

# WRONGFUL BIRTH CHILDREN AND ASSESSING DAMAGES FOR COSTS OF CARE: AUSTRALIAN AND BRITISH JURISPRUDENCE COMPARED

TRACEY CARVER,\* TINA COCKBURN\*\* AND BILL MADDEN\*\*\*

*The ability to recover damages for the costs of caring for, feeding, clothing and maintaining a ‘wrongful birth’ child has been debated worldwide by courts. Recent Australian cases have provided the opportunity to consider how damages for wrongful birth should be calculated in this jurisdiction. They have raised, but not clearly resolved, a number of issues relevant to the assessment of damages which might be usefully determined in future claims. This article begins by outlining the basic principles regulating damages assessment in wrongful conception and wrongful birth actions. It then examines the specific issues which fall for consideration when awarding compensation for the costs of child maintenance and care. This analysis considers Australian jurisprudence but also adopts a comparative approach which explores the treatment of such issues in the United Kingdom, with a view to informing their resolution in future Australian cases.*

## I INTRODUCTION

Medical negligence actions arising from the fact of a child’s birth, while often compendiously referred to as ‘wrongful birth’ claims, may occur where a practitioner’s conduct has caused either: an unwanted pregnancy (wrongful conception);<sup>1</sup> or the birth of a child in circumstances where pregnancy would

\* BBus (Accy) (Dist), LLB (Hons) (QUT), LLM (Cantab). Senior Lecturer, Australian Centre for Health Law Research, Faculty of Law, Queensland University of Technology. Email: t.carver@qut.edu.au.

\*\* BCom, LLB (Hons) (Qld), LLM (QUT), Grad Cert Ed (Higher Ed); TEP. Associate Professor, Co-Director, Australian Centre for Health Law Research, Faculty of Law, Queensland University of Technology. Email: t.cockburn@qut.edu.au.

\*\*\* BA, LLB (Hons) (Macq); FAAL. Adjunct Professor, Australian Centre for Health Law Research, Faculty of Law, Queensland University of Technology. Special Counsel, Carroll and O’Dea Lawyers, Sydney. Email: william.madden@qut.edu.au. Bill Madden was solicitor for Mr and Mrs Waller at one stage of their litigation — *Waller v James* [2013] NSWSC 497 (6 May 2013). The law in this article is that as generally stated when the article was accepted for publication in October 2017, with minor additions during the editing process.

1 For example, negligently performed vasectomy or sterilisation procedures, and/or negligent post-operative testing or contraception advice. See, eg, *McFarlane v Tayside Health Board* [2000] 2 AC 59 (*McFarlane*) (negligent contraception advice post-vasectomy); *Cattanach v Melchior* (2003) 215 CLR 1 (*Cattanach*) (negligent sterilisation).

have been lawfully<sup>2</sup> terminated or would not have otherwise occurred<sup>3</sup> (wrongful birth).<sup>4</sup> Wrongful conception concerns negligence resulting in *unintended* conception. By comparison, wrongful birth includes acts or omissions occurring in the context of *wanted* conception, or where no steps have been taken to prevent impregnation, which lead to unwanted results.<sup>5</sup>

The issues surrounding whether damages are recoverable in these situations for the costs associated with caring for, feeding, clothing and maintaining a resulting ‘wrongful birth’ child have been debated by courts worldwide.<sup>6</sup> In the United Kingdom, although some cases have differentiated wrongful conception when calculating damages on given facts,<sup>7</sup> it is accepted that the legal principles applicable ‘cannot sensibly be distinguished’.<sup>8</sup> Accordingly, in relation to the availability of compensation in all ‘wrongful birth’ actions and following the House of Lords decision in *McFarlane v Tayside Health Board* (*McFarlane*),<sup>9</sup>

- 2 See, eg, *Rance v Mid-Downs Health Authority* [1991] 1 QB 587 (failure to diagnose a child’s handicap at 26 weeks gestation did not give rise to a valid claim for the loss of an opportunity to terminate, as an abortion in such circumstances was illegal); *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 (*CES*).
- 3 See, eg, *Waller v James* [2013] NSWSC 497 (6 May 2013) [212]–[215], [239] (*Waller*); *Waller v James* (2015) 90 NSWLR 634, 672, discussed at below nn 37–45, 140–3 and accompanying text. The claimants argued that, had they received appropriate genetic counselling, they would have used donor sperm or postponed in vitro fertilisation (‘IVF’) treatment until screening techniques could ensure the implantation of a foetus unaffected by anti-thrombin deficiency.
- 4 For example, negligent genetic or prenatal testing, counselling or advice; or a failure to diagnose or terminate pregnancy. See, eg, *McLelland v Greater Glasgow Health Board* 2001 SLT 446 (*McLelland*) (failure to diagnose Down’s syndrome); *Nunnerley v Warrington Health Authority* [2000] PIQR Q69 (*Nunnerley*) (failure to properly warn of a genetic disorder’s inheritability).
- 5 ‘Unwanted results’ will not necessarily equate to a child suffering from physical disabilities. See, eg, *Collins v Xytex Corporation* (Ga Superior Ct, No 2015CV259033, 20 October 2015) (McBurney J) (claim resulting from a child’s birth following sperm donation in circumstances where the parents were advised that the donor had an IQ of 160, tertiary qualifications and no criminal history. The donor was a convicted felon and schizophrenic who had not completed college); *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 (Court of Appeal) (ovum fertilised, in an IVF procedure, using sperm from someone other than the intended father).
- 6 For the position outside the United Kingdom and Australia, see Erin Nelson, *Law, Policy and Reproductive Autonomy* (Hart Publishing, 2013) 220–9; Lady Justice Hale, ‘The Value of Life and the Cost of Living — Damages for Wrongful Birth’ (2001) 7 *British Actuarial Journal* 747, 756–9.
- 7 Commitment to conceiving a child prior to the defendant’s negligence may affect the calculation of general and special damages. See, eg, *Rand v East Dorset Health Authority* (2000) 56 BMLR 39 (*Rand*) (general damages for wrongful birth made no allowance for the pain and suffering of childbirth as the child was wanted. However, damages for the extra pain and discomfort associated with the birth of an additional child, conceived for the purpose of proving that another healthy child was possible, were awarded); *Hardman v Amin* (2000) 59 BMLR 58 (*Hardman*) (special damages for loss of earnings consequent upon a wrongful birth were reduced by such future loss occurring anyway on account of a child). See also discussion in Part II(B) below.
- 8 *Groom v Selby* (2001) 64 BMLR 47, 54 [28] (Hale LJ) (*Groom*) (failure to diagnose pregnancy). Here, the principle in *McFarlane* [2000] 2 AC 59 (a wrongful conception case), discussed at below n 9 and accompanying text, was considered to also apply to cases of wrongful birth. See also *Groom* (2001) 64 BMLR 47, 52 [20] (Brooke LJ); Justice Hale, above n 6, 757. The availability of the conventional sum and damages for the extra cost of raising a disabled child (see below nn 13, 31 and accompanying text) has also been held to be equivalent between wrongful conception and birth claims: *Less v Hussain* [2012] EWHC 3513 (QB) (6 December 2012) [177] (*Less*), citing *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, 349 [123] (*Rees*).
- 9 [2000] 2 AC 59, 74–6 (Lord Slynn), 82–4 (Lord Steyn), 91, 95–7 (Lord Hope), 103–6 (Lord Clyde), 108–14 (Lord Millett).

it has been held ‘that as a matter of legal policy it is unacceptable to award damages for the birth of a normal, healthy child to compensate for the cost of [their] upbringing’.<sup>10</sup> Instead, the compensation awarded has been limited to: a parent’s physical or psychiatric injury;<sup>11</sup> ‘general damages’ for maternal pain, suffering and distress stemming from pregnancy, confinement and delivery; and ‘special damages’ for expenses suffered as a direct consequence of pregnancy and childbirth, including extra medical costs, clothing and loss of earnings during pregnancy.<sup>12</sup> A conventional sum in the order of £15 000,<sup>13</sup> to recognise the parents’ lost ‘opportunity to live their lives in the way ... wished and planned’,<sup>14</sup> may also be awarded.

By contrast, in Australia, in addition to injury, and general and special damages,<sup>15</sup> in *Cattanach v Melchior* (*‘Cattanach’*)<sup>16</sup> the High Court confirmed that the past and future costs of raising and maintaining a child were recoverable.<sup>17</sup> The parents’ relevant damage was ‘the expenditure that they have incurred or will

- 10 *Ahern v Moore* [2013] 1 IR 205, 220 [60] (Ryan J). See also *McFarlane* [2000] 2 AC 59, 82 (Lord Steyn); *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522. Full analysis of reasoning underpinning *McFarlane*, while outside the scope of this article, is provided by: Cordelia Thomas, ‘Claims for Wrongful Pregnancy and Damages for the Upbringing of the Child’ (2003) 26 *University of New South Wales Law Journal* 125, 134–8, 149–56; Margaret Fordham, ‘Blessing or Burden? Recent Developments in Actions for Wrongful Conception and Wrongful Birth in the UK and Australia’ [2004] *Singapore Journal of Legal Studies* 462; Emily Jackson, *Medical Law: Text, Cases, and Materials* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 742–9.
- 11 See, eg, *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, 288 (Hale LJ) (*‘Parkinson’*); *Less* [2012] EWHC 3513 (QB) (6 December 2012) [182]–[192] (while the mother’s psychiatric injury was allowed, there was insufficient evidence that any paternal mental injury, due to a child’s stillbirth, was caused by the sudden shock necessary to make it recoverable).
- 12 See, eg, *McFarlane* [2000] 2 AC 59, 74 (Lord Slynn), 84 (Lord Steyn), 86–9 (Lord Hope), 102, 105 (Lord Clyde); cf 114 (Lord Millett) (Lord Millett denied general damages on grounds that as a healthy child’s birth was a blessing, this would weigh against any inconvenience). See also *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651, 657 (*‘Allen’*); *Fish v Wilcox* (1994) 5 Med LR 230, 231 (*‘Fish’*); *Hardman* (2000) 59 BMLR 58; *Rees* [2004] 1 AC 309, 345. The cost of re-sterilisation, where warranted, might also be awarded: *Allan v Greater Glasgow Health Board* 1998 SLT 580.
- 13 Originally formulated and set at £5000 in *McFarlane* [2000] 2 AC 59, 114 (Lord Millett).
- 14 *Rees* [2004] 1 AC 309, 349 (Lord Millett). See also 317 (Lord Bingham), 319 (Lord Nicholls), 356 (Lord Scott). Cf 327–8 (Lord Steyn), 333–5 (Lord Hope) (dissenting).
- 15 See, eg, *Melchior v Cattanach* (2001) Aust Torts Reports ¶81-597, 66 626 [34], 66 631–4 [63]–[77] (*‘Melchior’*); *Gentile v Ferri* [2004] WADC 144 (16 July 2004) [188] (*‘Gentile’*); *G v Armellin* (2008) 219 FLR 359, 401–3 (*‘Armellin’*) (wrongful conception). A father’s claim for loss of consortium, totalling \$3000, was also allowed at trial in *Melchior* (2001) Aust Torts Reports ¶81-597, 66 634–5 [80], such claims being still available in Queensland: *Law Reform Act 1995* (Qld) s 13; *Civil Liability Act 2003* (Qld) s 58. Cf *Administration of Justice Act 1982* (UK) c 53, s 2.
- 16 (2003) 215 CLR 1.
- 17 *Ibid* 35–9 (McHugh and Gummow JJ), 66–8 (Kirby J), 104–9 (Callinan J). Cf 19–24 (Gleeson CJ), 69, 89–94 (Hayne J) (only the extra costs of special needs children are recoverable), 126–49 (Heydon J) (dissenting). The extra costs of caring for a disabled child had been recovered in *Veivers v Connolly* [1995] 2 Qd R 326 (wrongful birth) (*‘Veivers’*). However, the costs of raising a healthy child had previously been allowed in *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, 70, 84–5 (for at least until the child could have been adopted) (wrongful birth); *Dahl v Purnell* (1992) 15 Qld Lawyer Reps 33 (*‘Dahl’*). More recently, they have been awarded in *Armellin* (2008) 219 FLR 359, 403–6; *McDonald v Sydney South West Area Health Service* [2005] NSWSC 924 (16 September 2005) [1], [87]–[89] (*‘McDonald’*) (wrongful conception). *Stobart v Al-Hakeem* [2017] WADC 127 (22 September 2017) [329] saw a notional assessment of damages (the negligence claim for wrongful conception having failed) which included \$289 298.25 for the ‘expenses associated with raising’ the child.

incur in the future, not the creation or existence of the parent-child relationship'.<sup>18</sup> As stated by Kirby J, 'it is not the birth of the child that constitutes the harm, injury or damage for which the parents sue. Instead, it is for the economic harm inflicted upon them by the injury they have suffered as a consequence of the negligence'.<sup>19</sup> As this principle applies whether the child is healthy or disabled,<sup>20</sup> the award of a conventional sum has not traditionally occurred in Australia. This is because, although not intended to compensate for the financial cost of child maintenance, that sum is, in reality, only awarded where such a claim is denied.<sup>21</sup>

In some Australian jurisdictions,<sup>22</sup> the common law is restricted by legislation which: precludes damages awards for the costs 'ordinarily'<sup>23</sup> associated with rearing or maintaining a child (Queensland and South Australia);<sup>24</sup> or limits the recoverability of child raising costs to those 'associated with rearing or maintaining a child who suffers from a disability that arise by reason of the disability' (New South Wales).<sup>25</sup> Therefore, in cases governed by statute, only the additional costs of care, upbringing, education and advancement attributable to a disabled child's special needs are allowed. While the New South Wales legislation applies generally to all wrongful conception and birth claims,<sup>26</sup> the South Australian statute particularises actions arising in a range of specified contexts.<sup>27</sup> The Queensland provisions are, however, more confined, applying exclusively to wrongful conception claims stemming from negligent sterilisation<sup>28</sup> or contraceptive procedures and advice.<sup>29</sup>

18 *Cattanach* (2003) 215 CLR 1, 32 (McHugh and Gummow JJ).

19 *Ibid* 57 [148]. See also 32 (McHugh and Gummow JJ).

20 *Ibid* 35–6 (McHugh and Gummow JJ), 63 (Kirby J).

21 See, eg, *Rees* [2004] 1 AC 309, 317 (Lord Bingham), 350 (Lord Millett), 356 (Lord Scott); *McFarlane* [2000] 2 AC 59, 114. Nevertheless, in stating that such a sum 'is to be awarded irrespective of whether the child or the parents are healthy or disabled', Andrew Burrows argues for its award in all British cases (and by extension therefore in Australia) in Andrew Burrows, 'Damages' in Michael A Jones et al (eds), *Clerk and Lindell on Torts* (Thomson Reuters, 22<sup>nd</sup> ed, 2018) 1985, 2024 [28–63]. An amount for 'loss of genetic affinity' has recently been awarded in *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918. See Jordan English and Mohammad Jaamae Hafeez-Baig, '*ACB v Thomson Medical Pte Ltd* — Recovery of Upkeep Costs, Claims for Loss of Autonomy and Loss of Genetic Affinity: Fertile Ground for Development?' (2018) 41 *Melbourne University Law Review* 1360.

22 There is no legislation in Victoria, Tasmania, Western Australia, the Northern Territory or the Australian Capital Territory.

23 The ordinary costs of child raising include 'all costs associated with the child's care, upbringing, education and advancement in life except, in the case of a child who is mentally or physically disabled, any amount by which those costs would reasonably exceed what would be incurred if the child were not disabled': *Civil Liability Act 1936* (SA) s 67(2). See also *Molloy v El Masri* [2014] SADC 53 (4 April 2014) [13] (undiagnosed pregnancy leading to the wrongful birth of a Down syndrome child).

24 *Civil Liability Act 2003* (Qld) ss 49A, 49B; *Civil Liability Act 1936* (SA) s 67.

25 *Civil Liability Act 2002* (NSW) ss 71(1)(a), (2).

