the focus on the *Davidson* test, which essentially concentrated on the medical grounds for abortion. His Honour added (at 29) as part of the test, that:

> "… it would be for the jury to decide whether there existed in the case of each woman any *economic, social or medical ground or reason* which in their view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a *serious danger to her physical or mental health*." (Emphasis added.)
>
> *(1995) 38 NSWLR 47 at 60*

The *Wald* test therefore allows a consideration of the economic demands on the pregnant woman and the social circumstances affecting her health when considering the necessity and proportionality of a termination: see N Cica, "The Inadequacies of Australian Abortion Law" (1990) 5 Aust J Fam Law 37 at 39. Levine DCJ went on to say (at 29):

> "… It may be that an honest belief be held that the woman's mental health was in serious danger as at the very time when she was interviewed by a doctor, or that her mental health, although not then in serious danger, *could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy, if uninterrupted*. In either case such a conscientious belief on reasonable grounds would have to be negatived before an offence under s 83 of the Act could be proved." (Emphasis added.)

The appellants' submissions before this Court did not seek to challenge the interpretation which the word "unlawful" has been given in *Wald* and in the few cases since in which it has been thought necessary to consider it. Nor did the respondents dispute the *Wald* test. However, there is one anomaly in the test to which I must draw attention.

The test espoused by Levine DCJ seems to assert that the danger being posed to the woman's mental health may not necessarily arise at the time of consultation with the medical practitioner, but that a practitioner's honest belief may go to a reasonable expectation that that danger may arise "at some time *during the currency of the pregnancy, if uninterrupted*" (emphasis added). There seems to be no logical basis for limiting the honest and reasonable expectation of such a danger to the mother's psychological health to the period of the currency of the pregnancy alone. Having acknowledged the relevance of other economic or social grounds which may give rise to such a belief, it is illogical to exclude from consideration, as a relevant factor, the possibility that the patient's psychological state might be threatened *after* the birth of the child, for example, due to the very economic and social circumstances in which she will then probably find herself. Such considerations, when combined with an unexpected and unwanted pregnancy, would, in fact, be most likely to result in a threat to a mother's psychological health *after* the child was born when those circumstances might be expected to take their toll.

This view of the Act is supported by the opinion of de Jersey J in *Veivers*. There a woman claimed damages from a medical practitioner for negligently failing to carry out a blood testing necessary to determine whether or not she had rubella. Had it been determined that she was suffering from rubella, a

termination of pregnancy would have been recommended. Instead, the patient gave birth to a child with severe physical and mental deficiencies. de Jersey J rejected the submission for the medical practitioner that the only relevant "serious danger to mental health" related to the period of the pregnancy itself. Instead, he found that "the 'serious risk' to the first plaintiff's mental health crystallised with the birth of the terribly disabled child". There is every reason of logic and consistency why this approach should be followed. I would do so. Newman J did not address his attention to the effect of continuation of the pregnancy on the psychological health of the first appellant after the birth of the child, when the economic and social circumstances in which she found herself would foreseeably have their greatest effect.

I remind myself of the heavy burden upon the respondents in establishing the *(1995) 38 NSWLR 47 at 61*
unlawfulness of any proposed termination. Newman J did refer to the way in which the onus of proof was distributed. But at no stage did his Honour expressly recognise the nature of the burden which the respondents had to satisfy to succeed in this defence. His Honour simply concluded that:

> "… had the first plaintiff's pregnancy been terminated, that termination would have been unlawful and would have constituted an offence under eithers 82 or s 83 of the *Crimes Act*. A fortiori any operation carried out during the first fourteen weeks of her pregnancy (which was the period when the evidence indicates it would have been safe to perform the procedure) would have been so out of proportion to any danger to the mental of physical health of this plaintiff caused by the pregnancy that such a procedure could not be described as lawful."

With all respect to Newman J, this formulation avoids the complexities which arise from the claim and the defence belatedly raised. These complexities are two-fold. First, in seeking to deal with the alleged unlawfulness of a termination, the Court is asked to assess the character of a hypothetical act. It is required to conclude that it has been proved to a high standard of satisfaction that, if the opportunity had been provided, the termination would have been performed, and it would have been unlawful. The test by which the act was to be assessed was not one of the strict liability. It was one under which the honest belief of a hypothetical medical practitioner, asked to perform the termination, would have to be negatived in a criminal trial by the Crown, or, in this trial, by the respondents. The crime alleged is not expressed in terms that the act of procuring the abortion shall be unlawful unless the accused can show an honest and reasonable belief that it was necessary and proportionate, given the mental and physical health of the pregnant woman. The onus is upon those who assert the unlawfulness to negative that belief.

The second problem posed by the defence of illegality is the assumption made by Newman J about the role of the jury in a criminal trial in this case. In order to establish a sufficient case to answer at a criminal trial, evidence would have to be led suggesting grounds on which a jury would be entitled to conclude, beyond reasonable doubt, that:

(1) There were no reasonable grounds for an honest belief that the termination was necessary to avoid the serious danger to the mother's mental and physical health (which the *Wald* test presupposes); or that

(2) The risks posed by the operation were not proportionate to the dangers which it was seeking to prevent.

Newman J failed to acknowledge these considerations. His Honour's approach attempted to escape these difficulties. His conclusion should not have been that the "defendants have established that the first plaintiff's pregnancy did not involve a serious danger to her mental health". Rather it should have reflected an answer to the correct question of whether the defendants had, by sufficient evidence and available inference, established that a jury would have been entitled to conclude, beyond reasonable doubt, that a hypothetical medical practitioner, performing the termination operation upon the first appellant, *could not* have held an honest and reasonable belief that her mental or physical health was in fact gravely affected by her pregnancy warranting termination. Such a formulation would have been a more accurate reflection of the considerations which had to be negatived for proof of the offence under s 83 of

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the *Crimes Act*, which the respondents asserted was necessarily involved in the proposed termination which barred the appellant's recovery.

In many ways, the hypothetical situation with which we are occupied is analogous to that which arises when a court is asked by a party to make a declaration where the question under consideration is hypothetical. Where parties have no real interest and where there is no real contradictor, the question which is presented being no more than a theoretical one, a court will ordinarily decline to make a declaration: see, eg, *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438; *Johnco Nominees Pty Ltd v Albury-Wodonga (New South Wales) Corporation* [1977] 1 NSWLR 43 at 41, 54. The usual justification for such refusal is that the relief is discretionary in character. Hutley JA, in *Johnco*, drew a distinction between theoretical and abstract questions. The latter, he believed, raised a jurisdictional bar to the making of the declaration.

For a court to find an action which has not taken place to be illegal, it must consider both the quality of the alleged act, and the person alleged to have committed it. As was the case at trial, this Court has neither the accused nor his act before it. Neither court could possibly have been presented with a defendant responsible for committing an unlawful act. No witnesses were called for the respondents to give evidence of what would probably have been the state of mind of a hypothetical medical practitioner to whom the first appellant was referred for advice upon, and if advised, performance of, a termination of the pregnancy.

There is a further problem. It was suggested that there was a possibility of the first appellant's being found guilty of aiding and abetting the commission of the offence under s 83 of the *Crimes Act* by asking for a termination. Clearly the statutory provision, like all criminal provisions, is directed towards the proscription of an act by an identified accused. In the expression of the offence, "Whosoever: unlawfully administers … or unlawfully uses", the unlawfulness is adverbial. It is directly connected with the *commission* of the act by an identified subject. It is not adjectival. The act will not itself be expressed by the

Act to be unlawful in isolation. Far from stating the obvious, this observation highlights the problem of assessing the "unlawfulness" of the act in relation to the pregnant women who may be alleged to be a party to an unlawful abortion.

In relation to the complicity of the referring doctor in *Wald*, Levine DCJ said (at 32) that it was enough for the prosecution to raise sufficient evidence that the medical practitioner "… knew or believed than an unlawful operation would be performed upon women whom he referred to this clinic", although the actual decision as to whether or not the termination would be unlawful or not was left to the performing surgeon. It would then be open to a jury to find that practitioner guilty of aiding and abetting, "… provided the Crown established that the operation upon such women turned out to be unlawful" (at 32f).

Similarly, it would be necessary for the respondents in this case, in raising a sufficient case for their defence with respect to the suggestion that the first appellant was aiding and abetting the unlawful act of a hypothetical surgeon in performing the termination, to establish that *she* would have known or believed that termination of her pregnancy would be unlawful. The actual decision of terminating, unlawfully or lawfully, would have been left to the surgeon. Even provided the respondents could establish, hypothetically, that it would not have

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been possible in the facts of this case for a surgeon to hold an honest and reasonable belief about the proposed danger of the pregnancy to the mental or physical health of the first appellant, it would be necessary for the respondents to prove that the first appellant would *herself* have known that such act was unlawful. But if the first appellant had been referred to a Family Planning Clinic, such as Dr Weisberg described, and informed there, as by the attending surgeon, that such procedure would be lawful, even if it were later established that neither medical practitioner held the requisite honest and reasonable belief in the necessity or the proportionality of the operation, the first appellant *herself* would have been committing no offence under the *Crimes Act*. To establish the first appellant's complicity, the respondents would have to establish her knowledge of facts demonstrating the absence of an honest and reasonable belief on the part of the medical practitioners. Simple negligence, or even recklessness on her part (still less ignorance), would be insufficient to implicate her in any criminality by them: cf *Giorgianni v The Queen* (1985) 156 CLR 473 at 500. Establishing wilful blindness on the part of the first appellant would only suffice to establish her criminality if knowledge of the unlawfulness were the only rational inference available: cf *Pereira v Director of Public Prosecutions* (1988) 82 ALR 217; 63 ALJR 1.

