

Can't buy me love — Public Policy Implications of Cattanach v. Melchior

Natasha Cica

The question of whether compensation could be awarded for raising a healthy child born as the result of a doctor's negligence was recently examined by the High Court of Australia in *Cattanach v. Melchior* (2003) (hereafter 'Melchior'). the case involved litigation brought by Kerry and Craig Melchior, a married Brisbane couple, against an obstetrician and gynaecologist, Dr Stephen Cattanach. In 1992 he had performed a tubal ligation on Kerry Melchior. She sought the procedure because, having given birth to two healthy daughters, she and her husband had decided they did not want more children. Four years after the sterilisation procedure, at age 44, Kerry Melchior became pregnant. This happened because both she and her doctor mistakenly believed she only had one fallopian tube, and he had only clipped that tube in the operation. Kerry Melchior carried the pregnancy to term and in 1997 gave birth to a healthy son, Jordan.

Kerry and Craig Melchior initiated legal proceedings in both tort and contract in respect of the failed sterilisation, against Stephen Cattanach and the State of Queensland, as the authority responsible for the public hospital where the procedure was performed. The action in contract was not pursued, but the trial judge agreed the doctor had been negligent in respect of his provision of advice about the risks of further conception. She awarded around \$103 000 damages to Kerry Melchior in relation to the pregnancy and birth, \$3 000 to her husband for 'loss of consortium' associated with the pregnancy and birth, and around \$105 000 damages to both plaintiffs for the cost of raising Jordan to age 18. The defendants appealed unsuccessfully against the last component only of this damages award — compensation for the cost of bringing up the child — to the Queensland Court of Appeal, and then to the High Court. By a majority of four (Justices McHugh, Gummow, Kirby and Callinan) to three (Chief Justice Gleeson and Justices Hayne and Heydon), in July 2003 the High Court upheld the original award of damages.

Before the High Court's decision Australian legal authority on whether damages could be awarded in these circumstances was limited and inconclusive. Two Queensland cases had allowed recovery for the cost of raising a healthy child born as a result of medical negligence — *Dahl v. Purnell* (1992) and *Veivers v. Connolly* (1995). The NSW Court of Appeal subsequently addressed the question in *CES v. Superclinics* (1995), denying recovery by a 2:1 majority. The High Court of Australia granted special leave to appeal against this last decision, in *Nafte v. CES* (1996), but did not ever hear the case as the parties settled out of

Natasha Cica is a Lecturer at the School of Professional Communication, University of Canberra and a Fellow at the Centre for Applied Philosophy and Public Ethics, Charles Sturt University.

court. The confused state of Australian law before Melchior reflected divergent legal and philosophical analyses of this question delivered by judges in both common law and civil law settings overseas (see Kirby J, 2003:paras 119-132; Weir, 2002).

Objections to the result in Melchior relied on three main claims. First, the claim that the case would open (or widen) the floodgates on successful litigation against doctors, placing them under increased and unacceptable economic strain, and affecting their ability to deliver professional services to the community. Second, the claim that the result in Melchior was the product of inappropriate judicial activism. Third, the claim that awarding damages for the cost of raising Jordan Melchior was a step onto the slippery slope of commodifying and devaluing children. This paper challenges these claims, and suggests some different questions that should be posed to facilitate more constructive public policy debate.

The Escalating ‘Medical Indemnity Crisis’

The Australian Medical Association (AMA), the most politically influential doctors’ organisation in Australia, was a leading and vocal critic of the result in Melchior (Molloy, 2003; Haikerwal, 2003a and 2003b). Its objections were expressed against the backdrop of considerable public concern about Australia’s so-called ‘medical indemnity crisis’ (Dudley, 2002; Jamieson, 1999; Cashman, 2002), specifically about medical negligence litigation inhibiting doctors’ ability to provide, and consumers’ ability to access, the full range of medical services. All this occurred in the context of widespread community anxiety about the socio-economic impact of soaring public liability insurance premiums in Australia in recent years, widely (but not universally) perceived as caused by a rising incidence of large damages payouts for personal injuries in successful negligence claims (see generally Kehl, 2002; Senate Economics Reference Committee, 2002; Davis, 2002; Graycar, 2002; Coonan, 2002b; Luntz, 2002; Vines, 2002; Callinan, 2002).