26 *Ibid* s 70(1) provides that Part 11 of the Act 'applies to any claim for damages in civil proceedings for the birth of a child'. Proceedings for personal injury brought by a child for damages 'sustained by [them] pre-natally or during birth' are excluded: at s 70(2).

27 The statute applies to: innocent misrepresentation or negligence leading to unintended conception or the birth of a child from a pregnancy that would have been terminated; negligence resulting in failed abortion; and actions for breach of statutory or implied warranties due to the conception of a child from a failed contraceptive device. See *Civil Liability Act 1936* (SA) ss 67(3), (4).

28 *Civil Liability Act 2003* (Qld) s 49A(1).

29 *Ibid* s 49B(1).

As reflected in the Australian legislation, in *Parkinson v St James and Seacroft University Hospital NHS Trust* ('*Parkinson*')<sup>30</sup> the English Court of Appeal held that, compared to the case of a healthy child, ordinary people would consider it fair to award damages for 'the extra expenses associated with bringing up a child with a significant disability'.<sup>31</sup> The level of disability required, while usually not questioned,<sup>32</sup> has been held to exclude 'minor defects or inconveniences'.<sup>33</sup> Nevertheless, recognised impairments are likely to include mental and physical disabilities.<sup>34</sup> These may arise 'from genetic causes or foreseeable events during pregnancy (such as rubella, spina bifida, or oxygen deprivation ... ) up until the child is born alive'.<sup>35</sup> Statutory definitions of 'disability' may provide further guidance.<sup>36</sup>

Despite the ability to recover damages for raising children via 'wrongful birth' claims now being relatively settled, the method of assessing such awards is less so. *Waller v James* ('*Waller*')<sup>37</sup> and *Neville v Lam [No 3]* ('*Neville*')<sup>38</sup> provided Australian courts with the opportunity to consider how such compensation, in relation to disabled children, should be calculated. In *Waller*, a wrongful birth action arose from a gynaecologist's failure to ensure that parents were informed of

30 [2002] QB 266.

31 [2002] QB 266, 283 (Brooke LJ). See also 282 (Brooke LJ), 292–5 (Hale LJ), 295 (Sir Martin Nourse) (wrongful conception); *Rand* (2000) 56 BMLR 39; *Hardman* (2000) 59 BMLR 58; *Groom* (2001) 64 BMLR 47; *McLelland* 2001 SLT 446, 451 [18], 454–5 [31]–[34] (Lord Prosser) (the ordinary costs of maintenance unrelated to a child's Down syndrome were disallowed); *Lee v Taunton and Somerset NHS Trust* [2001] 1 FLR 419, 431 (Toulson J) ('*Lee*') (recovery of the extra costs of maintaining a disabled child born following the non-detection of spina bifida (wrongful birth)). In *AD v East Kent Community NHS Trust* [2003] 3 All ER 1167, damages for maintaining a healthy child conceived due to the defendant's negligence while responsible for the mother's psychiatric care were refused because the 'cost of rearing C [was] not "additional" or "extra" in the sense envisaged in [*Parkinson*]: at 1172 [20] (Judge, Longmore LJ and Sullivan J). Cf *Rees* [2004] 1 AC 309, where the House of Lords was inclined to disallow the extra costs of raising a disabled child and instead award the conventional sum (discussed at above n 13 and accompanying text): at 317 (Lord Bingham), 346, 349 (Lord Millett), 355–6 (Lord Scott). See also Nicolette Priaux, 'Damages for the "Unwanted" Child: Time for a Rethink?' (2005) 73 *Medico-Legal Journal* 152, 159–61; Antje Pedain, 'Unconventional Justice in the House of Lords' (2004) 63 *Cambridge Law Journal* 19, 20–1.

32 See, eg, *Neville v Lam [No 3]* [2014] NSWSC 607 (21 May 2014) [2] (Beech-Jones J) ('*Neville*') ('it is not necessary at this point to make any findings concerning the extent of Samuel's disabilities, other than to note that it is accepted that they are significant'). Cf *Rand* (2000) 56 BMLR 39, 42, 47, 57 (challenged the seriousness of the disability of a child described as 'one of the most able children with Down's Syndrome': at 47).

33 *Parkinson* [2002] QB 266, 283 (Brooke LJ).

34 *Ibid.* See also *Civil Liability Act 1936* (SA) s 67(2).

35 *Parkinson* [2002] QB 266, 294 (Hale LJ). See also *Groom* (2001) 64 BMLR 47, 53 [23] (Brooke LJ), 55 [32] (Hale LJ) (held that the bacterium exposure, causing a child's meningitis and disability, occurred during the birth process).

36 *Parkinson* [2002] QB 266, 293 [91] (Hale LJ), quoting *Children Act 1989* (UK) c 41, s 17(11) (which defines when a child is disabled for the purpose of providing services for children in need). In Australia, the *National Disability Insurance Scheme Act 2013* (Cth) s 24 provides for a government funded scheme facilitating the provision of reasonable support and assistance to people meeting certain 'disability requirements'. Broadly speaking, permanent and significant disability, affecting a person's ability to partake in everyday activities, must be shown.

37 [2013] NSWSC 497 (6 May 2013).

38 [2014] NSWSC 607 (21 May 2014).

the inheritability of anti-thrombin deficiency ('ATD').<sup>39</sup> *Neville* instead involved wrongful conception, stemming from an alleged failure to advise of a risk of pregnancy following endometrial ablation.<sup>40</sup> Both cases sought damages for the provision of past and future care and out-of-pocket expenses resulting from the child's disability.<sup>41</sup> Yet because the legislation only applied to limit *Neville*'s claim,<sup>42</sup> the parents in *Waller* argued that, at common law, they might recover the full costs of raising their child without reference to his disabilities.<sup>43</sup> Although unsuccessful in terms of liability,<sup>44</sup> each case still commented on damages.<sup>45</sup>

In this light, Part II of this article outlines the basic principles regulating damages assessment in 'wrongful birth' claims, before examining specific issues which fall for consideration when awarding compensation in actions for the costs of child maintenance and care. This analysis proceeds by reference to Australian jurisprudence, but also adopts a comparative approach — exploring the treatment of such issues in the United Kingdom with the view to informing, as summarised in Part III, their resolution in future Australian cases.

## II ASSESSING DAMAGES FOR THE COSTS OF RAISING 'WRONGFUL BIRTH' CHILDREN

The issue before the High Court of Australia in *Cattanach* was whether damages for the costs of maintaining a child *should* be awarded, not the reasonableness of amounts claimed or their method of calculation.<sup>46</sup> Despite this, two broad principles relating to the assessment of damages emerged. Firstly, that the relevant harm is the financial cost of child rearing, not the unplanned birth per se.<sup>47</sup> Secondly, that

39 [2013] NSWSC 497 (6 May 2013) [5].

40 [2014] NSWSC 607 (21 May 2014) [3].

41 The parents in *Waller* also claimed damages for the pregnancy, the IVF procedure via which their child was conceived, and 'psychiatric and physical injury caused by or resulting from' their child's disabilities: [2013] NSWSC 497 (6 May 2013) [6]. See also [346]–[350]. The claimant mother in *Neville* similarly sought out-of-pocket expenses associated with pregnancy and delivery, and damages for injuries sustained (including the pain of childbirth, and depression from the shock and stress of discovering her pregnancy and then dealing with her son's disabilities): [2014] NSWSC 607 (21 May 2014) [5], [200]–[211].

42 See *Civil Liability Act 2002* (NSW) s 71, discussed at above n 25 and accompanying text. The events in *Waller* predated this legislation.

43 [2013] NSWSC 497 (6 May 2013) [9]. See also *Waller v James* (2015) 90 NSWLR 634, 638–9, 671. The resolution of this aspect of the parents' claim is discussed further at below nn 112–14, 140–3, 202–4 and accompanying text.

44 Due to a failure to establish causation and breach respectively: *Waller* [2013] NSWSC 497 (6 May 2013) [252]–[260] (Hislop J); *Neville* [2014] NSWSC 607 (21 May 2014) [7], [140], [143] (Beech-Jones J). An appeal on liability in *Waller* to the New South Wales Court of Appeal was dismissed: *Waller v James* (2015) 90 NSWLR 634. Special leave to appeal to the High Court of Australia was also refused on 12 February 2016: Transcript of Proceedings, *Waller v James* [2016] HCATrans 31 (12 February 2016). See *Meadows v Khan* [2018] 4 WLR 8, 11 [69] for a later decision which addressed similar causation issues.

45 *Waller* [2013] NSWSC 497 (6 May 2013) [273]–[345] (Hislop J); *Neville* [2014] NSWSC 607 (21 May 2014) [144], [149]–[163], [167]–[170], [213]–[223] (Beech-Jones J).

46 (2003) 215 CLR 1, 13, 27, 69, 108.

47 *Ibid* 32 (McHugh and Gummow JJ), 57 (Kirby J).

emotional satisfaction and other benefits derived from a child's birth cannot be set off against that cost because those benefits, being different in kind or non-economic, are unrelated to that head of damage.<sup>48</sup>

Subsequently, in *CSR Ltd v Eddy* ('*CSR Ltd*'), the Court also confirmed that, at common law, a plaintiff who sues to recover damages for negligently caused personal injury can traditionally only recover three types of loss: non-pecuniary loss (encompassing general damages); 'loss of earning capacity'; and 'actual financial loss'.<sup>49</sup> In Australia, the courts have generally proceeded on the basis that claims by parents relating to the costs of caring for a 'wrongful birth' child are claims for damages for personal injury.<sup>50</sup> This has been justified on the grounds that the claim, even when brought by the father also,<sup>51</sup> 'has an integral and unique link' with the mother's pregnancy and childbirth 'which are considered *by law* to constitute personal injury'.<sup>52</sup> Although healthy pregnancy and childbirth were not legally understood as injuries in *FJ v Commonwealth*,<sup>53</sup> its statutory context is significant.<sup>54</sup> There, in determining whether a damages claim for child raising costs, arising from a missed pregnancy diagnosis upon enlistment, was precluded as being in respect of a 'service injury' under the *Military Rehabilitation and Compensation Act 2004* (Cth),<sup>55</sup> it was recognised that '[i]n ordinary language, pregnancy and childbirth are not injuries. The definition of "injury" in the Act broadly reflects its meaning in ordinary usage and *the statutory context of the*

48 Ibid 37–9 (McHugh and Gummow JJ) ('[t]he benefits received from the birth of a child are not legally relevant to the head of damage that compensates for the cost of maintaining the child.' at 39). See also *McFarlane* [2000] 2 AC 59, 81–2 (Lord Steyn), 103 (Lord Clyde); *Parkinson* [2002] QB 266, 277 (Brooke LJ).

49 (2005) 226 CLR 1, 15–16 (Gleeson CJ, Gummow and Heydon JJ).

50 See, eg, *Waller* [2013] NSWSC 497 (6 May 2013) [309] (Hislop J) ('the economic loss claim in respect of raising and caring for Keeden ... is properly categorised as part of a total claim for damages for personal injury. Economic loss is a separate head of damage in a personal injury claim') (wrongful birth); *Neville* [2014] NSWSC 607 (21 May 2014) [149]–[162] (Beech-Jones J); *Gentile* [2004] WADC 144 (16 July 2004), [163]–[176] (Macknay DCJ); *Cattanach* (2003) 215 CLR 1, 31, 33 (McHugh and Gummow JJ), 57–8 (Kirby J), 72 (Hayne J), 114–15, 124–5 (Heydon J). McHugh and Gummow JJ discounted any distinction between pure and consequential economic loss in relation to the loss claimed, stating that it did not 'advance understanding greatly, one way or the other, to describe the expenditure required to discharge [the parents'] obligation [to rear their child] as "economic loss"': at 31 (citations omitted). Cf 11, 14, 19 (Gleeson CJ), 107, 109 (Callinan J); *Murray v Whiting* [2002] QSC 257 (20 June 2002) [27]–[28] (Chesterman J) (wrongful conception).

51 See, eg, *Cattanach* (2003) 215 CLR 1, 58 (Kirby J) ('the father's claim is made concrete by the physical injury suffered by the mother. It is artificial to sever the parents' claim which is made jointly for the same sum'). In *McDonald* [2005] NSWSC 924 (16 September 2005) a father's lone claim for child rearing costs flowed from a duty owed to the claimant 'to ensure that his partner, Ms Foster, was properly treated so that she or the plaintiff did not suffer the financial burden of raising an additional child': at [69] (Harrison AsJ). Claims solely by fathers are however classified as pure economic loss in: Dean Stretton, 'The Birth Torts: Damages for Wrongful Birth and Wrongful Life' (2005) 10 *Deakin Law Review* 319, 331.

52 *Caven v Women's and Children's Health* (2007) 15 VR 447, 462 (Kaye J) (emphasis added) (wrongful birth).

53 (2017) 317 FLR 477, 500–1 [75]–[76], 518–19 [128] (Tate, Santamaria and Beach JJA) ('*FJ*'). '[N]ormal pregnancy and childbirth' is also referred to: at 521 [136].

54 Ibid 501–2 [80]–[81], 519 [130]–[131].

55 *Military Rehabilitation and Compensation Act 2004* (Cth) ss 27, 388.

*Act* sharpens that meaning by deploying the concepts of “rehabilitation” and “treatment”.”<sup>56</sup>

While British courts have treated ‘wrongful birth’ applications as stand-alone claims for pure economic loss,<sup>57</sup> the artificiality of the distinction has been recognised.<sup>58</sup> Nevertheless, once the claim is allowed, the same issues arise regarding the quantification of damages.

These norms informed the approach in *Waller* and *Neville* as to the means via which damages for the ‘costs’ of child raising should be determined. The issues which arise in this context are:

- Do claims for the costs of maintaining a child extend beyond the age of majority?
- Under Australian common law, despite *Cattanach*’s decision<sup>59</sup> in the context of wrongful conception, should *wrongful birth* claims by parents be limited to those maintenance costs solely attributable to a child’s disability? In such cases, and as a separate issue, should an amount recognising the acceleration of ordinary child rearing costs be allowed?
- Is the value of gratuitous care provided by parents recoverable, or is compensable loss limited to a loss of parental earning capacity, absent statutory constraints<sup>60</sup> on recovery of that earning capacity?
- Should amounts awarded for future paid care and other costs be limited according to parental income and notions of reasonableness?
- Should offsets for government assistance be made?

The treatment of these issues in *Waller* and *Neville*, and their consideration in other Australian and British jurisprudence, will now be discussed in turn.

## **A Relevance of the Age of Majority?**

In *Waller*, the parents submitted that their child would never live independently and, as such, they had ‘a moral obligation to care for Keeden for the rest of his life’.<sup>61</sup> A claim was therefore made in respect of his care until the age of 52 (this agreed life expectancy being slightly less than that of the mother).<sup>62</sup> The defendant

56 *FJ* (2017) 317 FLR 477, 481 [10] (emphasis added). See also 518–19 [125]–[128].

57 *McFarlane* [2000] 2 AC 59, 75–6 (Lord Slynn), 79 (Lord Steyn), 89 (Lord Hope), 100 (Lord Clyde); *Hardman* (2000) 59 BMLR 58, 71 (Henriques J). Cf *McFarlane* [2000] 2 AC 59, 109 (Lord Millett); *Walkin v South Manchester Health Authority* [1995] 4 All ER 132, 139 (Auld LJ) (wrongful conception).

58 *McFarlane* [2000] 2 AC 59, 109 (Lord Millett).

59 (2003) 215 CLR 1. See above n 16 and accompanying text.

60 Discussed at below n 166 and accompanying text.

61 [2013] NSWSC 497 (6 May 2013) [279].