Absent the establishment of such a case, the actual termination procedure would not have been unlawful in relation to the first appellant (and hence the second appellant). The only question then remaining would be whether, for other reasons of public policy, the appellants should be denied recovery for the established negligence of the respondents causing their damage.

The evidence suggesting the unlawfulness of any proposed termination:

Having exposed the inherently unsatisfactory nature of the inquiry, I turn to examine the evidence from which Newman J was asked to draw the inferences

necessary to a conclusion of the unlawfulness of a hypothetical termination in this case.

The first limb of the test for unlawfulness addresses the mental state of a medical practitioner to whom the first appellant would have presented for a termination procedure. The appellants only challenged the interpretation of Levine DCJ's test in *Wald* in so far as it excluded consideration of the *results* of the birth of the child upon the first appellant's mental health. The *formulae* in*Wald* and *Davidson* each refer to an honest belief in a *serious* danger being posed to the physical or mental health of a pregnant woman. Necessarily, the application of this test must itself be open to subjective interpretation. Neither of the cited decisions provides a list of criteria to which a decision-maker may refer in assessing the level of risk which a medical practitioner may reasonably take into account in considering the danger to the mother's health. This re-emphasises the subjective nature of the honest belief which must be negatived in order to reach a finding of unlawfulness as required by the Act. With the growing recognition of such conditions as postnatal depression, not to mention other serious economic and social pressures, the gravity of the dangers posed by a pregnancy must be seen as considerations to be balanced and evaluated in their variety as applied to the case in hand.

It was not contended that the physical health of the first appellant was in any danger by her continuing with the pregnancy, other than to the extent entailed by the normal course of a confinement and delivery. However, there was

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evidence pointing to the risk of damage to the mental health of the first appellant resulting from her being informed both that she was pregnant and also that the time within which the operation to terminate could safely have been performed had passed, compelling her to carry the child to full term.

The first appellant pointed to her profound anxiety that she was pregnant at a time when she did not desire to give birth to a child. This anxiety was evidenced by her repeated attendances at Superclinics surgery to determine whether or not she was pregnant. At trial, when asked by counsel what her reaction was to her general medical practitioner's suggestion she may be pregnant, her response was:

> "A. I burst out crying. I was in absolute shock.
>
> Q. What did you say? A. I said 'Am I — is it too late to have a termination because I very much want a termination? She [Dr Kok] said, 'No. That is not possible'."

Upon confirmation by ultrasound of her advanced pregnancy her evidence was that she was "crying, very very upset and very angry and confused because I had had two tests which I was told were negative". This was confirmed on examination of Dr Kok. The latter gave the following evidence:

> "Q. And given the anxiety that I have already put to you that she had expressed on more than one occasion, given the insistence which she demonstrated also on wanting the pregnancy terminated, is it your view that there was a serious danger to her mental health in allowing the pregnancy to proceed to term? A. Yes, I think so.

> Q. And it was on that basis that you would have referred her to one of the sources that you have already referred to for a termination? A. Yes, and also possibly at that point in time to further psychiatric assessment and counselling."

Newman J found that the more compelling evidence of Dr Kok as to the first appellant's mental health was her subsequent comment that the first appellant's reaction was that she had been "certainly upset … [which was] all quite appropriate to the occasion". She was then asked:

> "Q. By appropriate, you mean appropriate to someone who did not want to have a baby? A. Yes, absolutely."

His Honour found that as Dr Kok was a caring medical practitioner, the fact that she had not referred the first appellant, her patient, to a psychiatrist at that stage indicated to Newman J that "the first [appellant's] reaction to her pregnancy was not such as to require treatment by a psychiatrist".

With all respect, this comment dismisses too lightly the fact that immediately preceding those words, Dr Kok had answered in the affirmative the question addressed to whether she thought there was a "serious danger to the first appellant's mental health". She had confirmed that she would, in fact, have referred the first appellant for psychiatric counselling had it been still medically safe to perform a termination. Concluding that it was then too late to consider an abortion, Dr Kok could well have considered that as nothing could be done to terminate the pregnancy, the best thing for her patient was to be as practical as possible in dealing with the situation. While a referral to a psychiatrist may tend to indicate an assessed threat to a patient's mental stability, the lack of an immediate referral does not necessarily prove that there was no such threat then, or in the future. The existence or absence of mental disturbance cannot be surrendered to psychiatrists. An experienced general medical practitioner could

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conclude that practical assistance and advice, including from herself, was of more immediate use than acknowledgment of a potential psychiatric weakness requiring therapy. Many suffered in the past with mental disturbance — and many still do — without the intervention of psychiatrists.

With respect, Newman J also erred in not properly taking into account the evidence relating to the first appellant's likely and actual state *after* the birth of her child. As I have indicated above, if the economic and social circumstances of a pregnant woman seeking a termination are relevant factors which may affect her mental health, it must be relevant to consider the effect which such conditions may have *after* the birth of the child, when the consequences are most likely to manifest themselves: see *Veivers*.

The evidence showed that the first appellant had just turned twenty-one years of age when she discovered that she was pregnant. She was a full-time student of photography. Her financial resources were very limited. She was working part-time while she was studying. She had little prospect at that time of a long-term relationship with the father of her child, or with anyone else, although the relationship with the father (the second appellant) continued haphazardly before the couple finally separated a little more than a year after the child's birth. The

evidence before Newman J was that the first appellant was referred by Dr Kok to the Mood Disorders Unit of the Prince Henry Hospital. She was there attended to by Dr Kay Wilhelm on 14 June 1989. In a letter to Dr Kok, dated 26 June 1989, Dr Wilhelm indicated her opinion that the first appellant was suffering from:

> "… neurotic depression complicated by her ambient feelings toward the baby, the baby's father, resentment over the situation and unresolved issues… I will consider antidepressants … if she does not improve symptomatically."

The first appellant did not continue with treatment from Dr Wilhelm. However, she was referred to Dr Robert Gertler, a consultant psychiatrist, whom she saw in February 1993. He described the first appellant as continuing to experience:

> "… intermittent depressions and ambivalent feelings towards her daughter. In a sense she has never come to terms with the unexpected arrival of her daughter six years ago and the major changes in her life situation which resulted.
>
> I would agree that she should benefit from ongoing psychotherapy and have arranged to see her every one to two weeks for the time being."

There was, therefore, evidence before Newman J that the first appellant's mental health had been seriously affected in a perfectly predictable way after the birth of the child. This was the result of the combined pressures of having an unwanted baby when in an unstable emotional relationship. This had, in turn, forced her to give up her studies. It had prevented her from obtaining full-time employment in her chosen discipline. The effects of such factors both on the mother's mental health, and consequently on her ability to care for the child, are not to be trivialised. Nor are they unusual in today's society. They would have been factors which could reasonably have been predicted by those to whom the first appellant presented on discovering that she might be pregnant. Had only those medical practitioners (the respondents) performed their duties carefully, they would have indisputably have been obliged to consider a referral of the first appellant to a surgeon for advice about, and

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possible performance of, a termination of her pregnancy. This much was clear from the evidence of Dr Kok set out above.

In relation to the assessment of a risk to the *future* mental health of a pregnant woman, which crystallises on the birth of the child, it may be argued that it would be hard to know when to draw the line with respect to the future psychological difficulties suffered by the mother. However, the only relevant question is whether a referring medical practitioner, or a surgeon performing such terminations, could honestly and reasonably have believed that a serious threat to the mother's mental health would have emerged upon the birth of the child if the pregnancy were not terminated, as desired. The inquiry cannot satisfactorily be further limited. Nor should it be, given the wide variety of particularities which will arise for consideration in each case.

The primary judge erred in holding any termination to be unlawful:

The very nature of the inquiry required by s 83 of the *Crimes Act* made it difficult for any court, faced with such a claim as the present, to pronounce with assurance upon the alleged unlawfulness of the hypothetical surgical act, when such lawfulness is itself determined, in part, by a subjective test. This Court must remind itself that, in a hypothetical criminal trial, it would be an issue for the jury as to whether there was "danger", on the evidence before them, and whether the degree of danger amounted to a "serious" danger, such as to warrant the honest belief of the surgeon performing the operation. As Levine DCJ acknowledged in *Wald* (at 32):

> "… [the jury's] decision will depend upon what facts they accept and what inferences they decide those facts should bear, and *in particular, it is for the jury to decide whether there is sufficient to negative a view that the danger was serious*." (Emphasis added.)

On the evidence before this Court, and with respect to Newman J, I would conclude that there was, within the very broad language of the *Wald* test, sufficient evidence to suggest that a medical practitioner advising the first appellant could honestly and reasonably have formed the view that she was facing a serious danger to her mental health by being forced to continue with the unwanted pregnancy. It would then have been open to conclude that the termination procedure was proportionate as a solution to that danger in her case. More accurately, a jury in a criminal trial following a termination would have had to question whether there was sufficient evidence to *negate* the surgeon's honest belief that the danger was serious, thus rendering the opinion unreasonable, and the performance of the operation unlawful.