Questions related to public and professional liability began receiving especially intense attention in Australia at the beginning of last year, in the economic wake of the collapse of HIH Insurance and the 9/11 terrorist attacks in 2001, and pursuant to the provisional liquidation of leading Australian medical defence organisation United Medical Protection in early 2002 (see Dudley, 2002). Media reporting of these matters was frequently sensationalist, and arguably skewed public understanding of relevant legal principles and their public policy implications. Criticising this phenomenon, Justice Atkinson of the Supreme Court of Queensland stated ‘we cannot conclude that litigiousness is on the rise ... by reference to isolated cases, or worse still, by reference to imaginary cases as they are portrayed in *Ally McBeal*, or the ABC’s latest legal drama *MDA*’ (Atkinson, 2003:3; see also Callinan, 2002:860-2; Cashman, 2002:893-4). By contrast, other Australian judges have accepted that our society has become aggressively and unacceptably litigious (see views cited in Spigelman, 2002:436-7).

The Federal Government instituted a process of inquiry and reform in response to this public concern. In May 2002 the Commonwealth appointed an expert panel, chaired by Justice David Ipp, to examine the law of negligence (Coonan, 2002a). The Ipp Inquiry was directed to devise 'a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death' (Ipp, 2002:ix). The Ipp panel reported in August and September 2002. It recommended far-reaching national reforms to the law of negligence in Australia, including as it specifically applies to the liability of medical practitioners. The Ipp recommendations aimed to reduce both the quantum of damages payouts and the frequency of successful negligence claims, regardless of whether the claim is brought under tort, contract or on a statutory basis (Ipp, 2002:1-4). This package of recommendations differed in important respects from those suggested by the Australian Health Ministers Advisory Council (AHMAC) Legal Process Reform Group, in its own report released in September 2002 (AHMAC, 2002; AMA, 2002; LCA, 2002a). All Australian governments chose the Ipp model as their template for reforming negligence law. By mid-2003, each State and Territory government had either introduced or foreshadowed legislation giving broad effect to the Ipp reforms, with complementary legislative moves at Federal level.

In opposing the Melchior result, the AMA asserted it would serve to undermine the mooted benefits of the Ipp reforms. AMA spokesmen variously stated that 'medical practitioners [are left] even more exposed in the current medical indemnity crisis ... the court's decision means there are now even more opportunities to grant compensation ... [which] will drive up medical indemnity costs and the cost of patient care' (AMA, 2003), '[t]he potential explosion in costs is awesome' (Molloy, 2003) and '[t]his will have a major impact on awards even beyond sterilisation failure' (Molloy, 2003). In relation to this last concern, the AMA raised the spectre of general practitioners being pressured by rising insurance premiums and fear of litigation to limit their delivery of contraceptive advice and other family planning services (Molloy, 2003; Haikerwal, 2003a). While doctors' subjective anxiety in connection with Melchior clearly is very real, it is not clear that this anxiety is objectively justified.

First, the fact situation in Melchior was highly unusual — certainly the failure rate of both sterilisation and contraception procedures is not insignificant, but the percentage of such cases where a doctor has been negligent in legal terms is very small, and even smaller is the number of cases where successful litigation ensues. Dr Paul Nisselle (Nisselle, 2003), the CEO of the Medical Indemnity Protection Society, observed that in most legal claims where medical negligence leads to an unwanted pregnancy,

... the same motivation which led the patient to seek sterilisation or contraception leads to a decision to terminate the pregnancy ... [hence] compensation is limited to the costs of the termination, some loss of wages and a relatively small general damages claim. Further, many people in the position of the Melchiors do not seek compensation.

Having decided against terminating the pregnancy, having decided against putting the child up for adoption, many people get over the shock of the unwanted pregnancy and decide to enjoy the unexpected joy of the child without seeking compensation.