62 *Waller* [2013] NSWSC 497 (6 May 2013) [274]. Current authority implies that, even if unconfined by the age of majority, the period during which child maintenance costs may be claimed should not extend beyond a parent’s own life expectancy or capability to facilitate care: see, eg, *Hardman* (2000) 59 BMLR 58, 74. Perhaps future claims may seek to incorporate maintenance costs incurred by the parents’ estate in accordance with their testamentary directions.



accepted the need for lifelong care,<sup>63</sup> but argued that because the relevant harm was the ‘burden of raising a child’ liability should not extend to care past the age of 18<sup>64</sup> (for which the parents have no legal responsibility).<sup>65</sup> It has been stated that ‘[t]he natural and moral obligation of a parent to support a child [only] becomes, by force of the legislation, a legal obligation’.<sup>66</sup> Under the *Family Law Act 1975* (Cth), parental responsibility is *generally* limited to children not yet 18.<sup>67</sup>

In considering this issue in *Waller*, Hislop J noted an absence of binding authority and inconsistent Australian decisions.<sup>68</sup> For example, in *Cattanach*, the parents’ case was limited by the claim itself to the ordinary costs of raising their healthy child to the age of 18.<sup>69</sup> Despite this, several judges (in obiter) contemplated the notional recovery of damages for tertiary education and other expenses beyond the age of majority, regardless of the parents’ legal obligation to incur them.<sup>70</sup> Later, in *G v Armellin* (*Armellin*),<sup>71</sup> the Supreme Court of the Australian Capital Territory rejected a claim for the cost of continuing to support, while in tertiary education, the additional child born due to the negligent implantation of two embryos during in vitro fertilisation. According to Bennett J, there was no legal responsibility to support a child through university; and many parents did not do so.<sup>72</sup>

Whilst *Armellin* limits practitioner liability, legal obligations to support adult children with disabilities, or to complete education, are in fact recognised by the Family Court<sup>73</sup> and legislation.<sup>74</sup> Furthermore, Bennett J’s latter observation, citing

63 *Waller* [2013] NSWSC 497 (6 May 2013) [274], [277].

64 *Ibid* [278], [281]. In Australia, the age of majority is 18: see, eg, *Age of Majority Act 1974* (Qld) s 5.

65 *Waller* [2013] NSWSC 497 (6 May 2013) [278]. Some support for this argument of limiting claims to the duration of the parents’ legal obligation to support may also be found in *McFarlane* [2000] 2 AC 59, 75 (Lord Slynn), 82 (Lord Steyn), 89 (Lord Hope).

66 *Luton v Lessels* (2002) 210 CLR 333, 340 (Gleeson CJ).

67 *Family Law Act 1975* (Cth) s 61C(1). See also *Family Law Act 1975* (Cth) ss 60B, 66C; *Child Support (Assessment) Act 1989* (Cth) ss 3, 12(1)(c) (‘[a] child support terminating event happens’ if, amongst other things, a ‘child turns 18’). There are, however, exceptions to this: see discussion at below n 74 and accompanying text.

68 [2013] NSWSC 497 (6 May 2013) [282].

69 (2003) 215 CLR 1, 14 (Gleeson CJ), 94 (Callinan J). See also *CES* (1995) 38 NSWLR 47, 86 (claim limited to ordinary child rearing costs ‘from birth to age eighteen’); *Brown v Thoo* (Unreported, New South Wales District Court, Sorby DCJ, 22 September 2004) (damages awarded for the cost of raising to 18 years a healthy, yet wrongfully conceived, child). Similarly, in *PD v Harvey* [2003] NSWSC 487 (10 June 2003), during a joint consultation prior to engaging in unprotected sex, a medical practitioner failed to advise the claimant of the need to obtain her partner’s consent to the disclosure of discordant HIV test results. Damages for the cost of caring for the resulting child, after such time as the now HIV-infected mother would be unable to do so, were claimed and allowed until the child was aged 18: at [107].

70 *Cattanach* (2003) 215 CLR 1, 14–15 (Gleeson CJ), 99 (Callinan J), 111 (Heydon J). See also *Edwards v Blomeley* [2002] NSWSC 460 (12 June 2002) [112] (Studdert J) (‘[i]t is not to be assumed that a [wrongful conception] claim available to parents of a disabled child must be limited to the period of the child’s minority.’)

71 (2008) 219 FLR 359.

72 *Ibid* 405. This was not challenged on appeal: *G v Armellin* [2009] ACTCA 6 (1 May 2009) [3].

73 See, eg, *Re AM* (2006) 198 FLR 221 (legal liability to support a disabled adult child).

74 *Family Law Act 1975* (Cth) s 66L (provision for child maintenance orders to support children over 18 where needed: to complete education; or because of mental or physical disability); *Child Support (Assessment) Act 1989* (Cth) s 151B (carers entitled to child support may apply for child support obligations to continue until the end of the secondary school year in which the child turns 18).

no source or data,<sup>75</sup> appears instead merely based upon judicial understandings or assumptions about parent-child relationships. It is also in contrast to *McDonald v Sydney South West Area Health Service*.<sup>76</sup> Here the Supreme Court of New South Wales had previously considered that parental responsibility did not always cease upon a healthy child turning 18, but could continue during tertiary studies.<sup>77</sup>

In the United Kingdom, submissions that damages for the care of disabled children should be cut off at the age of 18,<sup>78</sup> based upon assumptions that progeny then: cease 'to be dependent' upon parents; or are in adulthood 'entitled in [their] own right to various statutory allowances',<sup>79</sup> have predominantly<sup>80</sup> been rejected. The precise duration of the award for disability-related costs past majority, however, has depended on the facts and circumstances of each case.<sup>81</sup> While acknowledging some of the British decisions in *Waller*,<sup>82</sup> Hislop J concluded that:

The authorities to which reference has been made provide little guidance ... The issue appears to be an open one. Any entitlement beyond 18 years will depend upon policy considerations. At this stage of the development of the law, if I was awarding damages I would limit them to the period up to Keeden's 18th birthday.<sup>83</sup>

Although not identifying the relevant policy considerations favouring extension of the award in the case of healthy or disabled children absent legal obligation, such factors should arguably include:<sup>84</sup> the foreseeability of care past majority;<sup>85</sup> the best interests of the child;<sup>86</sup> the reasonableness of the claim 'in character and

75 Recent data include, for example: Ben Phillips, 'Cost of Kids: The Cost of Raising Children in Australia' (Income and Wealth Report No 33, AMP.NATSEM, May 2013) 4–5, 8 (children aged 18–24 years are living at home for longer and '[t]he pressure on low income families is especially pronounced' due to costs such as tertiary education).

76 [2005] NSWSC 924 (16 September 2005) (Harrison AsJ), discussed at above n 51.

77 Ibid [88].

78 *Gaynor N v Warrington Health Authority* [2003] Lloyd's Rep Med 365, 367 [14]–[16] ('*Gaynor*'). See also *Nunnerley* [2000] PIQR Q69, Q70–Q72.

79 *Nunnerley* [2000] PIQR Q69, Q71–2. See also discussion in Part II(E) below.

80 Cf *Fish* (1994) 5 Med LR 230, 231 (cost of future care awarded until the disabled child's 18<sup>th</sup> birthday); *Thake v Maurice* [1986] QB 644, 668 (Peter Pain J) (Peter Pain J awarded damages, pre-*McFarlane*, for maintenance until the age of 17 of a healthy child born due to negligent contraception advice post-vasectomy).

81 *McLelland* 2001 SLT 446, 455 (costs of caring for and maintaining a Down's syndrome child awarded beyond the age of 40); *Rand* (2000) 56 BMLR 39, 58, 66–7 (considered the costs of raising a disabled child until the age of 25); *Hardman* (2000) 59 BMLR 58, 74 (damages for the birth of a disabled child, due to the defendant's failure to diagnose or test for rubella, extended to the lifespan of the child's parent).

82 [2013] NSWSC 497 (6 May 2013) [283], citing *Rand* (2000) 56 BMLR 39; *Hardman* (2000) 59 BMLR 58; *Gaynor* [2003] Lloyd's Rep Med 365, 367 [16].

83 *Waller* [2013] NSWSC 497 (6 May 2013) [284] (emphasis added).

84 See generally *Gaynor* [2003] Lloyd's Rep Med 365, 367 [14] (Pill LJ), 367 [16] (Hale LJ) (disabled child).

85 Given that damages in tort can only be recovered where the type of loss is foreseeable: *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd; The Wagon Mound* [1961] AC 388.

86 In the Australian context, it is acknowledged that this is subject to the general principle that where lump sum damages are awarded for expenses to be incurred in the future, '[t]he recipients are at liberty to spend the damages on themselves or on any other purpose whatsoever': *Cattamach* (2003) 215 CLR 1, 112 (Heydon J). Therefore, in 'wrongful birth' cases, the monies may not necessarily be spent on the child: at 145 (Heydon J).

amount’;<sup>87</sup> and the indemnity principle, or notion that the primary purpose of tort compensation is to restore to claimants no more and no less than ‘the loss ... suffered as the natural result of the wrong’.<sup>88</sup> On this basis, if parents are entitled to compensation for the time during which their child is under 18, they should not be denied compensation for needs persisting afterwards. For in ‘wrongful birth’ claims, in caring for a child both up to and past the age of majority, parents clearly do ‘[suffer] a loss [which] would not have [been] incurred but for the tort’.<sup>89</sup>

Consistent with fundamental norms, such as those recognised in the *Convention for the Protection of Human Rights and Fundamental Freedoms* (‘*European Convention on Human Rights*’),<sup>90</sup> a family’s autonomy to make their own decisions as to care should also be recognised and enabled. For example, in *Hardman v Amin* (‘*Hardman*’),<sup>91</sup> damages past the age of majority were awarded to:

permit the Hardmans, as a family unit independent of the state, to meet Daniel’s needs. A failure to provide adequate compensation would have disrupted and prevented the family leading as ‘normal’ a life as possible ... It would have deprived this family of its autonomy vesting all major decisions as to care in the state.<sup>92</sup>

This social policy is supported by the *Convention on the Rights of Persons with Disabilities*, which recognises the family as the ‘natural and fundamental group unit of society’ and as ‘entitled to protection by society and the State’.<sup>93</sup> The Convention further affirms that ‘persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities’.<sup>94</sup> As such, it stands in favour of providing parents reasonable compensation to enable disabled children to be cared for in the family unit beyond

87 See, eg, *Rand* (2000) 56 BMLR 39, 58 (Newman J). The requirement that costs claimed for child maintenance and care must be reasonable, and capable of being incurred by parents independently of a damages award, is discussed further in Part II(D) below.

88 *Admiralty Commissioners v Owners of the Steamship Valeria; The SS Valeria* [1922] 2 AC 242, 248 (Lord Dunedin) (‘*Steamship Valeria*’).

89 *Nunnerley* [2000] PIQR Q69, Q73 (Morison J).

90 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8 (right to respect for family and private life). See also *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Preamble, art 27.

91 (2000) 59 BMLR 58.

92 *Ibid* 80 (citations omitted) (Henriques J). See also 74, 79 (damages for the birth of a disabled child, due to the defendant’s failure to diagnose or test for rubella, extended to the lifespan of the child’s parent).

93 *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Preamble para x. Signed and ratified by both Australia and the United Kingdom. See also art 19(a); *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX), UN GAOR, 30<sup>th</sup> sess, 2433<sup>rd</sup> plen mtg, Agenda Item 12, UN Doc A/RES/3447(XXX) (9 December 1975) para 9 (‘[d]isabled persons have the right to live with their families’); *Declaration on the Rights of Mentally Retarded Persons*, GA Res 2856 (XXVI), UN GAOR, 26<sup>th</sup> sess, 2027<sup>th</sup> plen mtg, UN Doc A/RES/2856(XXVI) (20 December 1971) para 4 (‘[w]henver possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance’).

94 *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Preamble para x.

minority. A similar stance is adopted in Australia under the *National Disability Insurance Scheme Act 2013* (Cth) which provides, as a general principle, that '[t]he role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected'.<sup>95</sup> The ability of significantly disabled persons to support themselves, and thereby wholly or partially negate their parental dependency, is more limited than in the case of healthy adult children and their need for parental care may last longer.<sup>96</sup> According to Cuskelly, '[p]arents of children with ... [a] disability typically care for their child at home, and then continue to provide care, generally in the family home, until they die or are no longer able to offer this support because of their own illness'.<sup>97</sup>

Awarding 'wrongful birth' damages for care costs during a child's adulthood, and for as long as they are reasonably necessary, is also consistent with the manner of providing compensation under the *Fatal Accidents Act 1976* (UK) c 30 ('*Lord Campbell's Act*') and the wrongful death legislation in all Australian jurisdictions.<sup>98</sup> Here, damages for the loss of financial support or services, which would have been provided by a deceased parent to their dependent children past the child's age of majority, might be awarded for as long as the child is not self-sufficient.<sup>99</sup> Damages are then assessed with reference to the 'reasonable expectation of pecuniary benefit', whether 'as of right or otherwise'.<sup>100</sup> The parent's legal obligation to support is irrelevant.

A statement of principle relevant to the duration of an assessment of damages was not necessary to Hislop J's decision in *Waller*,<sup>101</sup> and was not made in *Neville*.<sup>102</sup> As such, the issue of whether damages for child maintenance in 'wrongful birth' claims should be limited to the age of majority, or potentially extend to the period of the parents' own lives and capability to facilitate care (or until the child becomes able to care for themselves), remains open in Australia. To the extent that Hislop J was influenced by *Armellin's* requirement of legal obligation<sup>103</sup> in

95 *National Disability Insurance Scheme Act 2013* (Cth) s 4(12). The Scheme is discussed further at above n 36.

96 See, eg, *Gaynor* [2003] Lloyd's Rep Med 365, 367 [16] (Hale LJ); Justice Hale, above n 6, 763.

97 Monica Cuskelly, 'Parents of Adults with an Intellectual Disability' (2006) 74 *Family Matters* 20, 20. See also Lixia Qu, Ben Edwards and Matthew Gray, *Ageing Parent Carers of People with a Disability* (Australian Institute of Family Studies, 2012) 1, 4, 6, 11–13 (the number of disabled adults (aged 15 years or older) cared for by parents is rising, together with the number cared for by parents aged 65 years or older).

98 *Civil Law (Wrongs) Act 2002* (ACT) pt 3.1; *Compensation to Relatives Act 1897* (NSW); *Compensation (Fatal Injuries) Act 1974* (NT); *Civil Proceedings Act 2011* (Qld) pt 10; *Civil Liability Act 1936* (SA) pt 5; *Fatal Accidents Act 1934* (Tas); *Wrongs Act 1958* (Vic) pt III; *Fatal Accidents Act 1959* (WA).

99 Harold Luntz, *Assessment of Damages for Personal Injury and Death* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2002) 491.

100 *Franklin v The South Eastern Railway Co* (1858) 3 H & N 211, 214; 157 ER 448, 449 (Pollock CB), quoted in *Parker v Commonwealth* (1965) 112 CLR 295, 308 (Windeyer J).

101 [2013] NSWSC 497 (6 May 2013), [252]–[268] (Hislop J). See also discussion at above n 44 and accompanying text.

102 As to whether 'any expenditure recoverable in respect of the cost of living ... would cease upon ... [the child] turning eighteen', Beech-Jones J concluded that in 'the absence of full argument on the question of the time span ... I will not address this issue': [2014] NSWSC 607 (21 May 2014) [223].

103 (2008) 219 FLR 359, discussed at above nn 71–7 and accompanying text.

denying liability beyond the age of 18,<sup>104</sup> it is argued that his Honour's conclusion is premised on too narrow a view of parental responsibility, particularly in relation to disabled progeny. The decision fails to adequately reflect comparable jurisprudence, relevant policy, and contemporary societal norms. Alternatively, should the courts require a legal obligation, it has been noted above<sup>105</sup> that Australian parents might in fact show some obligation to provide for children after majority such as to justify claims at least while that obligation continues.

## **B Wrongful Birth Claims under Australian Common Law**

In Australian cases not governed by legislation,<sup>106</sup> *Cattanach*<sup>107</sup> permits recovery of the past and future maintenance costs of both healthy and disabled children. However, *Cattanach* was decided in the context of an unwanted conception.<sup>108</sup> The claimant's treating practitioner had failed to advise her of a risk of pregnancy post-sterilisation.<sup>109</sup> The issue before the High Court was therefore limited to 'whether damages for professional advice negligently given, or negligently omitted to be given, [could] be awarded to cover the cost of the healthy product of an *unwanted* pregnancy'.<sup>110</sup>

As discussed previously,<sup>111</sup> wrongful conception claims can, however, be distinguished from those for wrongful birth. Such cases involve *wanted* children. The claimants actively desire a child, or at least have not taken steps to prevent conception. Consequently, should maintenance claims in wrongful birth cases be treated differently by Australian courts? Namely, should a parent's claimable loss be reduced by the ordinary costs of raising a child that in such instances they would have ultimately incurred anyway? If so, should parents still receive an allowance to recognise any acceleration of ordinary child rearing costs? As discussed below, relevant jurisprudence suggests that on each account they should. In common law wrongful birth actions, this would curtail such claims in the case of healthy children and, similarly to the legislation, instead primarily limit awards to the additional costs attributable to a child's disability.