Beliefs as to the relative danger posed to the mental health of a pregnant woman wishing to terminate a pregnancy will inevitably vary. For example, they may vary according to the particular institutions and medical practitioners consulted. Some, for reasons of religious instruction or personal conscience, could not conceive of *any* circumstances where termination would be necessary or proportionate. But even in institutions and among medical practitioners (probably the majority) who do not take this strict view, variations will occur. This would be so particularly by reference to the changing economic and social conditions of Australian society today. A jury's assessment of the reasonable ness of such beliefs would doubtless take these considerations into account. In my opinion, Newman J erred in concluding that a termination sought by the first appellant would necessarily or probably have been unlawful. The

respondents did not lead in evidence any expert opinion from which it could have been found that a medical practitioner, faced with the facts of the first appellant's case, could *not* have formed the honest and reasonable belief that continuance with the pregnancy would have posed a serious danger to the mental health of the first appellant, either during the pregnancy or after the birth of the child. Nor did the respondents produce any evidence that a termination in her case would have been disproportionate in the circumstances. By way of contrast, the expert evidence of the appellants tended to suggest that such a belief could quite reasonably have been formed.

It would not be possible, in my view, to conclude that the first appellant, on

presenting to the hypothetical surgeon who would have informed her of the availability of such a procedure, would for her part have been guilty of complicity in the commission of an unlawful act. This would be so even upon the respondents' successfully negating an honest and reasonable belief in the medical practitioner, provided that the first appellant herself remained unaware of the absence of such a belief. It is not unreasonable to suppose that the first appellant, as patient, would simply have put herself in the hands of the surgeon. She would have relied upon him or her to tell her whether the termination could take place. The opportunity of which the first appellant was deprived could not, in my view, be seen as unlawful so as to the bar the recovery of damages.

The defence of illegality does not bar recovery of damages in this case?

I must now address Newman J's application of the principle in *Gala v Preston*, which he held to bar recovery of any damages upon concluding that any termination would have been unlawful in the first appellant's case. Strictly speaking it is unnecessary to do so given the conclusions to which I have come. However, even if a termination of the first appellant's pregnancy would have been found unlawful in respect of the surgeon performing it, on the evidence before the Court relating to the knowledge and intention of the first appellant herself, she could not have been considered an accomplice to that offence. This must affect the application of the principles explained in *Gala* in certain cases preventing recovery.

The majority of the High Court in *Gala v Preston*, considered a claim for damages of a plaintiff, injured by the careless driving of a defendant during the joint commission of a criminal offence involving the theft and unlawful use of a motor vehicle. In a joint judgment, Mason CJ, Deane J, Gaudron J and McHugh J said (at 254), that the question required:

> "… [the examination of] the relationship between the respondent and the first appellant with a view to ascertaining whether there was a relationship of proximity such as to give rise to a relevant duty of care on the part of the first appellant."

Their Honours concluded (at 254):

> "… in this situation the parties were not in a relationship of proximity to each other such that the first appellant, as the driver of the vehicle, had a relevant duty of care to the respondent, as a passenger in the vehicle. In the circumstances just outlined, it would not be possible or feasible for a court to determine what was an appropriate standard of care to be expected of the first appellant as the driver of the vehicle."

In his discussion of the principles in *Gala*, Newman J acknowledged that the appellants' case did not require determination of the *ambit* of duty of care owed

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by the respondent medical practitioners to the first appellant. The respondents clearly had a duty "to take reasonable care in their consultations with the [first appellant]". Nor did the case before him involve the commission of a joint illegal enterprise. Nonetheless, Newman J found that *Gala* was useful in determining whether a breach of duty, which prevented a person performing an illegal act, sounded in damages. He adapted the analogy used by the majority in *Gala* of the duty of care owed by one bank robber to another, and concluded:

"I am of the view that the common law would not allow damages if a bank robbery proved unsuccessful because the negligent act of a person unconnected with the attempted robbery prevented it being successfully undertaken. To use the words of the majority in *Gala v Preston*, it would be grotesque if the common law allowed damages to be awarded in such a situation.

Accordingly I am of the view that the common law does not categorise the loss of an opportunity to perform an illegal act as a matter for which damages may be recovered."

With all respect, I find the analogy expressed by Newman J unsatisfactory given the facts of the case before the Court. In the hypothetical case of a third party whose negligent driving caused an accident blocking the getaway path of bank robbers, it is not self-evident that the robbers would *not* be able to recover damages for injuries caused by such negligent driving: see, eg, *Hall v Herbert* (1993) 101 DLR (4th) 129; *Tinsley v Milligan* [1994] 1 AC 340; [1992] Ch 310 at 319. The duty of care in driving exists independently of the activities of the victims. Nevertheless, it is clear that the bank robbers would not be entitled to recover damages for the loss of opportunity to rob the bank successfully. The issue which would arise in such a case would be that of determining the appropriate*ambit* of the duty.

Critical to Newman J's example are the words, "loss of an opportunity *to perform* an illegal act". On the conclusions to which I have come, such a question simply does not arise in this case. However, even if this conclusion were incorrect, the first appellant could not have been guilty of being a party to the crime. The only evidence was that she would *not* have undergone a termination operation had she known that it was unlawful. She could not therefore have had the necessary mens rea to "perform the illegal act". The suggested incongruity of allowing recovery by her is thus reduced, if not eliminated. Neither the respondents nor the first appellant would have been guilty of committing a criminal offence. The duty of care was owed by the respondents to the first appellant independently of the actual lawfulness of the action of a surgeon later considering her case and, if so deciding, performing the termination procedure.

The approach of Brennan J in *Gala v Preston* confirms the good sense of this conclusion. His Honour posed the test whether to allow damages in such circumstances would have the effect of making a mockery of the principles of the criminal law. In discussing when participation by a plaintiff in a criminal offence should effectively bar recovery at civil law Brennan J, having expressed doubt about the relevance of the majority's reliance on the notion of "proximity" to provide the solution, stated (at 271ff):

> "… The essential purpose of the criminal law is normative; if that were not so, the imposition of criminal punishments would be uncivilised. As the criminal law is the chief legal means by which the peace and order of
>
> *(1995) 38 NSWLR 47 at 69*
>
> society are protected, no doctrine of the civil law can be allowed to impair the criminal law's normative influence. Subject to that consideration, however, there is no reason why a breach of the criminal law to which a plaintiff is party would sterilise a duty of care otherwise owing to him by the defendant. …

> To approach the problem in this way is not the same as seeking to divine the intent of a statute creating an offence: *the problem is not to find or to impute a legislative intention to bar a civil remedy, but to limit the admission of a civil duty of care in order not to trespass upon the operation of the criminal law*." (Emphasis added.)

Upon this approach, the question in the present case is not whether the scope of a civil duty of care should be limited. It is whether to allow such a duty to sound in damages would trespass unacceptably on the operation of the criminal law.

It is useful to test the respondents' pre-suppositions in this regard by the example of a woman who undergoes a surgical termination of pregnancy, having been informed of the performing surgeon's honest belief that it might and should (lawfully) be performed, and who then seeks to bring an action for medical negligence for damage inflicted by the surgeon during the operation. Could it seriously be argued, as a defence to such a claim, that the surgeon could not have reasonably held the belief in the necessity or proportionality of his operation, thereby rendering it unlawful? Would any such illegality be a bar to recovery of damages in such a case? I think not. The medical practitioner's duty of care to the patient would exist independently of any suggested illegality of the act. To allow recovery would not trespass on the normative application of the criminal law, or make a mockery of its effective operation.

Similarly, even if, contrary to my primary opinion, the hypothetical termination of pregnancy performed upon the first appellant would necessarily have been unlawfully performed, to allow recovery for damages for the loss of the opportunity of that operation would not affect the substantive application of the criminal law. The duty of care has been made out. It is directly linked to the cause of the loss of the opportunity which would, it has been established, have been utilised if it had been offered. The loss of that opportunity as a result of the respondents' negligence has incontrovertibly had an extremely significant effect on the life of the appellants, both financially and emotionally. They should be compensated. To allow compensation in such circumstances is not to deny the unlawfulness of abortions generally, if that unlawfulness be made out in the facts of a particular case, and with all the requirements and safeguards of a criminal trial. It is simply to acknowledge the independent existence of a duty of care which the medical practitioners, consulted by the first appellant, owed to her. It is to recognise the real and irreversible effect of the breaches of their duty to the appellants who themselves would not, on the facts, have been guilty of any criminal offence had a termination been recommended and expertly performed.

Before leaving this aspect of the case, I wish to say something about a preferable approach to the problem presented in this appeal. I refer to that taken in*Veivers*. It is one of the few Australian decisions which has considered the issue. It will be recalled that de Jersey J allowed recovery of damages by a plaintiff whose baby had been born severely disabled as a result of her contracting rubella during the pregnancy which, as his Honour found, should

have been diagnosed by her medical practitioner. This would then have led to a

recommendation for termination, given the recognised risks which rubella presents to a foetus.

While allowing the claim de Jersey J had to consider the possibility, that (although unlikely) a referral for termination may not have been found to be lawful under the relevant provisions of the *Criminal Code* in Queensland. His Honour took this possibility into account by allowing for it in the calculation of the damages which were recoverable. For this possibility, found to be small, he reduced the award of the damages by 5 per cent, being his assessment of the degree of risk which he considered that a termination would be unlawful in the facts of the case.