Kerry and Craig Melchior, of course, did seek compensation. The facts of the case suggest their claim was driven by genuine financial need rather than greed, as indeed does the relatively — some would say remarkably — modest amount of their claim for the costs of raising their unplanned son. Indeed, the modesty of this claim was remarked on by a number of judges in Melchior. The Melchiors claimed just over \$105 000 to cover the financial costs associated with rearing Jordan, from birth to age 18. This amount excluded compensation for a range of costs that might be claimed by more socially and economically aspirational parents. The Melchior ruling thereby raises the theoretical prospect of ‘middle class welfare’ *par excellence* — namely, the possibility of much larger compensation claims by parents who, for example, envisage their dependant child attending costly private schools, being taken on frequent overseas holidays, receiving ‘expensive clothes, toys, pastimes, presents and parties’ (Heydon J, 2003:para 306), necessitating extending the family home and upgrading the family car, and receiving tertiary education within Australia or abroad (even, perhaps, at blue-chip universities like Princeton or Cambridge). It is far from evident, however, that ambit claims of this kind will arise in practice with any real frequency, and even less clear that courts — responsibly alert to ‘exaggeration’ and ‘excess’ (Kirby J, 2003:para 180) — would award the full amounts sought.

Second, even if Melchior had been decided differently, there remains doubt that the Ipp reforms will achieve the result desired by the medical profession: namely, to stop medical indemnity costs rising. Arguably these important reforms were explored and implemented too hastily. The Ipp Inquiry’s terms of reference were announced in July 2002 and its final report was delivered less than three months later. The national peak representative body of the Australian legal profession, the Law Council of Australia (LCA), expressed strong reservations about the short time-frame of the Ipp Inquiry, having earlier advocated referring these questions to a Law Reform Commission (LCA, 2002b; LCA, 2002c:iv; see similarly Spigelman, 2002:451). Arguably, the post-Ipp legal regimes may actually invite litigation, as parties seek court interpretation of loosely drafted statutory tests and definitions (Atkinson, 2003:10-11; Crossland, 2002a; Luntz, 2002:841). Arguably, too, it is not certain that tort reform alone will reduce premium levels. The Law Council of Australia has consistently disputed the direct relationship between tort reform and premium rates, attributing the cause of rising premiums to insurance market factors including ‘loss of capacity by international re-insurers and insurers following September 11, the collapse of HIH Insurance, the substantial fall in the value of worldwide equities markets, and new prudential standards imposed by the Australian Prudential Regulation Authority’ (LCA, 2002d). Writing in the aftermath of Melchior, Nisselle (2003) stated:

I think the judgment will not substantially increase medical indemnity costs. Further, it may blunt, a little, the effect of the various reforms we've seen around the country, but it will not undo it. That's because I think the latter, whilst clearly desirable, were never going to produce substantial falls in medical indemnity costs ...

The various tort law changes and compensation reforms implemented over the last year or so will be likely to flatten the gradient of growth in the number of claims and the average cost of claims. However, we know that only a very small percentage of people who could sue successfully actually choose to. In an increasingly consumerist environment, it is likely that percentage, and hence total claims numbers, will rise faster than tort law reforms will reduce the average cost of a medical claim. In the US, insurers very carefully say that the tort law reform they suggest will lead to premiums 15 per cent lower than they would be without the reforms — that is, they don't say the premiums will fall.

Third, the AMA has seemed mainly worried by the reminder in Melchior that doctors, through their insurers, will be liable for the foreseeable consequences of providing substandard medical care. Instead, presumably, it would prefer the resulting costs to be directly met by patients themselves, or by the broader community through some operation of the welfare state. The welfare state might supply assistance through social security payments or a 'no-fault' accident compensation scheme. A scheme of this kind has operated in New Zealand since 1972 (see Todd, 2002). The Whitlam Labor Government attempted to introduce a similar scheme in Australia, but the *National Rehabilitation and Compensation Bill 1975 (Cth)* fell victim to the Dismissal. During the 2002 public liability debate, proposals of this kind were advocated by a number of Federal politicians (see Koutsoukis, 2002, citing Hockey; Kerr, 2002). No-fault compensation was strongly advocated by commentators who considered that the tort reform debate had become pincerred between the intransigent vested interests of two opposing lobby groups — lawyers on the one hand, and insurers on the other (see Crossland, 2002b; Luntz, 2002). No-fault compensation is not without its critics, however, who have argued that by comparison with the operation of the common law of negligence, schemes of this kind deliver insufficient compensation to people injured by negligent behaviour, remove the incentive for responsible risk-management, and are not necessarily less costly to the wider public (LCA, 2002c:13-14 and generally Chapter 3). This recites the three key public policy functions of tort law: namely, providing fair and just compensation to victims of negligence; creating incentives for safe behaviour and risk management by potential tortfeasors, which reduces the overall cost to society from negligently inflicted harm; and justly placing responsibility for repairing any such harm upon the actual and potential wrongdoers, rather than placing the burden on individual victims or the wider society. The first and third of these functions are often