104 *Waller* [2013] NSWSC 497 (6 May 2013) [282], citing *Armellin* (2008) 219 FLR 359, 405. A similar conclusion was recently reached in the notional assessment of damages made by Elkaim J in *Nouri v Australian Capital Territory* [2018] ACTSC 275 (28 September 2018) [443]–[447] (the negligence claim for wrongful birth having failed). In that case, Elkaim J said at [447]: 'My decision is reinforced by the fact that after Saba reaches 18 there will be a legal obligation on NDIS to support her.'

105 See above nn 73–4 and accompanying text.

106 This legislation is discussed at above nn 22–9 and accompanying text.

107 (2003) 215 CLR 1, discussed at above n 16 and accompanying text.

108 The costs of raising a healthy child were also awarded in a wrongful conception context in *Armellin* (2008) 219 FLR 359, 403–6; *McDonald* [2005] NSWSC 924 (16 September 2005) [1], [87]–[89].

109 Namely, that conception would still be possible should the claimant's assertion, regarding the childhood removal of her right ovary and fallopian tube, prove wrong. Due to this assertion, only the left fallopian tube was clipped during a tubal ligation: *Cattanach* (2003) 215 CLR 1, 12, 25–6, 40, 69, 94–7.

110 *Ibid* 108 (Callinan J) (emphasis added). See also 26–7 (McHugh and Gummow JJ), 39–41 (Kirby J), 94, 104 (Callinan J).

111 See above nn 1–5 and accompanying text.

## 1 Deduction of the Ordinary Costs of Care

In *Waller*, the evidence was that, by pursuing in vitro fertilisation, the claimants wanted a child — albeit one free from disability.<sup>112</sup> Accordingly, despite the plaintiffs' submission that '[i]t would be both artificial and contrary to the principles in *Cattanach* to distinguish between the costs incurred in raising that part of Keeden that ... is healthy',<sup>113</sup> Hislop J concluded that where having a child was intended, the ordinary costs of child maintenance were not recoverable. Damages were therefore limited (in obiter) to those losses occasioned by the child's cerebral thrombosis.<sup>114</sup> These facts can be contrasted with the wrongful conception claim in *Neville*.<sup>115</sup> There, akin to *Cattanach*,<sup>116</sup> the plaintiff did not want a child. Rather, had she known that pregnancy was still possible following endometrial ablation, she would have discussed contraception methods and undergone tubal ligation to avoid conceiving.<sup>117</sup> Although *Neville*'s action fell within the legislation,<sup>118</sup> Beech-Jones J considered 'that, at common law, in an unplanned pregnancy case' a parent could recover all 'financial expenditure that [has] been and will be incurred ... on a child's upbringing'.<sup>119</sup>

These conclusions uphold the indemnity principle.<sup>120</sup> In wrongful conception cases, the full recovery of costs, not otherwise intended to be borne in relation to any child (regardless of health), is allowed. In instances of wrongful birth, by deducting from claims the ordinary costs of a child which would have been incurred anyway, parents are placed in as good a position financially as would have endured had negligence not occurred. British jurisprudence also supports this result. For example, in *McLelland v Greater Glasgow Health Board* ('*McLelland*'),<sup>121</sup> an unborn child's disability was undetected due to a negligent failure to conduct amniocentesis testing. In assessing damages for the costs

112 [2013] NSWSC 497 (6 May 2013) [289]. The defendant submitted that 'the plaintiffs were intending to have a child. The first plaintiff does not say that if she had known about the possible inheritance of ATD she would have ceased all attempts to conceive a child': at [286].

113 *Ibid* [287].

114 *Ibid* [285]–[289]. In relation to the wrongful birth of a healthy child, see recently *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918: 'the upkeep claim must fail for the simple reason that the appellant "had wanted a second child all along"': at 932 [15] (Andrew Phang Boon Leong JA), quoting *ACB v Thomson Medical Pte Ltd* [2015] 2 SLR 218, 226 [15] (Choo Han Teck J).

115 [2014] NSWSC 607 (21 May 2014).

116 (2003) 215 CLR 1.

117 *Neville* [2014] NSWSC 607 (21 May 2014) [145].

118 See above n 42 and accompanying text.

119 [2014] NSWSC 607 (21 May 2014) [161]. In relation to the requirement that expense be incurred, and the implications of this for the recovery of: voluntary services or parental care provided; and future paid care and other costs, see *CSR Ltd v Eddy* (2005) 226 CLR 1, 16, quoting *Blundell v Musgrave* (1956) 96 CLR 73, 79 (Dixon CJ) ('*Blundell*') (see above n 49 and accompanying text), and Parts II(C) and (D) below.

120 Discussed at above n 88 and accompanying text. See also *Salih v Enfield Health Authority* [1991] 3 All ER 400, 404 (Butler-Sloss LJ), 408 (Sir Christopher Slade) ('*Salih*').

121 2001 SLT 446. See also *Rand* (2000) 56 BMLR 39, 54 (Newman J) ('[t]he parents' commitment to having a child prior to the negligent act, in my judgement, affects ... what may be just or reasonable to impose on the defendant by way of liability'); *Lee* [2001] 1 FLR 419, 432 (Toulson J) ('[i]f, following a termination of her pregnancy ... she had continued with her attempts and had been successful, she would have incurred the costs of bringing up a healthy child in any event').

of maintaining the child, Lord Prosser distinguished circumstances such as *McLelland* from wrongful conception cases:

The known situation was not that the pursuers did not want a child. They did ... what they did not want was Down's syndrome afflicting their child, and all that would entail for them. That was what the doctors should have averted. And I am in no doubt that the special and extra economic burdens attributable to that must be taken to have been in the contemplation of the doctors, and that it is fair, just and reasonable that the defenders should be liable in that respect. However, I am not persuaded that the circumstances of the case lead to the same conclusion, in relation to the ordinary costs of maintaining Gary ...<sup>122</sup>

Drawing this distinction between wrongful conception and wrongful birth may give rise to an argument that, in wrongful birth cases, the ordinary costs of maintenance might still be awarded if the child in question becomes, in fact, an 'additional child'.<sup>123</sup> Such a situation may arise where, although a child is wanted and despite the parents' original commitment to having a family of a certain size, they decide, following the birth of a disabled child, to increase this number. In those circumstances, can the parents argue that because their disabled wrongful birth child is now an *additional* child they ought to recover the ordinary costs of raising them, as it is no longer a situation where the normal expenses of child raising would have been borne by them anyway upon the birth of a child, because their family size has increased? In the British case of *Rand v East Dorset Health Authority* ('*Rand*'), the parents' second child was born disabled due to the defendants' failure to advise of possible foetal abnormality, and they subsequently decided to have a third child in order to prove that another healthy child was possible.<sup>124</sup> Nevertheless, although seeking to recover their second child's full maintenance costs, their remedy remained limited to the extra expenses arising by reason of the child's Down syndrome.<sup>125</sup> In Australia, at the time of the hearing in *Waller*,<sup>126</sup> the claimants were expecting a second child and although an additional child argument was not made, similarly to *Rand*, such claims may not be allowed. There are a number of reasons for this.

Unlike the distinction between wrongful conception and wrongful birth, which is objective, turning as it does upon a consideration of the parents' wishes as evidenced by the scope of the defendant's duty of care, whether someone is an additional child is prone to subjectivity and hindsight. For example, in a negligently performed sterilisation, the parents' prior intention to have no further children is clear at the time of the breach. However, while a couple may have

122 2001 SLT 446, 454. See also 456 (Lord Marnoch) ('[t]here is accordingly no suggestion that ... Gary is in any way an unwanted child and that, as I see it, places the respondents in the same position as Mr and Mrs McFarlane so far as the ordinary costs of maintenance are concerned'), 457 (Lord Morison) ('[I]iability for the consequences of an unwanted conception was treated, in *McFarlane*, obviously correctly, as different from that for the consequences of a "wrongful birth"').

123 See, eg, *ibid* 450–1 (Lord Prosser). This was not the situation in *McLelland*, where it was stated that 'the pursuers' intention was to have a family of two. They have a family of two. And it is unlikely that they will have any further children now': at 450.

124 (2000) 56 BMLR 39, 43, 67.

125 *Ibid* 58–9, 62 (Newman J).

126 [2013] NSWSC 497 (6 May 2013) [17], [195].

antecedent evidence of family planning in terms of desired family size, the impact upon that plan of a disabled child's birth is unlikely to have been considered in advance and post-birth may be difficult to evaluate unemotionally or without bias.<sup>127</sup> The success of an additional child argument should also not depend upon proof of an added pregnancy or birth before trial. Claimants ought to be afforded the autonomy to make decisions regarding further children in their own time, uninfluenced by any perceived financial penalty of not doing so in a judicially timely way.<sup>128</sup> The claim of an 'additional child' may also err too far towards suggesting some reduced value in the life of the handicapped child.<sup>129</sup>

The parents' decision to have a further child<sup>130</sup> might moreover be claimed to be a *novus actus interveniens*, such that no case for that child's maintenance costs can be made.<sup>131</sup> A defendant may argue that the chain of causation is broken because the parents' decision is voluntary and the latter child's conception or birth is not something that the medical practitioner's duty is designed to prevent.<sup>132</sup> Accordingly, as a matter of legal coherence, if damages for the birth of the further child cannot be awarded, that birth should be equally irrelevant to increasing an assessment of the damages payable in a wrongful birth action on account of their older disabled sibling.

Conversely, where, following the wrongful birth of a disabled child, parents decide to forgo further children, the damages awarded have been reduced by this cost saving. In *Salih v Enfield Health Authority* ('*Salih*'), following the defendants' failure to diagnose and warn of congenital rubella syndrome, the parents decided, given their child's disability, not to have another child but limit their family to

- 127 The reliability of a claimant's own evidence or testimony generally, when given in hindsight, was questioned in *Chappel v Hart* (1998) 195 CLR 232, 246 n 64 (McHugh J).
- 128 A similar argument has been made against reducing the damages payable in wrongful death claims, for the death of a spouse, on account of the surviving spouse's re-partnering prior to trial. There, the criticism is made that the law should not operate so as to encourage the postponement of re-partnering decisions in order to maximise damages awards: see Peter B Kutner, 'Reforming Wrongful Death Law' (1999) 7 *Torts Law Journal* 46, 54–5, 82–4, 87, quoting Law Reform Committee of South Australia, *Relating to the Factor of the Remarriage of a Widow in Assessing Damages in Fatal Accidents under the Wrongs Act*, Report No 27 (1972) 8–11; Queensland Law Reform Commission, *Damages in an Action for Wrongful Death*, Report No 57 (2003) 42, quoting New South Wales Law Reform Commission, *Working Paper on Deferred Assessment of Damages for Personal Injuries and Interim Payments during the Period of Postponement and on the Relevance of Remarriage or Prospects of Remarriage in an Action under Lord Campbell's Act*, Working Paper No 2 (1969) 73–4.
- 129 See, eg, *Melchior v Cattanach* (2001) 217 ALR 640, 647–8 (McMurdo P) ('it is offensive and wrong to suggest that children born with disabilities, even severe disabilities, cannot enrich the lives of their parents, family and the wider community in diverse ways'); *Cattanach* (2003) 215 CLR 1, 10 (Gleeson CJ), 35–6 (McHugh and Gummow JJ); *Parkinson* [2002] QB 266, 293 (Hale LJ); *Rees* [2004] 1 AC 309, 346 (Lord Millett) ('[a] disabled child is not "worth" less than a healthy one').
- 130 This should be contrasted with parental decisions to keep (not terminate or offer for adoption) the child subject to a wrongful conception or birth claim. Such voluntary choices do not break the chain of causation because that child's conception or birth is the very thing that the practitioner was engaged to prevent: *McFarlane* [2000] 2 AC 59, 74 (Lord Slynn), 113 (Lord Millett); *Cattanach* (2003) 215 CLR 1, 17 (Gleeson CJ), 46 (Kirby J), 79–80 (Hayne J).
- 131 In *Harvey v PD* (2004) 59 NSWLR 639, discussed at first instance at above n 69, the costs of another child, conceived after the claimant knew of her HIV status, were not recognised on the basis of the claimant's 'informed decision to have a second child': at 643 (Spigelman CJ). See also 661, 665 (Santow JA), 676 (Ipp JA).
- 132 See, eg, *McFarlane* [2000] 2 AC 59, 74 (Lord Slynn), 109, 113 (Lord Millett).



three of the four children planned.<sup>133</sup> The saving of this likely future expenditure was a relevant consideration, which the English Court of Appeal took into account by denying damages for the parent's loss in providing for their child's basic needs unrelated to his disability.<sup>134</sup> Such an accounting, again being consistent with the indemnity principle,<sup>135</sup> may be arguable in Australia. It is also consistent with the courts' practice of awarding damages in general personal injury claims for the 'lost years', but reducing the award for loss of future earnings during that period (between a claimant's post-accident age of death and pre-accident age of retirement) by the amount saved on their own maintenance (by being dead).<sup>136</sup>

The discounting of damages in *Salih* does, however, sit uncomfortably with the rejection of the additional child argument above. Therefore, it may be the case that if the actual or intended birth of another child cannot be claimed in order to increase a damages award, then an argument based upon the 'savings of a child' should not be allowed to reduce damages payable either.

## 2 Allowance for Ordinary Costs Acceleration

In relation to children born due to wrongful conception, Luntz has previously argued that if contraceptive measures are undertaken due to a maternal or filial risk which does not eventuate, or to postpone child rearing, damages for child maintenance costs should, respectively, not be recoverable at all or be 'limited ... to the acceleration of expenditure'.<sup>137</sup> Therefore, in wrongful birth cases, if the ordinary costs of child maintenance are denied,<sup>138</sup> a similar issue arises as to whether compensation should nonetheless be provided for any acceleration of such costs. Potentially arising to some extent in all wrongful birth claims, such an allowance may be particularly pertinent if, for instance, due to the non-detection of pregnancy in a young career woman, she has a child which would otherwise have been delayed until later in life.<sup>139</sup>

The award of an allowance appears supported by the New South Wales Court of Appeal in *Waller v James*.<sup>140</sup> Although appealed on grounds of liability, not assessment of damages, in determining causation of harm the Court considered whether, even if appraised of the genetic risk of ATD, the parents would ultimately

133 [1991] 3 All ER 400, 405 (Butler-Sloss LJ), 407 (Mann LJ), 408 (Sir Christopher Slade) (pre-*McFarlane*).

134 Ibid 403–5 (Butler-Sloss LJ), 407 (Mann LJ), 408 (Sir Christopher Slade). As discussed at above nn 9, 30 and accompanying text, following *McFarlane* [2000] 2 AC 59 and *Parkinson* [2002] QB 266, only the additional costs of maintaining disabled children are now claimable in the United Kingdom in any event.

135 Discussed at above n 88 and accompanying text. See also *Salih* [1991] 3 All ER 400, 404 (Butler-Sloss LJ), 408 (Sir Christopher Slade).

136 See, eg, *Sharman v Evans* (1977) 138 CLR 563, 577; *Skelton v Collins* (1966) 115 CLR 94, 121; *Pickett v British Rail Engineering Ltd* [1980] AC 136.

137 Luntz, *Assessment of Damages for Personal Injury and Death*, above n 99, 640.

138 See discussion in Part II(B)(1) above.

139 Similar facts, absent an assessment of damages, existed in *FJ* (2017) 317 FLR 477, where a 19-year-old woman was starting her military career.