This is a much more sensible approach to the issue than the assessment of the hypothetical legality, or illegality, of a lost opportunity. I would underline the need to consider the likelihood of such a termination being *found* to be unlawful. This reflects the reality of the availability of termination procedures in our society today. Taking that reality into account would permit commonsense to intrude into the Court's deliberations. It would allow the Court to take into account the fact that it would be most unlikely that any medical practitioner, still less the first appellant, would have been prosecuted and taken to trial. There is an air of unreality in the contrary approach favoured by Newman J and favoured by the majority in this Court.

I realise that termination of pregnancy is a subject which is prone to engender very strong feelings. It has a tendency, in some cases, to divide the attitudes of women (who must, in practice, bear most of the consequences) and of men (who number most of the judges enforcing the law). But a point is reached in this case where I feel bound to remind the Court of the reality of the application of s 83 of the *Crimes Act* in this State following *Wald*. It may or may not be a desirable reality. Upon that question, theologians, philosophers and citizens will differ. but to interpret that law without reference to such reality in a claim for civil damages where serious breaches of duty have been accepted to have occurred is, in my view, quite unrealistic. Effectively, it shifts the burden of the respondents' proved breaches of duty of care in this case from them to a patient who came to their “Superclinic” and received careless treatment. It sanctions without civil redress serious acts and defaults which have resulted in very substantial losses to the appellants. This cannot be, and is not, the law.

Quantifying the damages:

What then are the damages claimed? The components can effectively be divided into the categories of economic and non-economic loss. The principles governing recovery for pure economic loss, as set out in the judgments of the High Court in *Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad”* (1976) 136 CLR 529 would, absent any other consideration, allow both the first and second appellants to recover the components comprising their out-of-pocket expenses, the costs of rearing the child until she comes of age, and any loss of income directly resulting to them from the birth of her child. Subject to any further arguments as yet undetermined (for example, as in the particular case of Dr Baker) the respondents would have knowledge that their conduct foreseeably caused the suffering of economic loss by the appellants.

However, the first legal question affecting the recovery of the damages by

the appellants is whether or not public policy reasons would prevent either the assessment of the damages in such a case, or their recovery by the appellants. To some it is improper, even offensive, to allow recovery of damages in such a case. But, as I shall show, many courts have done so — in England, the United States and Australia. The issue is not to be resolved by emotion but by the application of legal principle.

Public policy considerations do not bar recovery of damages:

The respondents argued that, apart from the foregoing arguments of illegality, for public policy reasons, this Court would not award compensatory damages, even if it held that a cause of action in negligence had been made out.

The cases dealing with recovery of damages for an unwanted child can be divided into various categories, although the principles by which they have been decided are not perhaps so distinct. There are cases which are based on the wrongful *causation* of a pregnancy. This category includes cases of medical malpractice or negligence leading to conception, for example, after a failed attempt at surgical sterilisation, misinformation regarding, or misprescription of, contraceptive devices, and the failure promptly to detect a pregnancy to enable seeking of a termination. There are also cases argued on the basis of a breach of contract or warranty, which, in the present proceedings may be disregarded, given the assumption of the successful establishment of a cause of action in negligence. The cases can also be divided again into those concerning the birth of a "normal and healthy" child, and those which concern the birth of a child with congenital defects, resulting either from the negligence of medical practitioners to detect those problems which would otherwise have lead to consideration of a termination, or being defects directly caused by the doctor's negligence, for example, on delivery. Here, we are concerned with a claim for damages for the birth of a healthy, although at the time of first detection an unwanted, child.

Considerable legal disputation has surrounded such claims. The disputes arise from the suggestion that public policy forbids the provision of damages for the birth of a healthy child. The foundation of such policy is said to be the fundamental value placed by society on every human life: see, eg, A C Reichman,"Damages in Tort for Wrongful Conception — who bears the cost of raising the child?" (1983) 10 Syd LR 568 at 574; S G Quinland, "Damages for Wrongful Birth: Some Recent Cases" (1985) 15 Queensland Law Soc J 333f; R G Donaldson J D "Annotation: Recoverability of Cost of Raising Normal, Healthy Child Born as Result of Physician's Negligence or Breach of Contract or Warranty" 89 ALR 4th 632 at 639, 640.

In both the English and United States cases decided on the matter, there seems to be a consensus that, at least in those cases concerning, for example, failed sterilisation operations, recoverable damages would include those expenses for the failed operation, compensation for the pain and distress of the child's birth itself, the costs involved in the birth and loss of earning capacity in the time immediately surrounding the birth: see, eg, *Udale v Bloomsbury Area*

Health Authority [1983] 1 WLR 1098 at 1105; 2 All ER 522 at 528. *Udale* was a decision which denied the recovery of damages for the cost of rearing the child in the future; see also *Blash v Glisson* 325 SE2d 607 (Ga App) (1984); *Viccaro v Milunskly* 551 NE 2d 8 (Mass) (1990). An obvious problem arises when, having acknowledged that the cause of action exists, courts have held

that recovery of the costs of *rearing* the child is barred for public policy reasons: see, eg, *Udale*; *Morris v Sanchez* 746 P2d 184 (Okl) (1987). If some damages are recoverable it is difficult to see the legal principle which excludes the foreseeable costs that flow from the wrong.

On the existing authority, which is sparse, the appellants are at the very least entitled to recover those damages for the negligent causation of the birth of their child, directly related to the birth itself. This would include damages for the pain and discomfort of the first appellant associated with the birth, and for her loss of earning capacity which resulted directly from the pregnancy and its immediate aftermath. A question then arises as to whether recovery of damages in this category should be set-off against the ultimate enjoyment derived and to be derived from the birth of a healthy child. I shall return to consider this. But what are the suggested considerations upon which the public policy objections barring recovery at all are based? Can a bar to damages, operating solely to prevent recovery for the economic costs of rearing a child in such circumstances, be logically justified?

The second and third respondents argued that it could. They submitted that:

> "The mother suffers no damage in the event there being no serious impact upon her health because of the child's birth … even if the mother would have been entitled to a legal abortion, in the event of the child being born and there being no serious impact upon her health no damages would flow. The policy behind s 92 and s 93 [sic] of the *Crimes Act* is to avoid serious danger to the mother's health … Compensation (if any) should be referrable to the mother's health."

With all respect, these submissions appear to contradict earlier submissions of the same parties:

> "Contrary to a suggestion made during the course of the argument in this appeal, the policy cannot have been to protect the mother, for example, against the ravages of 'backyard abortions'. … In any event, the language of the sections in the Act evinces no intention other than to protect the life of the unborn foetus."

To assert that the mother suffers no damage on the birth of a healthy child, if her own health is also unthreatened by the birth, is completely to misapprehend the nature of the case argued for the appellants. The respondents, through their negligence, caused the first appellant to lose the opportunity to undergo a lawful termination of pregnancy. The damage incurred is that damage, mental, physical and economic, associated with having to carry a child to term and give it birth when such pregnancy was unexpected and unwanted. It is simply incorrect in fact to state that, if there were no serious impact on the mother's health on the birth, there was no damage at all. That assertion ignores not only the practical realities of childbirth, but also the actual evidence called in this case; some of which I have set out above. The damage alleged, once shown to

be reasonable, must be considered independently of any policy behind the provisions of the *Crimes Act*. The respondents, by their own submissions, acknowledged that the Act's policy is somewhat unclear.

The submissions of the first respondent address more closely the general policy concerns revealed in the cases in so far as they have dealt with this matter. They say:

> … the assessment of … damages by way of compensation is impossible and or ought not to be undertaken because it necessarily involves
>
> *(1995) 38 NSWLR 47 at 73*
>
> comparing the position of a plaintiff with the child (including the love, joy, satisfaction, contributions, disappointments and experiences associated with the child being a part of a household and family) against the hypothetical position of the plaintiff had the child not been born (including the experience of a physically and mentally painful operation for termination). The worth of a child in a household and family is inestimable (in both senses of word."

There are two principal strands to the public policy reasons which have prevented, or limited, recovery both in England and in the United States. First, it is said that the birth of a healthy child cannot ever, of itself, be considered damage, given the fundamental value placed on human life. Thus, the child's birth is variously described as a "blessing". It is a "cause for celebration". It is"not a matter for compensation". To award damages in such a case for such a cause would only "demean the value" accorded by the law to human life; see, eg, Reichman (at 574). The second argument rests on the suggested effect which such a claim would have, if it became known, on the family concerned. In particular, it would cause distress to a child who discovered that it was unwanted. This is a consequence which a court ought not to encourage through an award of damages. Further difficulties have also arisen because of the very speculative nature of the assessment of such damages, particularly if it is argued that the benefits received by the parents from the birth must be off-set against any burdens. This is another factor which, it has been argued, militates against recovery for economic loss caused by the birth of a healthy child: cf *Boone v Mullendore* 416 So 2d 718 (Ala); *Cockrum v Baumgartner* 425 NE 2d 968; 447 NE 2d 385 (Ill).