described as ‘corrective justice’ while the second is often characterised as the ‘deterrent’ or ‘normative’ function of tort law (see LCA, 2002e:7 and 9; Finnis, 1980:166 and 178; Cane, 2001).

In advocating measured (legislative) reform of tort law, the Chief Justice of New South Wales has argued that the law of negligence is in many respects — now it seems improperly, and certainly unfashionably — the ‘last outpost’ of the welfare state (Spigelman, 2002:434):

The traditional function of the law of negligence ... appears to have reached definite limits as to what society is prepared to bear ... For those of us who came to maturity during the years of the welfare state, the relevant ‘progressive’ project for the law was to expand the circumstances in which persons had a right to sue. We were brought up on ‘Australia Unlimited’ supplements in the quality newspapers. We are now more conscious of limits — social, economic, ecological and those of human nature. Hobbes has triumphed over Rousseau. For several decades now, the economic limits on the scope of government intervention have received primacy in more and more areas of social discourse. The law cannot be insulated from such broad trends in social philosophy.

This comment arguably obscures the important fact that the choice between a ‘welfare’ model and a ‘corrective justice/individual responsibility’ model for compensating injured people is not as stark as it is often portrayed. Arguably, the Australian system to date, despite its perceived flaws, overall has steered a middle course between these two extremes. It has done this by denying doctors immunity from the legal consequences of substandard service provision, but at the same time allowing them to relieve themselves from personally paying the full cost of their tortious conduct by partly sharing that cost with the wider community (for example, by allowing doctors’ insurance premiums to be claimed as a tax deduction, or through doctors passing part of the cost of the premiums they pay to their patients through fees). Chief Justice Spigelman’s comments nonetheless reveal the essentially political nature of disagreements surrounding the best policy approach to meeting the economic costs arising from negligent behaviour. In the *Melchior* case, the result and reasoning of the majority judges came down firmly on the side of maintaining the status quo, in respect of their accepting the core function of the law of negligence as the delivery of ‘corrective justice’ (see, for example, Callinan J, 2003:301). All this points to a largely overlooked public policy question underscoring the *Melchior* case: what role should the judiciary play in resolving this kind of political and policy disagreement?

Judicial Activism

Judicial rulings are frequently criticised, characterised and caricatured as examples of so-called ‘judicial activism’. This label generally is attached where the

commentator is of the view that the (appointed) judge has inappropriately 'stretched' legal principle to give effect to a policy result that properly should be determined by the (elected) legislature. The charge is often accompanied by an assertion that the judge's so-called activism has produced a legal result that reflects the judge's own personal or political views. These accusations frequently arise where the personal or political perspective of the commentator as to the desirable policy result differs from the perspective imputed to the judge.

The rulings of the majority judges in *Melchior* attracted such criticism from at least one commentator (Albrechtsen, 2003) who objected to the awarding of damages in this case, notwithstanding these judges' explicit statements that they considered they were applying well-established legal principles to resolve the factually novel problem before them. Others who objected to the result, however, accused the same judges of engaging in inappropriate 'legalism' (Shanahan, 2003) or 'literalism' (Nisselle, 2003). Shanahan called instead for an approach that can only be described as judicial activism:

It is a pity, and an appalling reflection on Australian values, that the judges of the High Court have apparently put the law of damages ... above [the principle that a child should never be seen as a 'damage']. The law is built on ethical and moral values, and the judges must acknowledge that.