140 (2015) 90 NSWLR 634.

have had a child anyway.<sup>141</sup> If so, but for the negligent non-appraisal, the ordinary costs of child raising would not have been incurred when they were but instead be deferred. The issue was stated and resolved in the following manner:

the appellants said that they would not have had the child when they did but would have waited until testing techniques were sufficiently advanced to ensure that, in accessing IVF treatment, a foetus with ATD would not have been implanted. As at 1999, it was considered that there was a reasonable chance that such testing would be available in three to five years ... *Even if the appellants were entitled to damages ... such damages would only be for the acceleration of child rearing expenses for a period of a few years. Such damages would be very small and likely to be less than \$10,000.*<sup>142</sup>

Accordingly, in future wrongful birth cases decided at common law, it may benefit parents to produce evidence that due to a practitioner's negligence they have incurred normal costs of child rearing that would otherwise have been deferred by them for a period as a result of the postponement or lawful termination of their pregnancy. In such cases, despite a denial of damages for ordinary child maintenance costs, an amount to compensate parents for the acceleration of such costs, in addition to all costs attributable to a child's disability, may be awarded. While not a conventional sum of the nature recognised in the United Kingdom,<sup>143</sup> as the figure of \$10 000 set by the New South Wales Court of Appeal suggests, the award, depending on the circumstances, is still likely to be quite modest.

### **C Gratuitous Care or Loss of Parental Earning Capacity?**

Distinct from a mother's allowable claim for compensation for loss of earnings during pregnancy and birth,<sup>144</sup> the parents in *Waller* also claimed compensation, at commercial rates, for the time they had spent, and would spend in the future, caring for their child.<sup>145</sup> The basis of this claim was assumed<sup>146</sup> to be an application, by analogy, of the principles set out in *Griffiths v Kerkemeyer* ('*Griffiths*').<sup>147</sup> There, the High Court of Australia held that damages were recoverable for services, including care and assistance, provided gratuitously by a relative or friend to an injured person and rendered necessary due to their injuries. As explained by Mason J, in such circumstances the injured person's

relevant loss is his incapacity to look after himself as demonstrated by the need for nursing services and this *loss is to be quantified by reference to the value or cost*

141 Ibid 671–2. See also above nn 37–44 and accompanying text.

142 Ibid 672 (Beazley P) (McColl and Ward JJA concurring) (emphasis added).

143 Discussed at above nn 13, 20–1 and accompanying text.

144 Discussed at above n 12 and accompanying text.

145 [2013] NSWSC 497 (6 May 2013) [312].

146 Ibid [313], [326].

147 (1977) 139 CLR 161 (a claimant, rendered quadriplegic by a defendant's negligence, was awarded damages representing the value of past and future nursing and other services gratuitously provided by his fiancée and family). In the United Kingdom, see *Housecroft v Burnett* [1986] 1 All ER 332 (damages awarded to a claimant, injured by the defendant's negligent driving, for services rendered by a mother out of love).

of providing those services. The fact that a relative or stranger to the proceedings is or may be prepared to provide the services gratuitously is not a circumstance which accrues to the advantage of the appellant. *If a relative or stranger moved by charity or goodwill towards the respondent does him a favour as a disabled person* then it is only right that the respondent should reap the benefit rather than the wrongdoer whose negligence has occasioned the need for the nursing service to be provided.<sup>148</sup>

While preferring to compensate on these grounds ‘for the supply of gratuitous care’,<sup>149</sup> Hislop J implicitly recognised that the recovery of gratuitous care costs was an anomaly.<sup>150</sup> Compensation of this kind departs from ‘the usual rule that damages other than damages payable for loss not measurable in money are not recoverable for an injury unless the injury produces *actual financial loss*’.<sup>151</sup> As such, remedies akin to the damages provided in *Griffiths*, measured by the market value<sup>152</sup> of services provided voluntarily, do not compensate for one of the three types of loss recognised as recoverable by *CSR Ltd*.<sup>153</sup> The parent’s claim in *Waller* additionally differed from that in *Griffiths* in that the parents, as claimants, were not the recipients in need of the care, but the providers of it.<sup>154</sup> *Parkinson* had also distinguished claims for gratuitous care in the context of ‘wrongful birth’ from claims in personal injury actions generally, because the care provided was *by* and not *to* the person wronged.<sup>155</sup> In truth, according to the English Court of Appeal, the distinction resulted in a reluctance to compensate for care provided voluntarily by parents. The preferred focus was instead upon financial costs, such

148 *Griffiths* (1977) 139 CLR 161, 192–3 (emphasis added).

149 *Waller* [2013] NSWSC 497 (6 May 2013) [326].

150 This was also the defendant’s submission: *ibid* [322], citing *CSR Ltd* (2005) 226 CLR 1. See also *CSR Ltd* (2005) 226 CLR 1, 17–18 (Gleeson CJ, Gummow and Heydon JJ).

151 *CSR Ltd* (2005) 226 CLR 1, 15 (Gleeson CJ, Gummow and Heydon JJ) (emphasis added).

152 (1977) 139 CLR 161, 180–1 (Stephen J), 192–3 (Mason J); *Nguyen v Nguyen* (1990) 169 CLR 245, 261–2 (Dawson, Toohey and McHugh JJ) (*‘Nguyen’*); *Van Gervan v Fenton* (1992) 175 CLR 327, 333–4 (Mason CJ, Toohey and McHugh JJ) (*‘Van Gervan’*). In *Waller*, the defendant submitted that if damages for the parents’ gratuitous care were allowed, the amount should be limited to the market cost of the services measured by the award rate for employed carers: [2013] NSWSC 497 (6 May 2013) [330].

153 (2005) 226 CLR 1, 15–16, discussed at above n 49 and accompanying text. In *Nouri v Australian Capital Territory* [2018] ACTSC 275 (28 September 2018) [25], the plaintiffs ‘accepted that a claim for gratuitous services for past care was not available’.

154 *Waller* [2013] NSWSC 497 (6 May 2013) [318]. For this reason, statutory limitations upon recovery for gratuitous care would also not apply to these claims: see *Civil Liability Act 2002* (NSW) s 15 (applies to ‘care services ... that have been or are to be provided by another person to a claimant’: at sub-s 1); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) ss 18 (definition of ‘gratuitous services’), 23; *Civil Liability Act 1936* (SA) s 58; *Civil Liability Act 2002* (Tas) s 28B; *Wrongs Act 1958* (Vic) ss 28B (definition of ‘gratuitous attendant care services’), 28IA; *Civil Liability Act 2002* (WA) s 12. Section 59(1) of the *Civil Liability Act 2003* (Qld) affects ‘damages for gratuitous services provided to an injured person ... [arising] solely out of the injury in relation to which damages are awarded’. Even if a disabled child were the ‘injured person’, the section would still not apply to ‘wrongful birth’ actions, as such claims are generally seen as arising out of injury to the mother, in the form of pregnancy and childbirth, not injury to the child (see above nn 50–6 and accompanying text).

155 [2002] QB 266, 287 (Hale LJ). See also Justice Hale, above n 6, 762–3.

as the parents' 'out-of-pocket expenditure' and 'loss of earnings stemming from the caring role'.<sup>156</sup>

Accordingly, awarding damages on a *Griffiths* type basis in *Waller* was considered by Hislop J to involve policy considerations such that the favoured course, at first instance, was to award the parents an amount for past and future wages lost in reducing their working hours to care for their son.<sup>157</sup> Compensation for loss of earnings had been accepted by the defendant subject to proof of what the income would have been and that the parents would have continued to work following the birth of a child.<sup>158</sup>

This issue was also considered in *Neville*.<sup>159</sup> Beech-Jones J held that, owing to the categorisation of loss in *CSR Ltd*, there could 'be no recovery for the "cost" or value of any voluntary care of the child provided by anyone'.<sup>160</sup> This was reinforced by the fact that claims by parents for the provision of gratuitous care had also been excluded (in obiter) in *Cattanach*:

the relevant damage suffered by the Melchioris is the expenditure that they have incurred or will incur in the future ... If, for example, their child had been voluntarily cared for up to the date of trial, they could have recovered no damages for that part of the child's upbringing.<sup>161</sup>

As to whether the claim could be alternatively framed as one for the economic loss suffered as a result of a parent having to spend time caring for their child, although not in issue in *Cattanach*,<sup>162</sup> Beech-Jones J considered that, at common law, recovery of this loss, if proven, was consistent with the reasoning in that case. Further, '[n]o issue about setting off the benefits of having a child would arise' because, as discussed above,<sup>163</sup> those benefits are legally irrelevant to this head of damage.<sup>164</sup> However, it was unnecessary to conclusively determine the issue.<sup>165</sup> This was because the parent's claim in *Neville* was subject to legislation which precluded a court from awarding, in proceedings involving a claim for the birth of a child, whether disabled or not, damages for economic loss for 'any loss

156 [2002] QB 266, 287 (Hale LJ).

157 [2013] NSWSC 497 (6 May 2013) [326]. 'Loss of earning capacity' is one of the three types of loss recognised by *CSR Ltd* (2005) 226 CLR 1: at 16.

158 *Waller* [2013] NSWSC 497 (6 May 2013) [323], [325]. See also *McLelland* 2001 SLT 446, discussed at below n 187 and accompanying text; *Nouri v Australian Capital Territory* [2018] ACTSC 275 (28 September 2018) [448]–[452].

159 [2014] NSWSC 607 (21 May 2014).

160 *Ibid* [161]. See also [149]–[150], [162], [219].

161 (2003) 215 CLR 1, 32 (McHugh and Gummow JJ). See also 99 (Callinan J), 110 (Heydon J) (if maintainable, claims must generally be for expenses 'incurred' by parents). In *Gentile* [2004] WADC 144 (16 July 2004) [181] (Macknay DCJ), a claim for parental services voluntarily provided, based upon the commercial cost of employing someone to care for a healthy child following a failed Filshie clip sterilisation, was similarly denied as being contrary to *Cattanach*.

162 A potential claim for loss of earnings was, however, anticipated at (2003) 215 CLR 1, 20 (Gleeson CJ): 'the adverse financial implications of the assumption of parental responsibility might extend beyond the incurring of additional items of expenditure. What basis in principle is there for distinguishing between child-rearing costs and adverse effects on career prospects ... ?'

163 See above nn 46–8 and accompanying text.

164 *Neville* [2014] NSWSC 607 (21 May 2014) [163].

165 *Ibid* [163], [170], [217].

of earnings by the claimant while the claimant rears or maintains the child'.<sup>166</sup> Being unique to New South Wales, no similar statutory limitation exists in other Australian jurisdictions.

In the United Kingdom, recovery for the care provided by parents to a disabled child was refused on different grounds in *Rand*.<sup>167</sup> In that jurisdiction, 'wrongful birth' claims are treated as stand-alone claims for pure economic loss.<sup>168</sup> As such, the absence of expenditure meant that compensation for the parents' past and future services was not available. In this way, the same ultimate result was achieved as the courts in *Waller* and *Neville*<sup>169</sup> who instead applied the rule from *CSR Ltd* to what they considered a personal injury claim. However, there is British authority in support of gratuitous care awards. For example, in *Hardman*,<sup>170</sup> Henriques J concluded that 'by parity of reasoning', if a mother can claim for earnings lost because she had to cease work to care for her disabled child, 'she ought to be able to claim for the value of that care which she provides, provided there is not an overlap between the two'.<sup>171</sup> His Honour's decision was also justified with reference to the underlying rationale of British law in awarding damages for gratuitous services, that is, to provide reasonable or 'proper' compensation to the carer.<sup>172</sup> Due to this, and unlike *Parkinson* and *Waller*,<sup>173</sup> Henriques J attached little significance to the fact that in 'wrongful birth' cases the claim is brought by the providers, rather than the recipients, of the care.<sup>174</sup> Because the United Kingdom focuses upon compensating the carer, gratuitous care claims are normally brought by the recipient of the services (the victim of the defendant's wrong), on the carer's behalf, and the monies recovered held on trust for the carer.<sup>175</sup> In wrongful conception and birth actions, a direct claim by the parent caregivers, who have themselves been wronged, therefore poses no difficulty because the focus remains upon carer recompense.

166 *Civil Liability Act 2002* (NSW) s 71(1)(b).

167 (2000) 56 BMLR 39, 65–7 (Newman J).

168 See above n 57 and accompanying text. Accordingly, it has also been argued that, unlike an award for gratuitous care traditionally provided in an action for damages for personal injury, the parental care provided in 'wrongful birth' cases 'is not parasitical upon any personal injury suffered by the claimant': *Hardman* (2000) 59 BMLR 58, 76. See also 77.

169 See above nn 149–54, 159–61 and accompanying text.

170 (2000) 59 BMLR 58, approved in *Lee* [2001] 1 FLR 419, 434 (Toulson J).

171 (2000) 59 BMLR 58, 76.

172 *Ibid* 78, quoting *Hunt v Severs* [1994] 2 AC 350, 363 (Lord Bridge) ('*Hunt*'). See also *Hunt* [1994] 2 AC 350, 358 (Lord Bridge); *Cunningham v Harrison* [1973] QB 942, 952 (Lord Denning MR) ('*Cunningham*'); *Housecroft v Burnett* [1986] 1 All ER 332, 343 (O'Connor LJ). Cf *Donnelly v Joyce* [1974] QB 454 which instead, and similarly to Australian courts (see below n 176 and accompanying text), based claims for gratuitous care or services upon the injured claimant's need for the services.

173 *Parkinson* [2002] QB 266; *Waller* [2013] NSWSC 497 (6 May 2013). Discussed at above nn 154–6 and accompanying text.

174 See also *Fish* (1994) 5 Med LR 230, 232 (Stuart-Smith LJ); *Hardman* (2000) 59 BMLR 58, 77.

175 *Cunningham* [1973] QB 942, 952 (Lord Denning MR); *Hunt* [1994] 2 AC 350, 358, 363 (Lord Bridge). While in practice this does not always occur, in *Drake v Foster Wheeler Ltd* [2011] 1 All ER 63, damages were paid directly to the voluntary carer, a charitable hospice, which had cared for the claimant prior to his death: at 74 [43].

By comparison to the United Kingdom, Australian law awards gratuitous care damages on the basis of an injured claimant's 'need' for the services,<sup>176</sup> and 'wrongful birth' claims are generally treated as founded upon personal injury (the mother's pregnancy).<sup>177</sup> As such, it might be argued that the gratuitous care of a child provided by parents meets a need of the injured mother 'created by the medical practitioner's negligence namely the patient's obligation to care for and raise their child'.<sup>178</sup> Even if this claim, similar to that made in *Hardman* but according to the underlying object or rationale of Australian law, was made in support of awarding damages for voluntary parental care, in the absence of a policy decision akin to the analogy made by Henriques J above,<sup>179</sup> Australian claimants would face two hurdles. Firstly, that their loss falls outside one of the types recognised by *CSR Ltd.*<sup>180</sup> Secondly, that because the parents remain the providers, and not the recipients, of the care, allowing recovery would further extend the anomaly created by *Griffiths*<sup>181</sup> which permitted compensation for care provided gratuitously to an injured claimant absent financial loss. The High Court of Australia in *CSR Ltd*, by rejecting a claim for the loss of an injured party's ability to gratuitously provide care to another,<sup>182</sup> has already indicated that heads of damage merely analogous to a *Griffiths* claim are not recoverable at common law without statutory intervention.<sup>183</sup>

As an alternative to an award for gratuitous care,<sup>184</sup> compensation for a parent's loss of earnings consequent upon the birth of a child due to negligence has generally<sup>185</sup>

176 *Griffiths* (1977) 139 CLR 161, 180 (Stephen J), 192–3 (Mason J); *Nguyen* (1990) 169 CLR 245, 261–2 (Dawson, Toohey and McHugh JJ); *Van Gervan* (1992) 175 CLR 327, 333 (Mason CJ, Toohey and McHugh JJ). Accordingly, there is no obligation to hold amounts recovered on trust for the carer.

177 See above nn 50–6 and accompanying text.

178 *Neville* [2014] NSWSC 607 (21 May 2014) [162] (Beech-Jones J).