It is the first premise which seem principally to underpin Jupp J's decision in *Udale*. His Lordship concluded (at 1109):

> "… A plaintiff such as Mrs Udale would get little or no damages because her love and care for her child and her joy, ultimately, at his birth would be set off against and might cancel out the inconvenience and financial disadvantages which naturally accompany parenthood. By contrast, a plaintiff who nurtures bitterness in her heart and refuses to let her maternal instincts take over would be entitled to large damages. In short virtue would go unrewarded; unnatural rejection of womanhood and motherhood would be generously compensated. … It has been the assumption of our culture for time immemorial that a child coming into the world, even if, as some say, 'the world is a vale of tears', is a blessing and an occasion for rejoicing."

A like view has been adopted in a number of United States cases: see, eg, *O'Toole v Greenberg* 477 NE 2d 445; 64 NY 2d 427; 488 NYS 2d 143 (1985),

where the court held that the acknowledged "sanctity of human life" prevented the law, as a matter of public policy, from classifying the birth of the child as a compensable harm; see also G G Sarno, "Annotation: Tort Liability for Wrongfully Causing One to be Born", 83 ALR 3d 15 at 36-40; Donaldson (at 640-650).

I cannot accept this reasoning. It is quite inappropriate for a court to declare that a child, initially unwanted, and whose birth was caused by the negligence of a medical practitioner, should always be regarded for all purposes as a blessing, whatever the facts of the particular case. Similarly it is unconvincing (at least to me) that to deny recovery for the undoubted economic loss that

(1995) 38 NSWLR 47 at 74

accrues would demean the sanctity of human life, whatever the circumstances of the case. The inadequacy of such reasoning is highlighted by the fact that the parents themselves have already, in a case such as the present, assessed the situation. They concluded that the child would, in fact, be a greater burden that a desired "blessing". This conclusion was manifested by the steps taken, or the desires expressed, to secure a termination of the pregnancy at a time when this could have been safely done. The widespread use of contraceptive measures is itself an indication of a general social disagreement with the theory that every potential child must necessarily be considered an unalloyed blessing. Sentiments which permit a judge to proclaim that a conscious decision or expressed desire not to have a child is an "unnatural rejection of womanhood and motherhood" are out of harmony with the modern Australian society in which the Australian common law must operate. Reichman, in her article, quotes a United States judge, in dissent, (*Public Health Trust v Brown* 388 Sp 2d 1084, (1980) at 1087 (per Pearson J) who commented (in language which I find apt):

> "… [t]here is a bitter irony in the rule of law announced by the majority. A person who has decided that the economic or other realities of life far outweigh the benefits of parenthood is told by the majority that the opposite is true."

See also *Marciniak v Lundborg* 450 NW 2d 243 (Wis) (1990). The Court there recognised that, although parents may well bring love and affection to the task of rearing the child once born, such love does not, alas, provide the economic means to rear the child. Damages cases are not about love. They are principally about recoverable costs.

This view appears now to have been adopted in the English courts, without the prevarication evident in some of the United States authorities. In *Thake v Maurice* [1986] QB 644, Peter Pain J, deciding a claim for damages following the birth of a sixth child after a negligently performed vasectomy, found that he was not convinced there were any public policy objections which would bar recovery of damages by the patient. Similarly, in *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044, at 1050-1051, Waller LJ concluded:

> "I do not find the arguments in favour of the public policy objection convincing. If public policy prevents a recovery of damages, then there might be an incentive on the part of some to have late abortions. On the other hand, damages can be awarded which may in some cases be an encouragement and help to bring up an unplanned child."

Brooke J in *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651 discussed the decision in *Emeh's* case, when considering what amounted to the "reasonable" cost of rearing a child born as a result of the health authority's negligence.

The approach of the recent English cases demands respect. I would follow them. Particularly given the modern realities of sexual conduct and birth control, and the real possibilities of obtaining a termination of an unwanted pregnancy, as described in this case by Dr Weisberg, the Court should not embrace the fiction that an unwanted but healthy child must always be considered a blessing, and one the benefits of whose birth necessarily outweighs the financial detriment caused. The view which I have reached is also more consistent with recent decisions of the Queensland courts deciding

(1995) 38 NSWLR 47 at 75

similar points. In *Dahl v Purnell* (1992) 15 Qld Lawyer Reps 33, Pratt DCJ held (at 36):

> "It can now be accepted that notions of public policy would not be a bar in the UK to recovery in a 'cost of an unwanted child case' under the heads of damage with which this court is concerned. In my opinion the same approach should be taken in Queensland."

In the case of *Veivers*, public policy issues were not even argued as an impediment to recovery of damages.

The arguments suggesting that an award of damages may undermine the family unit and cause distress to a child who later discovers that it was initially unwanted, may be similarly disposed of. In most such cases, it was not the child as revealed which was unwanted. Nor is the child's existence the *damage* in the action. The birth of the child is simply the occasion by which the negligence of the respondents manifests itself in the economic injury to the parents. It is the economic damage which is the principal unwanted element, rather than the birth or existence of the child as such. As one legal commentator has noted, "The value of the child is not at issue, but rather the costs and benefits that result from its birth": see note, "Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant", (1982) 68 Va L Rev 1311 at 1371, Reichman (at 578). It would by no means be an uncommon occurrence today for a child to discover, at some time in its life, that its birth had not been sought, or even that an endeavour had been made to prevent it, or that its birth had been unplanned. Usually children discover such matters at an age when they themselves have reached sexual maturity. If they grow up in Australian society, at least, the discovery of such facts would today rarely cause hurt. Any such feelings would typically be overwhelmed by the knowledge of the affection usually accorded to them once they were born. The fact that acute economic reasons may lie behind the desire not to fall pregnant, and not to give birth to a child at that time, would also be likely to be divulged, if at all, when those economic difficulties were being most severely felt by parents and other family members. Failure to award damages for the economic loss suffered as a result of negligence of supposedly skilled medical advisers in such circum stances might, in fact, produce greater friction than an award of damages. Such damages would ameliorate the situation. This was the view taken by Peter Pain J in *Thake*. After consideration of the reasons of Jupp J in *Udale*, his

Lordship said (at 667):

> "I do not think that if I award damages here it will lead little Samantha to feel rejection … by the time she comes to consider this judgment (if she ever does) she will, I think, welcome it as a means of having made life somewhat easier for her family."

To the same effect, the court in the Massachusetts decision of *Burke v Rivo* 551 NE 2d 1; 89 Am LR 4th 619 (1990) pointed out the illogicality of allowing recovery for those expenses directly suffered as a result of the negligence of a physician, yet barring recovery for probable and reasonably foreseeable economic loss on the grounds that it would cause distress to the child upon finding out the circumstances in which it was born.

There are no good policy reasons for barring recovery for economic loss incurred as a result of the established negligence of the respondents. Alike with Peter Pain J in *Thake*, it would be my opinion that recovery could only go to ameliorating an already difficult financial situation, particularly as the severe

economic hardship of raising a child was a basis for the expressed wish of the first appellant to terminate her pregnancy, had she been given the opportunity by proper medical care by the respondents.

I would also reject the oft-repeated argument that damages of the kind sought in this case would be so speculative as to defy calculation. Judges and juries are required every day to make assessments of future economic and non-economic loss incurred as a result of another's negligence. They do so upon such amorphous considerations as "loss of enjoyment of life". They do so upon such intimate matters as disturbance of libido: see, eg, *Knight v Government Insurance Office of New South Wales* (Court of Appeal, 13 April 1995, unreported). Were injury to be sustained by an infant, as a result of the negligence of a medical practitioner in its early years, similar difficulties would arise in the calculation of projected earning capacity. Yet an assessment would be required of a court considering a claim on the child's behalf. The instant case provides no special difficulty in that regard.

There is authority for the proposition that full recovery should be offset by the benefits which parents ultimately derive from the birth and rearing of their child, although initially unwanted. In the United States, this approach has been adopted following the American Law Institute's *Restatement (2d) — Torts* at §920 which, as Donaldson writes (89 ALR 4th 632 at 638), recognises that:

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

In some United States jurisdictions, the set-off principle has been rejected on the grounds that the "benefit" should be expressly limited to the "same" interest as that which is harmed. Thus, it would be inappropriate to set off against the economic detriment suffered, the emotional benefits typically to be

derived from the child's birth, once it occurs: see *Marciniak v Lundborg* (at 249). The court there found:

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

The policy of allowing full recovery has not been followed universally: see, eg,*Burke v Rivo* (at 6; 628). In *Morris v Frudenfeld* 185 Cal Rptr 76 (1982), the Court decided that the burden of proving the requisite elements to be off-set should like upon the tortfeasor. In *Thake v Maurice* [1986] QB 644 at 683, Kerr LJ, in the English Court of Appeal, held that the elements of damages relating to the time and trouble incurred in rearing the child should be off-set against the joy of having a healthy child. This approach was also applied by Brooke J in*Allen v Bloomsbury Health Authority* (at 663). Similarly, in the Queensland decision of *Dahl v Purnell* allowing recovery, Pratt DCJ decided (at 36):

> "… to hold that public policy is no bar to claim in a 'cost of an unwanted child' case is not to hold that the intangible benefit of a healthy child should also be disregarded provided one exercises usual moderation."

There seems to be little consistency in the cases deciding the issue, either as to whether a "set-off" rule should be applicable in the circumstances, or, if it

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is applied, against what component of the damages it should be measured. I would discard the notion propounded by Jupp J in *Udale*, that any child, born into whatever circumstances, ought always to be considered a blessing. That is not the law in Australia. It is not even now the law in England. For the same reasons, a setting-off of nett benefits is something to be assessed by the fact finder in a case against the nett injury incurred. Each case will depend upon its own facts. Such questions can be safely committed to trial judges or juries.