This fundamental division of critical response to the result in *Melchior* reveals a Kafkaesque dimension of the long-running debate in Australia about the virtues and vices of judicial activism (see further Sackville, 2001). The judicial activism/legalism divide is substantially a constructed, although not entirely false, dichotomy. As Ackland (2003) has argued:

... large quantities of judicial reasoning frequently involve coating personal values in what law is to hand to lend support. To suggest that is not activism or adventurism is really too much of a con to swallow. The principle to bear in mind when weighing the value of the commentary is that whenever a court's reasoning does not conform to a conservative perception of values, then it is denounced as 'judicial activism.' Conversely, for a liberal minded person, a decision that favours conservative values invariably is said to be infected with 'excessive legalism'. They are entirely unhelpful labels deployed to enhance or rebuke judges according to the acceptability or otherwise of the values they bring to their task.

Illustrating this point, Ackland refers to the minority opinion of Justice Heydon in *Melchior*, a judgement replete with speculative commentary about the psychology and duties of good parenting and about what is conducive to 'the health of family life' (Heydon J, 2003:paras 323-4, 269), as well as value-laden assertions that human dignity is affronted by attempts to estimate the impact of an unplanned child on its family in economic terms (Heydon J, 2003:paras 353, 347

and generally 352-362). Not dissimilar, but more balanced and restrained, statements about social and family values were made by the other minority judges in *Melchior*, especially with regard to their claim that allowing damages in this case would represent ‘commodification’ of children or of the parent-child relationship (Gleeson CJ, 2003:paras 35, 38 and cf 8; Hayne J, 2003:paras 194 and 258-261). Justice Heydon’s approach in this case deserves special attention, however, in the light of his outspoken extracurricular attacks on judicial activism, defined by him as attempts to further ‘some political, moral or social program’ (Heydon J, 2003b:10). With respect, it is difficult to see how Justice Heydon’s own approach in *Melchior* differed, in process if not flavour of result, from judges he has criticised as:

... soigné, fastidious civilised, cultured and cultivated patricians of the progressive judiciary — our new philosopher-kings and enlightened despots — [who] are in truth applying the values which they hold, and which they think the poor simpletons of the vile multitude — the great beast, as Alexander Hamilton called it — ought to hold even though they do not. (Heydon J, 2003b:21)

This is not to say that the legal pronouncements of judges are, can, or should ever be detached from the values of the society in which the law operates. As Justice Kirby reminded us in *Melchior*, the common law ‘does not exist in a vacuum. It is expressed by judges to respond to their perceptions of the requirement of justice, fairness and reasonableness in their society’ (Kirby J, 2003:para 106). Justice Kirby discussed an interpretive approach that would allow judges explicitly to rely on public policy considerations when resolving novel claims for damages in negligence (Kirby J, 2003:paras 120-122; see further Mason, 2001). A policy-oriented approach of this kind was set out by the House of Lords in *Caparo* (1990). Justice Kirby himself has advocated the *Caparo* approach but now (and with apparent reluctance) considers himself bound by its rejection by the majority of the High Court in *Graham Barclay Oysters* (2002).

Justice Kirby went on in *Melchior* to assert (Kirby J, 2003:para 137; see also paras 151, 159) that judges

... have the responsibility of expressing, refining and applying the common law in new circumstances in ways that are logically reasoned and shown to be a consistent development of past decisional law ... [but] they have no authority to adopt arbitrary departures from basic doctrine ... [least of all] in our secular society, on the footing of their personal religious beliefs or ‘moral’ assessments concealed in an inarticulate premise dressed up, and described, as legal principle or policy.

On the one hand, according to Justice Kirby, judges must not be unduly susceptible to Scripture, their personal morality or the dangers of ‘overwhelming legal analysis with emotion’ (Kirby J, 2003:para 159). On the other hand, they must somehow be alive to ‘reality in contemporary Australia’, which includes:

... non-married, serial and older sexual relationships, widespread use of contraception, same-sex relationships with and without children, procedures for ‘artificial’ conception and widespread parental election to postpone or avoid children ...

and to the values of a society that has changed substantially since ‘the far-off days of judicial youth’ (Kirby J, 2003:para 164). This suggested approach may be described as one of ‘cautious but creative legalism.’