179 See above n 170 and accompanying text.

180 (2005) 226 CLR 1, 15–6 (Gleeson CJ, Gummow and Heydon JJ). Namely, non-pecuniary loss (encompassing general damages), loss of earning capacity, or actual financial loss: discussed at above n 49 and accompanying text. See also above nn 149–53, 159–60 and accompanying text.

181 (1977) 139 CLR 161, discussed at above nn 147–8, 154 and accompanying text.

182 (2005) 226 CLR 1, 32 (Gleeson CJ, Gummow and Heydon JJ), 47 (McHugh J), 49 (Callinan J). The claim in *CSR Ltd* related to an injured claimant's inability, due to negligently caused mesothelioma, to provide household services for his osteoarthritic wifersteoarthritis make such claims was overruled had osteoarthritisntal toll that may have upon them 281Dm are not recoverable.. Such claims, known as claims for *Sullivan v Gordon* (1999) 47 NSWLR 319 damages, are permitted by legislation in some jurisdictions: see, eg, *Civil Law (Wrongs) Act 2002* (ACT) s 100; *Civil Liability Act 2002* (NSW) s 15B; *Civil Liability Act 2003* (Qld) s 59A; *Civil Liability Act 2002* (Tas) s 28BA; *Wrongs Act 1958* (Vic) s 28ID. In the United Kingdom, see *Administration of Justice Act 1982* (UK) c 53, s 9; *Daly v General Steam Navigation Co Ltd* [1981] 1 WLR 120; *Lowe v Guise* [2002] QB 1369.

183 *CSR Ltd* (2005) 226 CLR 1, 8–10, 15–18, 24–7 (Gleeson CJ, Gummow and Heydon JJ), 40, 46–7 (McHugh J).

184 That parents cannot claim the value of both gratuitous care and earnings lost has been confirmed in *Rand* (2000) 56 BMLR 39, 61 (Newman J); *Hardman* (2000) 59 BMLR 58, 76–7 (Henriques J); *Fish* (1994) 5 Med LR 230, 231–2 (Stuart-Smith LJ) ('the plaintiff cannot do two jobs at once. She could not carry on with the employment with Burtons and look after Cally ... and she is not entitled to be paid for doing two jobs at once': at 232). See also *Waller* [2013] NSWSC 497 (6 May 2013) [324].

185 Cf *Greenfield v Irwin* [2001] 1 WLR 1279, 1291 (May LJ) (claim for lost earnings, consequent upon caring for a healthy wrongful birth child, refused due to there being 'no material distinction between the costs of caring for and bringing up a child held to be irrecoverable in *McFarlane* and the mother's claim for loss of earnings').

been allowed by British courts. Such claims are limited to the extra needs of disabled children post-*Parkinson*<sup>186</sup> and are subject to the claimant showing that their loss was caused by the child's existence. For example, in *McLelland*,<sup>187</sup> five years after the wrongful birth of her disabled son, Mrs McLelland gave birth to another healthy child such that it was not then clear whether she would return to work. The defender therefore argued that, after her son's fifth birthday, any earnings lost were not attributable to him.<sup>188</sup> The Court accepted that what was 'in issue [was] what Mrs McLelland would have done, if Gary had not been born', and that the matter was 'complicated by the fact of her having had another child'.<sup>189</sup> However, ultimately, because the evidence as a whole indicated that 'with one or two normal healthy children' the claimant 'would have been able to organise her life and theirs in such a way as to enable her to continue working full time',<sup>190</sup> the full amount of the claimant's past and future wage loss<sup>191</sup> was awarded. A claim for income from a family business, sold due to demands on the mother's time in caring for a disabled child, was also allowed in *Rand*.<sup>192</sup> The parents' claim for loss of profits was regarded 'as a reflection of the particular consequences which [the child's] disability had upon the earning power of both Mr and Mrs Rand'.<sup>193</sup> As such, because the disability did not affect the father's ability to work, by allowing a position to continue where he thereafter remained unemployed, the parents' failure to mitigate reduced their damages award.<sup>194</sup>

Awarding damages for earning capacity actually lost, rather than the notional cost of parental care provided, may therefore result in Australia from the requirements of general torts law principle. However, should gratuitous care claims be allowed in 'wrongful birth' actions, quantification issues may arise. Prior to the High Court's decision in *Cattanach*, damages for past and future care provided to a disabled child were allowed in *Veivers v Connolly* ('*Veivers*').<sup>195</sup> The action was one for wrongful birth<sup>196</sup> and the claim was limited to the additional responsibility borne by the mother in contrast to 'the usual obligations she would have assumed had the child been born without disability'.<sup>197</sup> Deducting care that would have been

186 [2002] QB 266, discussed at above n 30 and accompanying text. That this may also be the Australian position, in relation to wrongful birth cases at common law, is discussed at below n 202 and accompanying text.

187 2001 SLT 446.

188 Ibid 455.

189 Ibid 456 (Lord Prosser).

190 Ibid.

191 The claimant's loss was that, following the birth of her disabled son, she could only work part-time or approximately half of the full-time hours she worked previously. £25 000 was awarded to reflect this difference: ibid 455.

192 (2000) 56 BMLR 39, 59–60.

193 Ibid 60 (Newman J).

194 Ibid.

195 [1995] 2 Qd R 326. See also *Dahl* (1992) 15 Qld Lawyer Reps 33 (wrongful conception). In *Dahl*, the damages awarded for the parents' '[s]ervices, physical care and upbringing, past and future' were reduced by 25 per cent on account of the intangible benefit provided in return by a healthy child to the parents: at 36–7.

196 A general practitioner had failed to perform appropriate blood testing to determine if a mother suffered from rubella and her child was born with congenital rubella embryopathy.

197 *Veivers* [1995] 2 Qd R 326, 331 (de Jersey J). See also 333.

provided anyway may seem unreasonable, particularly where, due to the extent of a child's disability, the level of care now required is of such a different and enduring standard and nature that it is 'not truly comparable to the care (or more usually supervision)<sup>198</sup> that might normally have been expected, especially in a child's later years. For example, ordinarily a parent might supervise a child while engaging in other housekeeping activities, whereas in the case of significantly disabled offspring, this may prove impossible. Nevertheless, traditional *Griffiths*<sup>199</sup> claims for care provided by family members have themselves been limited to care going 'distinctly beyond that which is part of the ordinary regime of family life'<sup>200</sup> or which would not have been performed 'in the same way and to the same extent in any event'.<sup>201</sup>

While no similar limitation was explicitly imposed by *Waller* in relation to the recovery, if allowed,<sup>202</sup> of gratuitous care or loss of earnings, consistent with the approach advocated for past and future child maintenance costs in Part II(B)(1), it is arguable that in wrongful birth cases such claims should also be restricted to that care provided, or earnings lost, by reason of a child's disability. Support for this argument is yet implicit in *Waller*, where Hislop J considered that any award for gratuitous care would be determined by the 'format of Keeden's needs'.<sup>203</sup> Limiting the amount recoverable to the extra needs of a disabled child was also arguably recognised by his Honour when assessing damages, in the alternative, for economic loss: 'As Keeden grows older and heavier he will require greater care and both parents will be required to care for him over 24 hour periods. Consequently, a claim is made for both plaintiffs' loss of wages'.<sup>204</sup> Conversely, the full value of services provided, or earnings lost, in rearing either healthy or disabled children, might be awarded in wrongful conception cases where pregnancy is unwanted. For example, in *Neville*, in considering the potential for gratuitous care claims, Beech-Jones J appeared not to limit claims, if allowed,<sup>205</sup> to the value of care provided solely due to a child's disability, stating that 'the voluntary services meet a "need" of the patient created by the medical practitioner's negligence namely the patient's obligation to care for and raise their child'.<sup>206</sup>

A parent's loss of earnings, or provision of gratuitous care, are 'simply two ways of quantifying the same head of damage'.<sup>207</sup> Still, after a full case analysis, it

198 William Latimer-Sayer, 'Assessing Gratuitous Care' (Paper presented at the College of Occupational Therapists Annual Medico-Legal Conference, Hilton Reading, 20 October 2014) 20 <[https://www.cloisters.com/images/easyblog\\_images/49/Gratuitous-care-handout-20th-Oct-2014.pdf](https://www.cloisters.com/images/easyblog_images/49/Gratuitous-care-handout-20th-Oct-2014.pdf)>.

199 (1977) 139 CLR 161, discussed at above nn 147–8 and accompanying text.

200 *Mills v British Rail Engineering Ltd* [1992] 1 PIQR Q130, Q138–9 (Staughton LJ); see also *Giambrone v JMC Holidays Ltd [No 2]* [2004] 2 All ER 891, 900 [31] (Brooke LJ).

201 *Van Gervan* (1992) 175 CLR 327, 344 (Deane and Dawson JJ).

202 Recovery is subject to the discussion at above nn 144–56, 159–61, 166 and accompanying text, surrounding the availability of claims: for gratuitous services; and, under legislation, for loss of earnings.

203 [2013] NSWSC 497 (6 May 2013) [320].

204 *Ibid* [324].

205 See, in particular, the discussion at above nn 159–61 and accompanying text.

206 [2014] NSWSC 607 (21 May 2014) [162].

207 *Hardman* (2000) 59 BMLR 58, 76 (Henriques J).



would seem that the judicial preference in Australia may be to compensate and measure parental care according to the diminution of parental earning capacity after offsetting, in wanted or wrongful birth cases, diminution occurring anyway on account of a child.

### **D Recoverability of Future Paid Care and Other Costs**

Especially in the case of disabled children, parents may wish to engage a professional to provide assistance or to care for their child's particular needs. In *Waller*, as an alternative to a claim for gratuitous care or loss of earnings,<sup>208</sup> the parents sought compensation for 'future paid care on the basis of 24 hour, seven days a week live-in care provided at commercial rates'.<sup>209</sup> The parents had 'not employed paid carers to date' and the Court noted that, 'in the absence of a substantial verdict', there was no evidence the parents could fund such care.<sup>210</sup> Accordingly, the defendant submitted that the application of 'compensatory principles' meant that the parents should not recover compensation for an expense they would not incur, absent a damages award.<sup>211</sup>

In light of the indemnity principle,<sup>212</sup> such an argument might be founded upon a fear of overcompensation, or the windfall that would be bestowed should 'wrongful birth' parents be able to provide their child with a higher or different standard of maintenance following a defendant's breach than would have been possible independently of it. Speculatively, it might be rooted in principles of mitigation. However, if one accepts that claimants must only mitigate their loss or damage rather than the compensation payable,<sup>213</sup> in a 'wrongful birth' action for harm in the form of a child's care and maintenance cost, whether claims should be restricted to expenses capable of independent satisfaction relates less to limiting damage, or the need for particular care or expense<sup>214</sup> caused by the defendant's wrongdoing, and more to the reasonableness of that claim and the assessment of damages payable.<sup>215</sup> Despite its unattractiveness, as a court at first instance, Hislop J felt 'bound to accede to' the defendant's submission.<sup>216</sup> Still, his Honour

208 [2013] NSWSC 497 (6 May 2013) [324].

209 Ibid [334].

210 Ibid [335].

211 Ibid [336]–[337].

212 Discussed at above n 88 and accompanying text. See also *Livingstone v The Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn).

213 See, eg, Luntz, *Assessment of Damages for Personal Injury and Death*, above n 99, 116, 130. See also *British Westinghouse Electric and Manufacturing Co, Ltd v Underground Electric Railways Co of London, Ltd* [1912] AC 673, 688–9 (Haldane LC); *Munce v Vinidex Tubemakers Pty Ltd* [1974] 2 NSWLR 235, 240 (Glass JA).

214 For example, home modifications, special schooling or assisted care.

215 The requirement that particular expenditure be reasonable is discussed further at below nn 250–9 and accompanying text.

216 *Waller* [2013] NSWSC 497 (6 May 2013) [340]. The parents' claim was therefore limited to the income that they had and would forgo because of the care they had and would provide to their child: see above n 157 and accompanying text.

acknowledged that a ‘more pragmatic approach may well prevail’ if a higher court<sup>217</sup> perceived the rule as ‘unfair or unjust’.<sup>218</sup>

The issue was addressed more broadly in *Neville*,<sup>219</sup> which considered a claim for *all* future costs associated with caring for and maintaining a disabled child, not just those relating to the provision of professional care. Beech-Jones J also held that, for the costs of future care to be recoverable, a court ‘would have to be satisfied that the relevant expenditure would be incurred regardless of whether’ the parent’s claim succeeded.<sup>220</sup> According to his Honour, this requirement again flowed from the principle in *CSR Ltd*,<sup>221</sup> which limited recovery for negligently caused personal injury to three types of loss, including actual financial loss extending to future expenses as long as they would be paid by the claimant. However, insofar as this requirement favours parents with means, compared to those less well-off, reminiscent of *Waller*, Beech-Jones J acknowledged that while ‘[i]t is unjust ... it is the law as it stands’.<sup>222</sup> In *Cattanach*, the parents’ claim for the costs of raising their healthy child also ‘corresponded with that which persons on modest incomes of the type they received could provide’.<sup>223</sup>

To the degree that Australian ‘wrongful birth’ cases therefore discriminate against claimants according to their lifestyle characteristics or economic means, they are no different to other areas of damages law where similar distinctions are drawn.<sup>224</sup> An example is the eggshell skull rule.<sup>225</sup> Pursuant to this, as long as the kind of damage suffered by a claimant is reasonably foreseeable, a defendant’s liability will extend to any exacerbation of that loss due to the claimant’s own ‘physical, social or economic’<sup>226</sup> attributes. A child’s socio-economic background, in terms

217 *Waller* [2013] NSWSC 497 (6 May 2014) [340]. The Supreme Court of New South Wales decided *Waller*, making the New South Wales Court of Appeal and High Court of Australia its higher courts of appeal. Indeed, *Waller* was appealed to the Court of Appeal, but only on the issue of liability, not damages assessment: see *Waller v James* (2015) 90 NSWLR 634, discussed at above n 44.

218 *Waller* [2013] NSWSC 497 (6 May 2013) [340], quoting *CSR Ltd* (2005) 226 CLR 1, 40 (McHugh J) (‘[i]f the courts perceive a rule as requiring an unfair or unjust result in a particular case, they are likely to distinguish the rule, make an exception to it or even in some cases abolish it ... Pragmatism has become a powerful force in the law’).

219 [2014] NSWSC 607 (21 May 2014).

220 *Ibid* [222].

221 *Ibid*, citing *CSR Ltd* (2005) 226 CLR 1, 15–16 [28]–[31] (Gleeson CJ, Gummow and Heydon JJ), discussed at above n 49 and accompanying text.

222 *Neville* [2014] NSWSC 607 (21 May 2014) [222].

223 (2003) 215 CLR 1, 110 (Heydon J). According to his Honour, one item ‘that perhaps went a little beyond’ the parents’ means in *Cattanach* was a claim for \$800 per semester for private secondary schooling. This expense had been contemplated for the claimants’ other children, but abandoned due to expense. Nevertheless, ‘[f]ees of that order [were] not only “moderate” but relatively very low’ and had not been disputed by the defendants. See also 99 (Callinan J).

224 A similar observation is made in *Rand* (2000) 56 BMLR 39, 58 (Newman J).

225 See, eg, *Nader v Urban Transit Authority (NSW)* (1985) 2 NSWLR 501, 536–7 (McHugh JA); *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405, 415 (Parker CJ).