In the case before this Court, the appellants brought the action with clear evidence that had the first appellant's pregnancy been promptly and professionally detected she would have sought referral to a surgeon and the pregnancy would probably have been terminated. This, it was said, was for both economic reasons and also because of an acute emotional inability on her part to deal with the burden or rearing an unplanned child at that stage of her life. Since the birth, she has had to give away her chosen course of study. She has had to surrender her personal life. Her social life has obviously been profoundly affected. She has suffered from bouts of depression. Her existence has been completely changed. Given that those reasons in particular, rather than a professed fear of a severe threat to her physical health, or a fear of giving birth to a deformed child, formed the basis of the first appellant's desire to terminate her pregnancy, they appear, in this case, to be more indicative of injury suffered as a result of the respondents' negligence, which should be compensated in its entirety. I am certainly not suggesting that the appellants — and particularly the first appellant — have derived no joy from their child. But I am saying that any such enjoyment derived is not a factor which should be considered to reduce significantly the damages to which the appellants are entitled. In this respect, I would adopt the reasoning expressed in *Marciniak v Lundborg* (at 249), in the

context of a failed sterilisation operation:

> "… the parents made a decision not to have a child. It was precisely to avoid that 'benefit' that the parents went to the physician in the first place. Any'benefits' that were conferred upon them as a result of having a new child in their lives were not asked for and were sought to be avoided. With respect to emotional benefits, potential parents in this situation are presumably well aware of the emotional benefits that might accrue to them as the result of a new child in their lives. When parents make the decision to forego this opportunity for emotional enrichment, it hardly seems equitable… to tell them they must pay for it … by offsetting it against their proven emotional damages. … In addition, any economic advantages the child might confer upon the parents are ordinarily insignificant."

Although the matter could be subject to additional evidence in this case, the foregoing should be equally applicable here. As a termination procedure would have been sought, precisely to avoid the "benefits" for which the respondents now assert the appellants must allow, I see no other reason, grounded in public policy, to prevent a full recovery by the appellants of the damages which were claimed to compensate the appellants for the damage incurred, physical, psychological and economic.

Conclusion: a re-trial should be ordered on damages:

The appeal must succeed. Newman J took the appellants' case at its highest. Without making any definitive findings of fact, he accepted that Superclinics, and the respondent medical practitioners to whom the first appellant had

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presented, had breached their duties of care to their patient. Their breaches — multiple and repeated — resulted in their failure to diagnose her pregnancy in time for her to seek advice upon the availability of, and if available, the performance of, an operation to terminate the pregnancy. This is what she wanted. It is certainly what she would have sought. It is the standard of treatment to which the patient was entitled. She was denied it by the respondents' negligence.

It was conceded by all parties that the extent of any liability of the respondents would have to be reconsidered at a re-trial, were the appellants successful on the appeal on the issues of law argued, as in my view they are.

Given the breaches of the duties owed, and the damage and losses which were consequently incurred by the appellants as a result of those breaches, the cause of action in negligence was successfully established by each appellant. Newman J erred in denying to the appellants the compensatory damages which, as a matter of principle, would ordinarily flow from the establishment of their cause of action in negligence. No attention has been paid to the differential entitlements of the respective appellants. Nor has the differential liability of the several respondents been considered. Nor have the cross-claims as between the respondents themselves been evaluated. Nor does it appear necessary to consider any separate liability of the respondents to the appellants (or at least the first appellant) in contract as distinct from tort. In the view which I take, these questions — as well as the quantification of damages — should be committed to the re-trial. No principle of illegality or public policy stands in the way of so ordering.

Deriving a majority approach to damages:

It follows from the foregoing that I favour setting aside the judgment entered by Newman J, returning the matter to the Common Law Division with a direction that a re-trial be had conformably with my approach to the calculation of the plaintiffs' damages. Those damages would include the plaintiffs' connected with the confinement and in relation to the upbringing of the child.

Priestley JA, whose reasons I have seen, favours similar orders. But he would confine the plaintiffs' damages at the re-trial to exclude the expenses of rearing the child after birth.

Meagher JA favours dismissing the appeal and affirming the orders of Newman J.

It is not difficult to secure the orders of the Court in this case. The formal orders which Priestley JA and I favour are the same. To that extent, it is not necessary for any of us to withdraw our orders so that a majority of the Court is secured which will provide the Court's orders. Nevertheless, as both Priestley JA and I contemplate a re-trial of the plaintiffs' claims to damages, and as the judge conducting the re-trial is entitled to guidance from this Court on how he or she should calculate them, it is necessary to resolve the difference of reasoning which appears within the majority, that is, between Priestley JA and myself. Unless the High Court of Australia were to grant special leave and resolve the difference, a failure by this Court to provide clear guidance would cause embarrassment to the judge of trial. It would render inevitable a future appeal which might, in any case, occur. To the full extent possible, this Court should seek to avoid such a burden on the judge and the parties.

The proper approach to be adopted is, in my view, to be derived, by analogy, *(1995) 38 NSWLR 47 at 79*
from what was said by the Court in *Woolworths Ltd v Kelly* (1990) 22 NSWLR 189 at 200. In earlier times, differences of this kind were resolved by the principle of seniority of judicial appointment. In these more enlightened times, a more rational principle has been adopted by this Court. It seeks to express (and in its orders to reflect) the majority consensus of reasoning.

With respect, I do not agree with the opinion of Priestley JA that the costs of keeping and rearing the child should be severed from the foreseeable consequences of the medical practitioners' negligence and assigned exclusively to the patient, her partner and family. The suggestion that keeping the child, after its birth, was a deliberate choice of the first appellant and that it was open to her to give the child away for adoption appears unreasonable. I do not accept that the common law would take such a stance. I see no reason why, in addition to the other trauma which the negligent acts and omissions of the respondents have caused to the mother, her damages should be calculated on a footing which posits inflicting upon her the additional trauma of separation from her child after its birth. I consider that assumption to be insufficiently sensitive to the ordinary psychological impulses and needs of a mother who has just given birth to a child. If it is thought unacceptable, in the circumstances posited, for the negligent medical practitioners to have to bear the expenses of rearing the child, the law should say this upon public policy grounds. It should not be on

the basis that it is because the child's "parent has chosen to bring it up"; this to me has an element of the fictional. Natural sensibilities and legal obligations impose the duty of upbringing and maintenance upon the parents. Looking at the conduct of the respondents' prospectively, they would each have known that a result of carelessness on their part would have had that consequence. If, in earlier times, young women giving birth to an unwanted "illegitimate" child could be commonly expected to surrender the child immediately, such is no longer the case in our society. Unless that course were freely chosen (as I do not think it was in this case) it is not one which the law should effectively impute to the parents involved.

Nevertheless, there is obviously a higher degree of concurrence between Priestley JA and myself than between either of us and Meagher JA in respect of the outcome of this appeal. The highest measure of concurrence which the majority can produce appears in the opinion of Priestley JA. His Honour holds back from including in the appellants' damages the ordinary expenses of rearing the child. Whilst I remain of the view which I have indicated, I consider that the judge conducting the re-trial should, until this Court or the High Court decides otherwise, or legislation clarified the point, follow the approach to damages which Priestley JA has proposed. But it could be wise for the judge to estimate the damages on the alternative footing favoured by me against the possibility that, at the end of this litigation, after a second trial, my opinion previals.

Orders:

I agree in the orders for which Priestley JA has provided.

PRIESTLEY JA. The circumstances of this case are set out in the reasons of Kirby P. Some difficult issues emerged in the argument in this Court. Three different ways of deciding the appeal seem to me to require discussion.

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1. The simplest approach:

At first sight the facts of the case appear to support the plaintiff's argument that there should be a new trial. Accepting her evidence at its highest, as I think this Court must do in view of the approach adopted by the trial judge, it seems plain that at least some of the defendants negligently told the plaintiff she was not pregnant when she was, and that she suffered some financial damage, even if very minor (if the consequences of her not having an abortion are, without comment, left out of account) and that therefore she was entitled to judgment against one or more of the defendants for some amount of money. All parties were agreed that if the Court came to this conclusion there would have to be a general new trial in which the trial judge would have to make findings of fact, and if he accepted the material parts of the plaintiff's case, determine the cross-claims between the various defendants.

This approach to the appeal was supported, in my opinion, by what I think, with respect to the trial judge, were two flaws in his reasoning. The first was his Honour's view that "to make an abortion lawful in New South Wales there must be an element of serious danger … in terms of either the physical or mental well being of the [patient]". That, in my opinion, is not quite accurate,

at least not in all cases. In the case of an abortion done by a legally qualified medical practitioner, if, notwithstanding that a court concluded there had objectively been no element of relevant serious danger, nevertheless the medical practitioner doing the abortion honestly believed on reasonable grounds that the operation was necessary to preserve the patient from serious danger to her life, or physical or mental health, it would not be right to say the abortion had been unlawful. In New South Wales, this has been the accepted view of the operation of s 83 of the *Crimes Act* since (at least) 1971: see *R v Wald* (1971) 3 NSWDCR 25 at 29; and see also *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311 at 318.

The trial judge's statement of the relevant position, does not in my respectful opinion give full effect to the law stated in *Wald*. No attack was made by any party at the trial or in this appeal on the correctness of *Wald*.