The other majority judges in *Melchior* adopted a similar approach to Justice Kirby, albeit one where legalism arguably inclined more towards the cautious than the creative. All three judges apparently shared Justice Kirby’s stated enthusiasm for application of existing and established legal principle to novel tortious claims, regardless of the personal views of the judge on underlying questions of policy or morality. As Justice Callinan (2003:para 296 and para 292 — see also McHugh and Gummow JJ, 2003:para 77) stated:

It may well be seen by some to be distasteful for others to claim, and indeed for judges to assess, damages in a situation of this kind. The fact that I might as a judge find it personally distasteful to be required to assess damages of the kind claimed, can however provide no reason to refuse to award them if the application of legal principle requires me to do so.

These judges injected a larger dose of caution than Justice Kirby, however, into their recognition of the importance of judicial awareness of contemporary social realities in adjudication of negligence claims. In the course of their legal reasoning, Justices McHugh and Gummow (like Justice Kirby) did explicitly advert to the social reality of widespread use of contraception in our society by people like the *Melchior*s, in the course of rejecting the assertion that damages should be barred because the birth of a child is always a ‘blessing’ (McHugh and Gummow JJ, 2003:para 79). They went on, however, to emphasise both the difficulty of divining what should be accepted as the ‘paradigm of social behaviour’ in contemporary Australian society, and the importance of judges showing restraint in developing the common law according to changing social mores (McHugh and Gummow JJ, 2003:para 83). Justice Callinan referred in passing to ‘changed views in society about reproductivity’ in discussing the legal questions arising and foreshadowed by this case (Callinan J, 2003:para 294), but otherwise seemed prepared to have recourse to relatively strict legalism in upholding the *Melchior*s’ claim.

Where does the approach of the majority in *Melchior* really leave judges who are called upon to resolve novel damages claims in negligence? Arguably, in an uncomfortable position. Their discomfort is likely to be highest where judges deliver results that attract the ‘distaste’ of their individual conscience or of vocal segments of wider Australian society. In the current political climate — where the community is sensitised to the costs of rising insurance premiums in respect of professional and public liability, but generally ill-informed about the philosophical

and legal framework within which judges remain obliged to deliver ‘corrective justice’, unless and until the legislature imposes a different framework — this could occur against almost any factual setting. Arguably, however, judicial discomfort is most likely in negligence cases which, like *Melchior*, demand some delineation of rights and responsibilities in relation to the conception, bearing and raising of children, and produce symbolic as well as practical statements about the interrelationship of law, morality and human sexuality. These are ‘hot button’ issues in any society, no matter how notionally secular, liberal and pluralist. They generate controversy because they engage fundamentally competing understandings of what furthers or derogates from human dignity and personhood, based on differing conceptions of ‘existence, of meaning, of the universe, and of the mystery of human life’ (see *Planned Parenthood v. Casey*, 1992:2807). Even the most cautious and creative judge cannot hope to please all of the people, all of the time — and perhaps not even most of the people, most of the time — in adjudicating these questions.

Commodifying Children

Albrechtsen (2003) described *Melchior* as Australia’s *Roe v. Wade* (1973), referring to the groundbreaking decision of the United States Supreme Court establishing the constitutional protection of a woman’s right to abortion. Her analogy is partly accurate but substantially misleading.

The critical difference between *Roe v. Wade* and *Melchior* is that the result in the Australian case was not delivered in reliance on constitutionally protected or otherwise fundamental ‘rights’. The members of the High Court did not craft their judgements in *Melchior* in terms of rights — such as rights protecting reproductive choice, grounded perhaps in a right to privacy (as in *Roe v. Wade*), liberty and security of the person (as in the Canadian case *Morgentaler*, 1988), or even equality — because it was not legally or politically feasible for them to do so. Unlike many Western democracies in the common law tradition, such as Canada, South Africa and the United States of America, Australia has no Bill of Rights conferring fundamental, judicially enforceable rights and freedoms upon individuals. Unlike New Zealand and the United Kingdom, Australia has failed to enact even ordinary, non-entrenched legislation conferring or importing a menu of individual rights and freedoms which, although lacking full constitutional protection, nonetheless have some legal effect. Additionally, the existing Australian Constitution apparently contains little scope for judicial development of implied rights and freedoms. Further, Australian judges historically have displayed a marked reluctance to discern and develop common law rights, including in relation to questions associated with reproductive choice.