226 *Nader v Urban Transit Authority (NSW)* (1985) 2 NSWLR 501, 537 (McHugh JA) (‘[c]learly enough taking the plaintiff as you find him involves taking him in at least his social and earning capacity setting. The defendant who is unfortunate enough to run down a millionaire must pay accordingly’). See also Michael A Jones, ‘Causation in Tort: General Principles’ in Michael A Jones et al (eds), *Clerk and Lindsell on Torts* (Thomson Reuters, 22<sup>nd</sup> ed, 2018) 53, 169 [2-177]; *Cattanach* (2003) 215 CLR 1, 10 (Gleeson CJ), 99 (Callinan J).

of their likelihood of earning more or less than average, is similarly considered when assessing their future loss of earning capacity.<sup>227</sup> In *Cattanach*, the High Court therefore noted that '[t]he common law does not permit courts to impose a means test upon plaintiffs. Wealthy parents, who might reasonably be expected to spend more on bringing up their children, may have a larger claim than poor parents'.<sup>228</sup>

Limiting recoverable care amounts to the costs that could be incurred by reason of parental assets or income, although 'invidious',<sup>229</sup> is perhaps more justifiable than extending practitioner liability such that it bears relation not to the actual damage suffered by claimants but rather the ideal lifestyle for their child.<sup>230</sup> A means-based approach has found support in the United Kingdom in *Thake v Maurice*,<sup>231</sup> *Benarr v Kettering Health Authority*<sup>232</sup> and *Allen v Bloomsbury Health Authority*.<sup>233</sup> In *Rand*,<sup>234</sup> Newman J held that because British 'wrongful birth' actions involve claims for pure economic loss,<sup>235</sup> in the absence of expenditure or the parents' 'capability' to pay, there could be no recovery for respite care or other costs arising from a child's disability.<sup>236</sup> Such costs included private education, which was not allowed because the parents could not have financed it 'without recovery from the defendant'.<sup>237</sup>

227 See, eg, *Hutchinson v Sward* [1966] ALR 1021, 1022 (Taylor, Windeyer and Owen JJ); *Ren v Mukerjee* (Unreported, Supreme Court of the Australian Capital Territory, Miles CJ, 12 December 1996) 78; *Jamil bin Harun v Yang Kamsiah bte Meor Rasdi* [1984] AC 529, 538 (Lord Scarman).

228 (2003) 215 CLR 1, 10 (Gleeson CJ).

229 Luntz, *Assessment of Damages for Personal Injury and Death*, above n 99, 640; *Lee* [2001] 1 FLR 419, 432–3 (Toulson J).

230 See, eg, *Cattanach* (2003) 215 CLR 1, 76 (Hayne J) ('it would be difficult to justify a rule under which the extent of the liability of a careless doctor did not depend upon the particular damages shown to have been suffered by the plaintiff').

231 [1986] QB 644, 668 (Peter Pain J) ('Samantha has been born into a humble household and the defendant should not be expected to do more than provide her with necessities') (wrongful conception and healthy child) (pre-*McFarlane*).

232 (1988) 138 NLJ 179, 179–80 (Hodgson J) ('*Benarr*') ('if the victim of a negligent vasectomy is a father who would in any event have privately educated his children, he is entitled to be compensated for what in the circumstances of that family could properly be called a necessary') (wrongful conception and healthy child) (pre-*McFarlane*). Cf *Hardman* (2000) 59 BMLR 58, 75 where Henriques J argues that this statement does not limit claims by virtue of a parent's means, but only confirms 'the court's obligation to restore a claimant to the position he would have been in but for the tort'.

233 [1993] 1 All ER 651, 662 (Brooke J) ('defendants are liable to pay for all such expenses as may be reasonably incurred for the education and upkeep for the unplanned child, having regard to all the circumstances of the case and, in particular, to his condition in life and reasonable requirements') (wrongful birth and healthy child) (pre-*McFarlane*).

234 (2000) 56 BMLR 39 (wrongful birth and disabled child). Cf *McLelland* 2001 SLT 446, where the cost of supported accommodation for the claimants' child, after such time that they would be prevented by age from looking after him themselves, was allowed. This was despite a lack of evidence as to how the claimants might have achieved this financially absent a damages award: at 455.

235 See further above nn 57, 168 and accompanying text.

236 (2000) 56 BMLR 39, 58, 65.

237 *Ibid* 62–3. Furthermore, as the education authority had a duty to provide individual special needs education under the *Education Act 1996* (UK) c 56, the expense may not have been reasonably incurred. See also below nn 250–9 and accompanying text.

However, in *Hardman*,<sup>238</sup> the Queen's Bench Division of the High Court adopted the more pragmatic approach arguably advocated in *Waller and Neville*.<sup>239</sup> In departing from *Rand*, on the grounds that 'it might deny the claim of the poorest parent unable to buy in any care or equipment', Henriques J held that claims should instead be quantified according to the child's 'reasonable needs'.<sup>240</sup> Although subsequently applied,<sup>241</sup> the decision in *Hardman* does raise several concerns. Firstly, his Honour's decision has been described as being 'contrary to basic principle'<sup>242</sup> as its rejection of the relevance of parental income flows from a belief that the 'categorisation of a claim as one for economic loss identifies the criteria to be satisfied before a duty and its scope are established, but has nothing to do with the quantification of damages once a breach of the duty is shown'.<sup>243</sup> Secondly, Henriques J's focus, in a claim brought by parents, upon awarding compensation according to a child's needs rather than a parent's own loss, may not be followed in Australia due to *CSR Ltd*.<sup>244</sup> There, in the context of refusing compensation for an injured claimant's inability to gratuitously care for another, the High Court was reluctant to award damages measured otherwise than according to the 'extent of the plaintiff's [own] needs for personal care or services'.<sup>245</sup>

Consequently, until a High Court ruling, Australian claims are likely to remain limited to child maintenance and paid care expenses falling within parents' financial means. Many parents with insufficient funds for professional nursing and care will be reliant upon their own ability to meet their child's care requirements. This self-reliance may be reduced or removed with the implementation of the National Disability Insurance Scheme<sup>246</sup> to the extent that the scheme will provide

238 (2000) 59 BMLR 58 (wrongful birth and disabled child).

239 Discussed at above nn 216–18, 222 and accompanying text.

240 *Hardman* (2000) 59 BMLR 58, 74.

241 See, eg, *Lee* [2001] 1 FLR 419, 432–3 (Toulson J); *Roberts v Bro Taf Health Authority* [2002] Lloyd's Rep Med 182 ('*Roberts*') (wrongful conception following a negligently performed sterilisation where the child suffered from congenital cerebral palsy). That a parent's ability to recover an expense should not depend upon their own financial means to incur it was also argued in *Roberts* on grounds that a mother 'in reduced economic circumstances' would likely spend at least part of her general damages award on her child's additional care needs. Accordingly, although in effect self-funded at the defendant's expense, the mother's claim for those needs ought then be allowed on the basis of *Rand* (2000) 56 BMLR 39; *Roberts* [2002] Lloyd's Rep Med 182, 185–6 (Turner J). A similar argument was made in *Hardman* (2000) 59 BMLR 58, 74 ('two impecunious mothers who had both read the judgment in *Rand* and with claims pending in court, may both go down the High Street and inform their respective bank managers ... "Can I borrow £100,000 please so that I can recover £100,000 in damages?" One manager may agree ... lady A gets £100,000 damages and lady B gets nothing'). However, both examples, as framed, are arguably erroneous. In each, the parent is still unable to incur the expense *independently of the damages award* as required by *Rand* (2000) 56 BMLR 39; *Waller* [2013] NSWSC 497 (6 May 2013); *Neville* [2014] NSWSC 607 (21 May 2014); see above nn 211–216, 220, 234–7 and accompanying text.

242 Dominic Villa, *Annotated Civil Liability Act 2002 (NSW)* (Thomson Reuters, 2<sup>nd</sup> ed, 2013) 606.

243 *Hardman* (2000) 59 BMLR 58, 74.

244 (2005) 226 CLR 1.

245 *Ibid* 17 (Gleeson CJ, Gummow and Heydon JJ) (emphasis added). See also 22; Katie Talbot and Julia Werren, 'Wrongful Birth and *Sullivan v Gordon* Damages Claims: An Argument for Consistency and Reform in New South Wales' (2010) 18 *Tort Law Review* 76, 79.

246 Pursuant to the *National Disability Insurance Scheme Act 2013* (Cth), discussed at above n 36.

funding for reasonable and necessary supports, including care.<sup>247</sup> However, as well as the ‘physical and psychological burden of providing [child] care’, parents can still incur ‘considerable financial cost, in terms of reduction or complete elimination of [their] income’.<sup>248</sup> As a result, it is important that either the value of parents’ gratuitous care, or more likely their earnings lost in providing it, be recoverable.<sup>249</sup> In the case of significantly disabled children, ‘medical and educational expenses, beyond normal rearing costs, are often staggering and quite debilitating to a family’s financial ... health’.<sup>250</sup> These and other expenses, such as private tuition and schooling<sup>251</sup> or overseas holidays,<sup>252</sup> may, however, be recovered as long as they have been or would be incurred and are reasonable in character and amount<sup>253</sup> — including in light of the family’s lifestyle and socio-economic status. Together with expert evidence as to the costs of child maintenance,<sup>254</sup> parents’ claims may therefore be assisted by providing evidence of the types of expenses previously borne in raising their other children.<sup>255</sup>

In *Waller*, by noting that the parents had ‘themselves provided adequate and appropriate care’ for their child,<sup>256</sup> Hislop J implicitly reinforces that, if incurred, in order to be recoverable the provision of professional care in the circumstances must also be reasonable. The question must ‘be whether the plaintiff *really* stands in a situation in which he must pay the expenses’.<sup>257</sup> An expense must also provide a benefit to the child which is proportionate to its cost.<sup>258</sup> Awarding damages

247 *Re PNMJ v National Disability Insurance Agency* (2015) 68 AAR 8.

248 In relation to personal injury claims and gratuitous carers generally, see, eg, The Law Commission, *Damages for Personal Injury: Medical, Nursing and Other Expenses*, Consultation Paper No 144 (1996) 12 [2.18].

249 See above Part II(C).

250 *Parkinson* [2002] QB 266, 282 (Brooke LJ), quoting *Fassoulas v Ramey* 450 So 2d 822, 824 (Fla, 1984).

251 See, eg, *Benarr* (1988) 138 NLJ 179, 179–80; *Allen* [1993] 1 All ER 651, 662 (Brooke J); *McFarlane* [2000] 2 AC 59, 106 (Lord Clyde); *Nunnerley* [2000] PIQR Q69, Q73 (Morison J).

252 See, eg, *Cattanach* (2003) 215 CLR 1, 110 (Heydon J).

253 See, eg, *Allen* [1993] 1 All ER 651, 662, discussed at above n 233; *Rand* (2000) 56 BMLR 39, 58 (Newman J), discussed at above n 234 (‘whatever the wealth of the parents may be, the court can only make an award in respect of claims which it considers reasonable both in character and amount’); *Neville* [2014] NSWSC 607 (21 May 2014) [156] (Beech-Jones J), citing *Cattanach* (2003) 215 CLR 1 (McHugh and Gummow JJ) (it must be “necessary” for the expenditure to be incurred’).

254 *Roberts* [2002] Lloyd’s Rep Med 182, 183 also refers to objective evidence such as ‘National Foster Care Association’ rates.

255 See, eg, *Allen* [1993] 1 All ER 651, 662 (Brooke J); *Cattanach* (2003) 215 CLR 1, 110 (Heydon J) (‘[r]ich parents might legitimately seek to contend that they should recover from a negligent defendant the cost of expensive clothes, toys, pastimes, presents and parties of the type which the planned siblings of the unplanned child had enjoyed or were going to enjoy’).

256 [2013] NSWSC 497 (6 May 2013) [335].

257 *Ibid* [336], quoting *Blundell* (1956) 96 CLR 73, 79 (Dixon CJ) (emphasis added).

258 See generally *Diamond v Simpson [No 1]* (2003) Aust Tort Reports ¶81-695, 63 800–1 [91]–[111] Stein and Ipp JJA, Young CJ) (where damages for the claimant’s personal injury at birth already included an amount for a purpose-built house to allow her to live independently, additional modifications to the family home, beach house and ski lodge were disallowed as ‘an unreasonably costly imposition upon the appellant’ not ‘justified by the increase in amenity and convenience to the plaintiff’: at 63 801 [104]).

for a claimant's own serious personal injury often similarly requires courts to determine the appropriateness of institutional, rather than at home, care.<sup>259</sup>

Even where parents are of extremely modest means, *Waller* and *Neville* do not propose that the costs of care be irrecoverable if other usual familial activities and expenses are forgone to divert funds to them. Also, if paid nursing or other care is reasonably necessary for a child's primary health and wellbeing, despite a family's inability to afford such expense absent a damages award, it may still be possible to argue that the reasonable costs of care, at least to a typical if not ideal amount, should be allowed. Support for this can be found in *Waller*. There, in comparing the parents' claim for professional, or paid, care for their disabled child to the case of a claimant who requires an expensive wheelchair after injury in a car accident, the defendant submitted that:

the plaintiff who needs the wheelchair has a need created by the accident. If that need is not met because he can't afford it, the ... plaintiff is not and would not be in the same position as if the tort had not occurred. He would be left without a wheelchair that he needed to reclaim any kind of quality of life. That's why he would be entitled to damages for the wheelchairs. Here ... the plaintiffs are the parents ... *The plaintiffs will not, absent an award, use paid care. That still wouldn't be a sufficient answer for me if that left their legal and moral responsibilities unfulfilled, because that would mean their need, if we get this far, we have created is unfulfilled, just as for the chap that needed the wheelchair, but it doesn't, because their legal and moral responsibilities in this case are perfectly well fulfilled without the provision of paid care.*<sup>260</sup>

Damages in 'wrongful birth' claims are sought in relation to harm suffered by the parents and not the child.<sup>261</sup> Therefore, although the provision of professional care may not have been reasonable or warranted on *Waller's* facts, in future cases involving impecunious parents, it might successfully<sup>262</sup> be argued that if an expense is essential to a child's welfare reasonable compensation for it is required. This is due to the *parents' need* created by the practitioner's negligence, namely their legal or moral responsibility to provide appropriate care for their child. Consequently, in developing a more pragmatic approach, the issues relevant to a reasonable measure of damages for future paid care and other costs in wrongful conception and birth cases are likely to be the subject of further case law in Australia.

## **E Offsets for Government Assistance?**

Under the collateral benefits rule, if due to a wrong done to them a claimant receives a benefit to which they would not otherwise have been entitled, that

259 See, eg, *Sharman v Evans* (1977) 138 CLR 563, 566–7 (Barwick CJ), 572–4 (Gibbs and Stephen JJ), 596–7 (Murphy J); *Sowden v Lodge* [2005] 1 WLR 2129 (Pill, Longmore and Scott Baker LJ).

260 *Waller* [2013] NSWSC 497 (6 May 2013) [338] (emphasis added). See also *Lee* [2001] 1 FLR 419, 433 (Toulson J).

261 Claims in these circumstances by children are not maintainable: *McKay v Essex Area Health Authority* [1982] QB 1166; *Harriton v Stephens* (2006) 226 CLR 52.

262 Cf a similar, but overall likely unsuccessful, argument in the context of allowing a parents' claim for gratuitous care provided: discussed at above n 178 and accompanying text.

receipt will reduce their loss and the defendant's liability,<sup>263</sup> provided that it relates to a head of damage for which the claimant seeks compensation.<sup>264</sup> Benefits funded in whole or part by the claimant, including insurance proceeds, and sums motivated by benevolence or intended for the claimant independently of their right to compensation, are *not* offset on policy grounds,<sup>265</sup> due to their source and nature.

In the context of awarding damages for 'wrongful birth', if a child is or would in the future become entitled to assistance, such as by way of a disability pension or other social security allowances or benefits, should these receipts be brought to account? In *McLelland*, the Extra Division of the Scottish Court of Session discounted a claim for the future care and maintenance of a disabled child by the probability of state-funded support becoming available to cover some costs during the next 32 years.<sup>266</sup> In *Waller*, while not deciding the issue, Hislop J noted the defendant's submission that any social security benefits payable to the child should be offset against the parents' claim for future expenses on the basis that: 'to compensate the plaintiffs on the assumption that Keeden would not receive any such benefits, would result in over-compensation and would not be reasonable'.<sup>267</sup> However, as noted above,<sup>268</sup> to be deductible, the claimant's receipt of a benefit must be a by-product of the defendant's tort committed upon them. Therefore, a reduction of the parents' claim on account of any living allowance and, from the age of 18, income support and severe disablement allowance to which their child would be entitled was refused by the Queen's Bench Division in *Rand v East Dorset Health Authority*.<sup>269</sup> In this case, Newman J concluded that any benefits received by the parents are received on behalf of and for their child and as such are not received 'in reduction of the wrong done to them'.<sup>270</sup>

It is submitted that *Rand v East Dorset Health Authority* is the most consistent with the collateral benefits rule. In Australia, it is also compatible with the decision in *Veivers*,<sup>271</sup> which similarly held that a parent's use of her wrongful birth child's disability pension 'to defray expenses incurred ... in aid of [her child], should not relieve the defendant of the need to reimburse those expenses'.<sup>272</sup> A distinction

263 *Hodgson v Trapp* [1989] AC 807, 819 (Lord Bridge) ('*Hodgson*').