The second flaw is related to the first. His Honour found that "at all … times… it was the first plaintiff's intention to have her pregnancy terminated" and, because he concluded that, objectively, the pregnancy caused no unusual danger, the termination the plaintiff intended to have would necessarily "have constituted an offence under either s 82 or s 83 of the *Crimes Act*".

This reasoning led to his conclusion that "the common law does not categorise the loss of an opportunity to perform an illegal act as a matter for which damages may be recovered", so that the breach of duty he was postulating did not result in what was "damage according to law", and the plaintiff must fail.

In my view it follows from *Wald* that had the plaintiff been informed earlier than she was that she was pregnant, and then had that pregnancy aborted by a medical practitioner, that abortion would not *necessarily* have been unlawful. If the medical practitioner had formed the relevant opinion, honestly and on reasonable grounds, it could not be said the abortion had been unlawful.

On this approach to the case therefore the trial judge deprived the plaintiff of a judgment, even if a small one, to which she was entitled, and also deprived her of damages for the loss of the opportunity of seeking a medical practitioner who might form the opinion, honestly and on reasonable grounds, that because

of the danger to her physical or mental health if she did not have an abortion, an abortion should be done.

At first I was attracted to dealing with the appeal on the above footing, but on reflection I think there is an objection to it which now seems to me to be fundamental.

This is that there is no sign in the record before this Court that the plaintiff ever put her case at the trial on the basis which, in my view, would have led to her obtaining judgment, even if the consequences of her not having an abortion were left out of account. Her case was at all times put on the basis that if she had been told by one or more of the defendants that she was pregnant at the time when, had there been no negligence, she should have been told, then she *would* have had an abortion because it then would have been medically safe, in

a physical sense, to have one; she never put the case that had she been properly advised in due time that she would then have sought a lawful abortion within the*Wald* doctrine. Her case was that there were medical practitioner who would have done an abortion in any event, and that she would have had it done. So far as I can see, this was the case set out in the plaintiff's statement of claim, it was the case she sought to make at the trial, it was the case the trial judge was asked to rule on and, it follows, in my opinion, it is the case this Court should consider on appeal.

It also follows that the Court should not order a new trial by reference only to the damage element in the negligence tort comprised of small amounts which the plaintiff did not rely on at the trial.

The second approach:

When the case is dealt with the footing on which it was contested at the trial, it becomes necessary to consider whether, accepting the plaintiff's case that she would have had an abortion if she had received correct advice from the defendants in due time, she was entitled to damages for the consequences of not having had the abortion.

Here, it is strongly arguable that the rule must be that a plaintiff will not be able to recover damages for the consequences of not having had an abortion if it appears on the materials before the Court that the abortion would not have been a lawful one. In the present case, on the evidence as it was left before the trial judge, there is certainly an argument open that the abortion could not have been lawful. Although as I have indicated earlier I think the trial judge was applying the wrong test in reasoning that because, objectively, the pregnancy caused no unusual danger to the plaintiff, its termination must necessarily have been an offence, nevertheless, it seems to me that if the different and accepted test required by *Wald* had been used, the same result could have been reached. This would be because the evidence positively showed that there was nothing in the plaintiff's circumstances at the time when she would have approached a medical practitioner for an abortion had she been advised in due time of her pregnancy, upon which an honest practitioner could reasonably have formed the opinion that to use the words of *Wald*, there were "reasonable grounds" for believing that if the pregnancy continued to birth "… there would result a serious danger to her physical or mental health" (at 29).

There was material before the trial judge from which it would reasonably have formed the opinion that to use the words of *Wald*, there were "reasonable

(1995) 38 NSWLR 47 at 82

grounds" for believing that if the pregnancy continued to birth "… there would result a serious danger to her physical or mental health" (at 29).

There was material before the trial judge from which it could reasonably be inferred that there were medical practitioners who would have told the plaintiff at the relevant time that they believed they could lawfully carry out an abortion on her, but there was also positive evidence from which it would be right to conclude that there were no reasonable grounds upon which any medical practitioner could honestly form such an opinion. Such an opinion could only be reached by using a looser, more flexible test than that authorised by *Wald*.

It is understandable that the plaintiff's unwanted pregnancy caused her concern and worry. It is also, in my opinion quite clear that the *Wald* doctrine does not make such concern and worry by themselves alone reasonable grounds for a medical practitioner to come to an honest and reasonable belief that not to interrupt the pregnancy would result in serious danger to a woman's physical or mental health. Those factors *could* have such a result, but that is not the same as saying they *would* have such a result, and it is belief in the latter situation for which, on this approach, there must be reasonable grounds for an abortion to be lawful. The distinction is an important one because it means the difference in New South Wales between abortion for all practical purposes being available on demand, and its only being lawfully available in the limited circumstances described in *Wald*.

I mentioned earlier that this case has been conducted at all stages on the footing that *Wald* correctly states the law. The Court has not been asked to consider whether the *Wald* tests should be reformulated either more narrowly or more broadly. On the footing that *Wald* correctly states the position, I think the plaintiff's chances, on the evidence before Newman J, of securing medical opinion, complying with the law stated in *Wald*, that she could have a lawful abortion, were either nil or so small as not to base a claim for damages.

This way of looking at the case would enable the Court, for reasons somewhat different from those of Newman J, to reach the same conclusion as he did, and to dismiss the appeal with costs.

A third approach:

Further consideration of the way in which the words “lawful” and “lawfully” are used in what I have so far written has led me to think that the second approach is over-simple and obscures some further possibilities in the case. These have led me to give thought to the third approach.

One thing that is plain from the evidence given in the plaintiff's case is that had the plaintiff been told in due time that she was pregnant it is highly likely that she would have had her pregnancy terminated by a medical practitioner. It also seems relatively plain from the evidence that the medical practitioner she would have chosen or been directed to would have felt justified in carrying out the abortion and would have told the plaintiff of that opinion. On the evidence that the Court has I do not think the medical practitioner would have been right in expressing or acting upon that opinion, because, as I have already said, I do not see how on the facts available a medical practitioner could have honestly believed on reasonable grounds that the abortion would have been necessary to preserve the plaintiff from serious danger to her life or physical or mental health. Nevertheless, consideration must be given to the position that would have arisen had a medical practitioner, after erroneously telling the plaintiff she

could lawfully have an abortion, then terminated her pregnancy. Would the abortion have been unlawful?

Once attention is paid to a factual situation such as the one last outlined, it becomes possible to see that to ask whether the abortion would have been unlawful is to ask a question in a form too abstract and general to be sensibly

answered. The relevant section in the present case is s 83 which makes it an offence for a medical practitioner or any other person to procure a woman's miscarriage *unlawfully*. Presumably, and I will make this assumption for present purposes in the defendants' favour, it would equally be an offence for a woman to agree with another person that that person should *unlawfully* procure her miscarriage. She would then either be aiding and abetting the medical practitioner in a crime, or conspiring with the medical practitioner to commit a crime.

So long as the law in this area is accepted as being governed by *Wald*, whether or not any particular miscarriage has been *unlawfully* procured must depend on ascertaining whether or not the person procuring the miscarriage honestly believed on reasonable grounds that the operation was necessary to preserve the woman from serious danger to her life, or physical or mental health. In the absence of an answer to his question in some court proceedings in which it became an issue, how is the question to be answered? I do not think it can be.

Consider the state of affairs mentioned above: a medical practitioner tells a woman that in the medical practitioner's view the woman's pregnancy can be lawfully terminated; an abortion follows; the medical practitioner and the woman are prosecuted, the former under s 83 and the latter for aiding and abetting or conspiracy. On these facts it would be quite possible for the medical practitioner to be convicted under s 83 and the woman to be acquitted of the common law charge. If the medical practitioner were convicted, the women's acquittal would nevertheless follow if the Crown failed to persuade the jury beyond reasonable doubt that she had not accepted the medical practitioner's advice as genuine. On the facts I have supposed, it seems to me there would be a very good prospect of an acquittal for the woman in such circumstances.

If such a result came about, would the abortion be treated, for legal purposes, as having been unlawful or lawful? The action of the medical practitioner in procuring the miscarriage would have been found to be unlawful. The action of the woman in undergoing the abortion would not have been shown to be unlawful.

The example seems to me to illustrate that as the law stands it cannot be said of any abortion that has taken place and in respect of which there has been no relevant court ruling, that it was either lawful or unlawful in any general sense. All that can be said is that the person procuring the miscarriage *may* have done so unlawfully. Similarly the woman whose pregnancy has been aborted *may* have committed a common law criminal offence. In neither case however, unless and until the particular abortion has been the subject of a court ruling, is there anyone with authority to say whether the abortion was lawful or not lawful. The question whether, as a matter of law, the abortion was lawful or unlawful, in such circumstances has no answer.

If this view of the position is applied to the circumstances of the case under appeal, it seems to me that the appeal should be upheld. This is because, on the evidence before the trial judge, it was at least a real possibility that the plaintiff,

had she been told of her pregnancy in due time, would have gone to a medical practitioner who would have both carried out an abortion upon her and also told her that in that medical practitioner's opinion the abortion would not be unlawful.

In such circumstances the plaintiff at least, had she acted on the medical practitioner's advice without questioning the accuracy of it as legal advice, would not have been guilty of any offence in submitting to the abortion.