Yet a number of judgements in *Melchior* did contain explicit reference to the notion of reproductive choice. For example, Chief Justice Gleeson affirmed the ‘freedom’ the law grants couples like the *Melchior*s to ‘choose’ the size of their family, noting without elaboration that the legal harm resulting from denying such choice is ‘a loose concept’ (Gleeson CJ, 2003:para 23). Further, in their joint

judgement Justices McHugh and Gummow (2003:para 66) acknowledged the Melchior's legal interest in determining their own 'reproductive future[s]', expressly referring to the language adopted on these questions by courts in the United States of America. Notwithstanding the doubts cast by Justice Hayne on the 'utility' of describing the interest at stake as 'reproductive autonomy' — 'if only because it may reflect echoes of the wholly different debate in the United States about issues discussed [in] *Roe v. Wade*' (Hayne J, 2003:para 191) — to a limited extent the Melchior case suggested a potential new flavour of Australian jurisprudence on questions about the rights and responsibilities of reproduction. Given the concerns about judicial activism outlined above, however, that potential is likely to remain substantially unrealised without domestic enactment of a Bill of Rights.

Notwithstanding Justice Hayne's assertion that the issues raised in Melchior were 'wholly different' from those in *Roe v. Wade*, there are important similarities as well as differences between the two cases. Both involved judges answering a novel legal question relating to the kind of 'hot button' subject matter referred to above. Both explored legal questions related to unwanted pregnancy, unplanned children, and the reproductive choices legitimately available to women and men. Both rulings divided community opinion. Both rulings were broadly embraced by 'pro-choice' commentators, as examples of formal recognition of the philosophy of freedom of individual choice that underlies the modern family planning project (regarding Melchior, see Graycar, 2003; Cannold and Cica, 2003). Both rulings were attacked by conservative critics, as examples of secular liberalism run rampant, and as results that would devalue children and the experience of raising them (regarding Melchior, see Anderson, 2003; Shanahan, 2003; Albrechtsen, 2003).

Central to this last claim was the assertion that the majority position in each case represented a retreat from adherence to the so-called 'sanctity of life' doctrine, which demands that respect be given to the intrinsic value and dignity of every human life, and that every child be seen as a blessing or 'gift from above' (Anderson, 2003). The baldest form of this assertion is difficult to refute. The majority judges' recognition in *Roe v. Wade* of a woman's right to choose abortion was clearly inconsistent with an absolutist approach to 'sanctity of life', especially one that assumes human life begins at conception. Three of the four majority judges in Melchior explicitly disagreed with the view (previously relied on by courts in Australia and overseas to deny compensation to parents like the Melchior's) that legal result should proceed on the basis that all healthy children, in all circumstances, must be considered a 'blessing' or a 'gift from God' (Kirby J, 2003:paras140-2, 151, 191; McHugh and Gummow JJ, 2003:para 79; also see Callinan J, 2003:para 297, arguably displaying implicit, if not deliberate, support for this view). All majority judges in Melchior emphasised their conclusion was driven by the question of who should pay for the cost of raising an unplanned child born as the result of medical negligence, rather than the question of whether the unplanned child, once born, was in fact unwanted by his parents or indeed by wider society: 'In the real world, cases of this kind are about who must bear the

economic costs of the upkeep of the child. Money, not love or the preservation of the family unit, is what is in issue' (Kirby J, 2003:para 145 and see further paras 95, 148-9 and 153; Callinan J, 2003:para 298; McHugh and Gummow JJ, 2003:paras 68, 88 and 90). The majority also dismissed as merely speculative the minority judges' concerns that a child in the position of Jordan Melchior would grow up feeling unwanted or unloved, or otherwise psychologically damaged, simply because his parents had sought compensation for the financial costs of raising him (Kirby J, 2003:para 145; McHugh and Gummow JJ, 2003:para 79; Callinan J, 2003:para 298).