264 *Ibid* 823 (Lord Bridge); *Redding v Lee* (1983) 151 CLR 117, 125 (Gibbs CJ); The Law Commission, *Damages for Personal Injury: Collateral Benefits*, Consultation Paper No 147 (1997) 95 [4.49] ('only collateral benefits which meet the same loss as tort damages should be deducted').

265 *Hodgson* [1989] AC 807, 819–20 (Lord Bridge); *Bradburn v The Great Western Railway Co* (1874) LR 10 Ex 1, 3 (Pigott B); *Parry v Cleaver* [1970] AC 1, 13–14 (Lord Reid); *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, 573–4 (Dixon CJ), 598–600 (Windeyer J).

266 2001 SLT 446, 455 (Lord Prosser).

267 [2013] NSWSC 497 (6 May 2013) [292]. The indemnity principle is discussed at above n 88 and accompanying text.

268 See above n 263 and accompanying text.

269 [2001] PIQR Q1. Decided following the award of damages in *Rand* (2000) 56 BMLR 39.

270 *Rand v East Dorset Health Authority* [2001] PIQR Q1, Q5.

271 [1995] 2 Qd R 326.

272 *Ibid* 333 (de Jersey J). His Honour also stated, at 332–3 (citations omitted), that, had the child sued for the cost of her care,

the defendant could not have relied on the payment of the pension. That is because of the basis on which such a pension is granted ... that is, 'entirely for (her) use and benefit and not in relief of any person antecedently liable to (her) to compensate (her) in any way'. The same approach should apply here, where the first plaintiff administers the pension on Kylie's behalf.

may, however, be drawn in future cases between social security or disability benefits paid generally to a child by reason of their being disabled, and cases, such as *McLelland*, where benefits are provided by the state to defray specific costs (for example, the cost of a wheelchair accessible vehicle), which would otherwise be incurred by a child's parents. In the latter case, the benefits payable to the child, reflected in a cost saving to the parents, should arguably be brought to account precisely because the parents would not then incur those costs.<sup>273</sup>

In addition to benefits payable to their child, parents themselves may receive carers' payments, pensioner supplements and/or other social security benefits. In *Rand*,<sup>274</sup> the parents had recovered from the defendant an amount for lost income consequent upon the birth of their child. Due to this, job seekers' allowances and unemployment and income support benefits paid to them and available generally to meet this loss were deducted to prevent double recovery.<sup>275</sup> However, an invalid care allowance received by the parents, until their child turned 18 years, was not offset.<sup>276</sup> Because no compensation had been awarded for gratuitous care provided,<sup>277</sup> that benefit did not serve to mitigate damages recoverable in respect of the parents' care provision. Furthermore, to the extent that compensation for future child maintenance is limited to the parents' ability to incur an expense independently of their negligence claim,<sup>278</sup> if the parents' invalid care allowance had been used by them to meet the costs of maintaining their child, this still would not warrant its deduction from their damages award. For to do so in such circumstances would not prevent double recovery but instead prevent 'recovery for the economic loss they have sustained'.<sup>279</sup> In *Emeh v Kensington and Chelsea and Westminster Area Health Authority*, damages for the cost of maintaining a disabled child were also only allowed after taking into account the parents' child allowance.<sup>280</sup>

The defendant in *Waller* further submitted that payments received by parents, 'unless ... refundable by legislation or agreement, should be deductible from any verdict'.<sup>281</sup> The parents in turn conceded that, should they succeed in proceedings, there would be a set-off to the extent that such sums were not repayable to the

273 In relation to the requirement that expense be incurred in order to be recoverable, see *CSR Ltd* (2005) 226 CLR 1, 16 (at above n 49 and accompanying text).

274 (2000) 56 BMLR 39, discussed at above n 192 and accompanying text.

275 *Rand v East Dorset Health Authority* [2001] PIQR Q1, Q5 (Newman J).

276 *Ibid* Q4–Q5 (Newman J).

277 *Rand* (2000) 56 BMLR 39, discussed at above n 167 and accompanying text.

278 Discussed in Part II(D) above.

279 *Rand v East Dorset Health Authority* [2001] PIQR Q1, Q4–Q5. The defendant would also 'enjoy the value of a credit paid to the Rands, not because it was paid in connection with the consequences for which they have been found liable, but because the Rands chose to spend the receipt on items for which the defendant became liable to reimburse them': at Q4 (Newman J) (emphasis in original).

280 [1985] QB 1012, 1022 (Waller LJ). See also *Thake v Maurice* [1986] QB 644, 668 (Peter Pain J).

281 [2013] NSWSC 497 (6 May 2013) [293].



government under pt 3.14 of the *Social Security Act 1991* (Cth).<sup>282</sup> If a claimant is legally obliged to repay benefits received, there is no question of overcompensation necessitating a reduction in damages awarded.<sup>283</sup> Indeed, set-off must not occur so that the repayment can be made. This additional issue for ‘wrongful birth’ claims was also ultimately left unresolved in *Waller*. Hislop J did, however, note<sup>284</sup> that its determination would require an analysis of each statutory entitlement against any legislative provision expressly requiring its retention<sup>285</sup> or repayment. This may not always be straightforward. For example, while the National Disability Insurance Scheme<sup>286</sup> provides for the repayment of funding received for reasonable and necessary supports if compensation<sup>287</sup> in relation to a participant’s disability is received, the precise wording of provisions requiring repayment<sup>288</sup> may not clearly address the receipt of compensation, not by the participant, but by their parents in a ‘wrongful birth’ claim. In the event that matters are not determined by statute, as stipulated by general law and as confirmed in *Manser v Spry*,<sup>289</sup> the purpose of the payment, and the benefit’s source and nature,<sup>290</sup> must be considered to determine the deductibility of benefits received.

### III CONCLUSION

During the 11 years ending in 2014, the English National Health Service Litigation Authority (‘NHS LA’) reported 247 claims for wrongful conception and birth. Of these, 164 successful claims resulted in damages payments

282 Ibid [294]. The *Social Security (Recovery of Benefits) Act 1997* (UK) c 27 provides for compensation payments to be reduced by the amount of specified benefits received, with the defendant to pay the amount deducted to the state. However, the Act applies only to payments made as a consequence of an ‘accident, injury or disease’ suffered by another (s 1(1)(a)), and cannot apply to British ‘wrongful birth’ claims as such claims are treated as involving not physical injury but economic loss only: *Rand v East Dorset Health Authority* [2001] PIQR Q1, Q2–Q3 (Newman J). See also discussion at above nn 57, 168 and accompanying text.

283 See, eg, *Manser v Spry* (1994) 181 CLR 428, 436–7 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ); *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1, 16–17 (Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

284 *Waller* [2013] NSWSC 497 (6 May 2013) [296].

285 See, eg, *Hodgson* [1989] AC 807, 822 (Lord Bridge) (‘[i]t is, of course, always open to Parliament to provide expressly that particular statutory benefits shall be disregarded’).

286 Pursuant to the *National Disability Insurance Scheme Act 2013* (Cth), discussed at above n 36.

287 ‘Compensation’ is defined to include a payment in respect of personal injury received via judgment, settlement, or under a scheme of insurance or Commonwealth, state or territory law. It must be ‘wholly or partly in respect of the cost of supports that may be provided to a participant (whether or not specifically identified as such). It does not matter whether the payment is made directly to the person who sustained the personal injury or to another person in respect of that person’: *ibid* s 11(1).

288 *Ibid* ss 106–7.

289 (1994) 181 CLR 428, 435–6, 438–9 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ). See also *Harris v Commercial Minerals Limited* (1996) 186 CLR 1, 16–18 (Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

290 See above n 265 and accompanying text.

totalling £77.7 million.<sup>291</sup> While negligence actions for ‘wrongful birth’, although perhaps controversial,<sup>292</sup> are available in the United Kingdom and Australia, the comparative lack of reported cases in Australia suggests that claims are not always litigated. In terms of providing compensation for the cost of raising a ‘wrongful birth’ child, *McFarlane*<sup>293</sup> and *Parkinson*<sup>294</sup> have the effect, since 2001 in the United Kingdom, of limiting recovery to the extra costs attributable to disabled children. However, while now restricted by legislation in some jurisdictions,<sup>295</sup> the High Court of Australia in 2003 in *Cattanach*<sup>296</sup> allowed damages for child rearing, at least ostensibly,<sup>297</sup> whether or not the resultant progeny was healthy. Nevertheless, years later, there is still significant uncertainty at common law as to how damages for those costs should be assessed and the factors relevant in this regard. Similarly, none of the statutory provisions address whether such claims are limited to the child’s majority, nor do they expressly refer to the provision of past and future gratuitous care by parents,<sup>298</sup> or address any limitation upon damages recoverable based on parental income or benefit offsets.

For Australia, the decisions of the Supreme Court of New South Wales in *Waller*<sup>299</sup> and *Neville*<sup>300</sup> evidence a cautious approach to these issues, reflective perhaps of their situation as a court of first instance. Furthermore, liability findings in favour of claimants were not made in these cases and thus their comments may be seen as obiter. It is clear then that the law in this area is still developing. Informed by an analysis of relevant domestic and British jurisprudence, this article propounds the following conclusions relevant to an assessment of damages for the costs of child maintenance and care in future Australian ‘wrongful birth’ claims:

- Pending appellate authority, claims may be restricted to the period ending upon the child reaching the legal age of majority. Whilst there is no principled reason for limiting claims in this way, particularly in the case of disabled children, any entitlement beyond this age will be influenced by policy considerations and remains open for argument under Australian law.<sup>301</sup>

291 The Parliamentary Under-Secretary of State (Department of Health), by way of written answer, provided details of the amounts paid by the National Health Service for ‘wrongful birth’ claims in each year between 2003 and 2013: United Kingdom, *Daily Reports*, House of Commons, 14 October 2014, 56 (Daniel Poulter). There is an absence of comparable data in Australia.

292 See, eg, Philippa Taylor, ‘What Is the True Cost of “Wrongful Births”?’ on Christian Medical Fellowship, *CMF Blogs* (2 September 2014) <<http://www.cmfblog.org.uk/2014/09/02/what-is-the-true-cost-of-wrongful-births/>>.

293 [2000] 2 AC 59, discussed at above n 9 and accompanying text.

294 [2002] QB 266, discussed at above n 30 and accompanying text.

295 *Civil Liability Act 2002* (NSW) s 71; *Civil Liability Act 2003* (Qld) ss 49A–49B; *Civil Liability Act 1936* (SA) s 67, discussed at above nn 22–9 and accompanying text.

296 (2003) 215 CLR 1, discussed at above n 16 and accompanying text.

297 See argument in Part II(B) above.

298 Section 71(1)(b) of the *Civil Liability Act 2002* (NSW) does provide, however, that a court cannot award damages for any loss of earnings while a parent rears or maintains a child. See further at above n 166 and accompanying text.

299 [2013] NSWSC 497 (6 May 2013).

300 [2014] NSWSC 607 (21 May 2014).

301 Discussed in Part II(A) above.

- Relevant jurisprudence supports the contention that in wrongful birth cases at common law, where in contrast to claims for wrongful conception the parents actively desire a child, or at least have not taken steps in an attempt to prevent conception occurring, damages may be limited to the additional costs of maintenance and care attributable to a child's disability.<sup>302</sup> An amount to reflect the acceleration of the ordinary costs of child raising might still however be awarded in future cases.<sup>303</sup> Whilst subsequent decisions to reduce family size might also be argued to reduce a damages award, arguments that ordinary maintenance costs ought still be recovered, because a disabled child has become an additional child due to a later decision to increase family size, should not be promoted. Accordingly, a rejection of the latter argument may also necessitate a rejection of the former.<sup>304</sup>
- Until modified by legislation,<sup>305</sup> and consistent with *CSR Ltd*,<sup>306</sup> gratuitous care provided by parents should be assessed by reference to an award for lost wages or earning capacity due to a child's need for care. Although this head of loss is also subject to policy considerations, to the extent allowed in cases of wrongful birth, consonant with the treatment of costs for past and future child maintenance above, claims should be limited to that care provided, or earnings lost, by reason only of a child's disability.<sup>307</sup>
- Future paid care and other costs are recoverable where reasonably required. Contingent upon appellate authority and the adoption of a pragmatic approach in future cases, such amounts might not always be limited by parental income. Particularly, where reasonably necessary for a child's primary health and wellbeing, an argument might be made in favour of a reasonable or standardised amount.<sup>308</sup>
- Subject to the application of relevant statutory provisions requiring the repayment of benefits, the general law in relation to offsets will apply. Therefore, while social security or disability benefits payable generally to the child, and unrelated to specific costs, should be ignored, entitlements received by parents may be taken into account by way of set-off. In this way damages awards will ensure that, as claimants, parents do not receive and retain double compensation for the same loss or expense.<sup>309</sup>

302 Discussed in Part II(B)(1) above.

303 Discussed in Part II(B)(2) above.

304 Discussed in Part II(B)(1) above.

305 See, eg, *Civil Liability Act 2002* (NSW) s 71(1)(b) in relation to recovery for loss of earnings, and discussion at above nn 182–3 and accompanying text regarding gratuitous care.

306 (2005) 226 CLR 1.

307 Discussed in Part II(C) above.

308 Discussed in Part II(D) above.

309 Discussed in Part II(E) above.

The development of the law to date regarding ‘wrongful birth’ liability has been influenced by concerns regarding insurance affordability,<sup>310</sup> a fear of rising medical negligence claims, constraints upon public healthcare funds, and indeterminate liability.<sup>311</sup> For example, in *Rees*, Lord Bingham considered that ‘to award potentially very large sums of damages to the parents of a normal and healthy child against a National Health Service always in need of funds to meet pressing demands would rightly offend the community’s sense of how public resources should be allocated’.<sup>312</sup> While such concerns are then likely to arise when determining approaches to the quantification of damages, given that 5087 maternity claims totalling £3.1 billion were reported by the NHSLA between 2000 and 2010,<sup>313</sup> it must be remembered that ‘wrongful birth’ claims<sup>314</sup> in reality represent only a small proportion of all such maternity-related negligence. Therefore, while further judicial and legislative clarification of the considerations underpinning an assessment of damages for the costs of raising wrongful conception and birth children is required, it is hoped that, when setting appropriate limits or safeguarding against excessive claims, appropriate compensation is still provided for negligence against which it was the medical practitioner’s duty to protect.

310 For example, the second reading speech for the Justice and Other Legislation Amendment Bill 2003 (Qld) cl 41, inserting *Civil Liability Act 2003* (Qld) s 49A, stated that ‘[t]hese groundbreaking legislative changes ... removed excuses for profit-driven insurance companies to charge exorbitant premiums’: Queensland, *Parliamentary Debates*, Legislative Assembly, 21 August 2003, 3177 (Rod Welford, Attorney-General and Minister for Justice).

311 Michael A Jones, ‘Bringing Up Baby’ (2001) 9 *Tort Law Review* 14, 19; Pedain, above n 31, 19–20. See generally Harold Luntz, ‘Medical Indemnity and Tort Law Reform’ (2003) 10 *Journal of Law and Medicine* 385, 385–6.

312 [2004] 1 AC 309, 316. Such concerns may be lessened in Australia where claims are more normally brought ‘against an individual physician or surgeon or healthcare facility legally responsible for the legal wrong’: *Cattanach* (2003) 215 CLR 1, 67 (Kirby J).

313 NHS Litigation Authority, *Ten Years of Maternity Claims: An Analysis of NHS Litigation Authority Data* (2012) 4, 15.

314 Totalling approximately 2.5 per cent of this £3.1 billion amount over the 11 years ending in 2014: see above n 291 and accompanying text.