As events fell out, the plaintiff lost the real chance that that sequence of events would have taken place she had to bear the expense of the pregnancy and birth, and there was evidence that she suffered some emotional damage connected with the events.

On this basis she would have been entitled to judgment against at least one of the defendants for damages for loss of the chance to have had an abortion that was not unlawful.

The question would then arise of the damages to which she was entitled. The President has collected the case law on the subject. It displays many different opinions, none binding on this Court. The answer that seems to me to be right is simple. The ordinary rules for quantifying damages caused by breach of a duty of care owed to a plaintiff are applicable. These exclude damage both too remote and not caused by the negligent party. In my opinion the breach of duty in the present case did not cause the plaintiff any monetary damage associated with rearing the child after the date when the child could have been adopted out using reasonable expedition, following the birth. As I have indicated, any damage*flowing from the negligent advice* that she was not pregnant that she could prove she had suffered would I think (subject to foreseeability and remoteness) be recoverable. Since however keeping the child after that time was something which she chose to do, any expense of rearing the child thereafter was not relevantly caused by the breach of duty, but by the plaintiff's own choice, and no defendant is legally responsible for it.

I wish to emphasise that I am not suggesting that the plaintiff should have given her child away for adoption. The evidence, although scanty on this point indicates that the plaintiff herself had some emotional problems connected with the unwanted pregnancy and birth, but that as between herself and the child normal bonding came into being and the child has been a source of some happiness to the mother. The same evidence shows that the availability of adoption was not in dispute at the trial.

I would think most people in the community, whatever their views about abortion, would approved the plaintiff's decision to keep her child. That decision must have been difficult for her to make. Had she decided to have the baby adopted out, she may have suffered pain of heart then, and emotional problems in later life, and had these things happened, the negligent defendant or defendants would, I think, be responsible, difficult though they would be to put into money terms. However it is not necessary to decide this in the present case.

The point in the present case is that the plaintiff chose to keep her child. The

anguish of having to make the choice is part of the damage caused by the negligent breach of duty, but the fact remains, however compelling the psychological pressure on the plaintiff may have been to keep the child, the opportunity of choice was in my opinion real and the choice made was

(1995) 38 NSWLR 47 at 85

voluntary. It was this choice which was the cause, in my opinion, of the subsequent cost of rearing the child.

Putting the matter another way, in my opinion, if the test accepted by Deane J, in *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 522, and see Gaudron J (at 525) is applied, the defendant's negligence should not, as a matter of ordinary commonsense and experience, be regarded as a cause of the ordinary expenses of rearing a child that is parent has chosen to bring up.

The plaintiff, having chosen to keep the child in the human way that as I have said I think most people in the community would approve of, is not entitled to damages for the financial consequences of having made that difficult but ordinary human choice.

The position of the father:

I have been speaking of the mother as the plaintiff. At the trial the father was also a plaintiff. We were told in argument that no particular attention was paid at the trial to his place in the proceedings. No significant argument was put to this Court about him. I have accordingly confined myself to dealing with the mother's case. Any questions that need to be decided about him can be dealt with at the new trial which in my opinion should be ordered because of the success of the mother's appeal. The father's presence on the record in the appeal caused no additional costs that I could see.

Conclusion:

Of the three approaches I have considered, the third is the one which seems to be to follow most persuasively and easily from the facts assumed by Newman J. I do not see that this conclusion is against public policy. Public opinion on the question seems to me to be sharply divided. In my opinion the third approach should be adopted. Since Newman J did not make findings of fact, but assumed various facts in the plaintiff's favour that were contested by defendants, a general new trial should be ordered.

In my opinion, the Court should order:

- 1.

  Appeal upheld.

- 2.

  Judgment below set aside.

- 3.

New trial to be held.

- 4.

  Respondents to bear appellants' costs of appeal.

- 5.

  Costs of first trial to abide the event of the new trial.

- 6

  Any qualified respondent to have a Suitors Fund Certificate.

MEAGHER JA. In this matter I have had the advantage of reading in draft the judgments of Kirby P and Priestley JA. I disagree with both of them.

In the first place, I am of the view (which Priestley JA said at first attracted him) that the plaintiff's claim is repelled by statutory illegality. As Newman J said:"the common law does not categorise the loss of an opportunity to procure an illegal act as a matter for which damages may be recovered." The position is perfectly clear: s 82 and s 83 of the *Crimes Act* 1900 make abortion illegal. There is an apparent and unstated exception in cases where an abortion is necessary to preserve the mother's health: *R v Wald* [1971] 3 NSWDCR 25. This apparent exception has no application on the present facts. Newman J found the plaintiff's health excellent at all times. Nor could a medical practitioner, however progressive, have had honest or reasonable grounds to think otherwise — so much is expressly found by his Honour. Moreover, in

these circumstances the plaintiff could hardly have had honest or reasonable grounds for believing an abortion to be legal. But, I am also of the view that the plaintiff's action contravenes the general public policy of the law as well as the provisions of specific sections of the *Crimes Act* 1900.

It is important to focus attention on precisely what the plaintiff was trying to do. The case is not about the morality of abortion; nor is it really about whether the plaintiff would or would not be legally entitled to have an abortion. It is about the question whether a woman may in our courts sue a defendant because he allegedly deprived her of the opportunity of having an operation, with the result that she involuntarily gave birth to a child. Having given birth to a healthy child in August 1987, the plaintiff claimed at a court hearing in December 1993 that the child, then over six years old, was unwelcome, a misfortune, perhaps a disaster, certainly a head of damages. For all I know the child was in court to witness her mother's rejection of her. Perhaps, on the other hand, the plaintiff had the taste to keep her child out of court. Even if that be so, it does not mean the unfortunate infant will never know that her mother has publicly declared her to be unwanted. When she is at school some ame charitable— perhaps the mother of one of her "friends" — can be trusted to direct her attention to the point. That a court of law should sanction such an action seems to me improper to the point of obscenity.

It seems to me that our law has always proceeded on the premise that human life is sacred. That is so despite an occasional acknowledgment that existence is a"vale of tears". Hence, in criminal law, except within closely defined limits, to take another's life is murder; to threaten to do so is a criminal offence. To abort a child in utero is a common law misdemeanour. In the law of torts, negligently to shorten someone's life sounds in damages. Negligently to render someone sterile is tortious. Blackstone's *Laws of England*, vol 1, Chapter 1, Section 1:

> "Life is … a right inherent by nature in every individual and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."

A robust example of what I take to be this fundamental principle is the English Court of Appeal's decision in *McKay v Essex Area Health Authority* [1982] 1 QB 1166. In this case the plaintiff sued health authorities for their negligence in permitting him to be born. Griffiths LJ concluded his reasons (at 1193) with these words: "… Such a claim seems utterly offensive; there should be rejoicing that the hospital's mistake bestowed the gift of life upon the child."

That the allowance of such a claim as the present would contravene public policy is, I think, illustrated by the problems which would arise in assessing the quantum of damages to be awarded. In the present case, the principal claim for damages is expressed in the statement of claim as follows:

> "The reasonable costs of rearing the child from birth to age eighteen as follows:
>
> | | | |
> |---|---|---|
> | (i) | to age five, five years at $1,658.26 per annum | $ 8,211.30 |
> | (ii) | to age eight, three years at $1,040.57 per annum | $ 5,548.73 |
> | (iii) | to age eleven, three years at $2,401.21 per annum | $ 7,203.64 |
> | (iv) | to age eighteen, seven years at $4,557.42 per annum | $31,901.94" |

What is of great importance is that no allowance or discount is suggested for

the joy, comfort and happiness which the child might bring to its mother. Every child is a cause of happiness to its parents. Every parent looks on his child as David did on Absalon, or Oedipus on Antigone. In *St John's Gospel* (16.21) it is said: "A woman when she is in travail hath sorrow, because her hour has come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man is born into the world."

It would be unreal not to take account of such a factor. That this is so is recognised even by the courts which permit action like the present one to be brought: see, eg, *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651, *Thake v Maurice* [1986] QB 644 and *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1984] 3 All ER 1044.

But, by what factor, or according to what calculation, does one discount the damages to account for parental joy? I am well aware that mere difficulty is no barrier to assessing damages; but when the difficulty bespeaks an impossibility inherent in the problem it indicates that the problem should not exist.

The matter does not stop there. If the mother says of the child “I adore it; it gives me constant and enormous pleasure” presumably a heavy discount should be allowed; if she says “I am indifferent to the brute” only a small discount would be appropriate; but if she says “I hate and loathe the child, and have done so ever since she was born” no discount at all would be justified. Thus there would be a significant bonus for unnatural motherhood. Does that not indicate that the law has strayed into an area in which it has no business?

Even that is not the end of the problem. The law ordains that a plaintiff must mitigate her damages. In the present context, why does that not require the mother to put the child of which she vociferously complains out to adoption? Why should the law treat seriously her claim for the recovery of expenses which she does not need to incur? On this point the judgment of Priestley JA is distinctly to be preferred to that of Kirby P.

All these matters are lucidly — and, to my mind, correctly — summarised by Judd J in *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098; [1983] 2 All ER 522. The fact it has met the disapproval of a Queensland court in*Dahl v Purnell* (1992) 15 Qld Lawyer Reps 31 hardly dents its authority.

Appeal upheld.
Judgment below set aside.
New trial ordered.