With respect, the reasoning on this question offered by the majority judges in Melchior does not entirely demolish the arguments of those concerned that awarding damages in this kind of case both offends the notion that all children are a blessing, and contributes to the 'commodification' of children by assigning to them a 'market value' (Hayne J, 2003:para 248; Gleeson CJ, 2003:para 35; Heydon J, 2003:para 353; see also Anderson, 2003). The Melchior result most certainly does both these things — not by saying, in the words of the Deputy Prime Minister of Australia (Anderson, 2003), that a child like Jordan Melchior is 'a consumer durable there for our pleasure, rather like an expensive fridge or a new DVD player', but certainly by reminding us that in important respects even the most loved and wanted children do represent 'an economic burden that can be enumerated and tabulated'. The Melchior result exposes the disingenuous fiction that childrearing in our society is everything to do with sacrificial love and nothing to do with money.

In Australia today, where public policy and politics is increasingly driven by 'user pays' ideology, that particular fiction is practically a fairytale. It is commendable to protest that children should never be seen as commodities, but at the end of the day someone must meet the financial cost of bringing up each child. Single mothers are well acquainted with this reality, as are fathers who are legally obliged to pay child support pursuant to the *Child Support (Assessment) Act 1989 (Cth)*. Significantly, '[n]o court would be moved by the argument coming from a putative father that he should not be required to provide financial support for the child he has fathered on the grounds that he has bestowed on the mother a priceless blessing' (see Graycar, 2003). From the direct cost of providing a child with basic food, clothing, shelter, education and entertainment — Percival and Harding (2003) estimate it costs \$448 000 for the average Australian couple to raise two children from birth to age 20 — to the opportunity cost of forgoing career advancement to maintain a feasible balance between work and family commitments (Gray and Chapman, 2001), Australian parents pay a high economic price for raising the citizens and taxpayers of tomorrow.

By itemising exactly what it costs parents to raise a child today, by scrutinising who should pay these costs where the child is born as the result of negligence on the part of a third party, and even by opening the door to more damages awards along these lines, arguably the High Court in Melchior was simply bringing one part of the common law in line with some contemporary realities associated with raising children in today's society and economy. In other

words, the High Court was not so much stepping onto a dangerous slippery slope of commodifying human life and dignity as revealing how far down that slope Australian society has already slid. A not insubstantial part of the popular disquiet at the Melchior result may originate substantially in shocked surprise at being confronted directly with one of the unsavoury consequences of the current ascendance of radical neo-liberal economic theory. Hamilton (2003) has identified a far wider range of socially, economically and morally objectionable consequences of neo-liberalism-in-action. If citizens are now pre-eminently consumers or shareholders, and if every cost and benefit must be scrutinised and itemised, why should the question of allocating responsibility for meeting the tangible economic costs of raising children be treated more tenderly than similar questions in relation to paying for health care, education, utilities and other social services formerly caught more substantially by the net of 'social welfare'?

The Melchior judgements advert to another worrying consequence of elevating the economic and rational over finer, more generous feelings. Namely, the possibility that the High Court might one day decide that plaintiffs are legally obliged to mitigate their financial loss by either aborting an unplanned pregnancy resulting from medical negligence (where the abortion would be lawful under the applicable State or Territory law), or adopting out the child born as a result. The question was not raised in argument in Melchior, hence the High Court did not answer it. This question was raised in relation to adoption, however, in *CES v. Superclinics* (1995). The majority (Priestley and Meagher JJA, Kirby A-CJ dissenting) of the New South Wales Court of Appeal held that a woman who had lost the opportunity to choose to abort an unwanted pregnancy by virtue of medical negligence, could not claim damages for the economic cost of raising her healthy child, because she had chosen not to surrender the child at birth for adoption. Recall this case settled out of court before the High Court could hear an appeal. The judges in Melchior referred, with markedly different emphases and concerns, to the unanswered legal questions about abortion and adoption flowing from both *Superclinics* and Melchior itself (Gleeson CJ, 2003:para 35; Kirby J, 2003:paras 112-4; Hayne J, 2003:paras 220-2; Callinan J, 2003:paras 292 and 294). It remains to be seen if, when and how the High Court will resolve these questions. It is certainly open to defendants to advance a literalist 'failure to mitigate loss' defence (Nisselle, 2003). Should the High Court ever conclude that women and men situated similarly to the Melchiors are under some obligation to abort or adopt, the controversy generated by Melchior would pale into comparative insignificance.

Conclusion

The questions to which Melchior alludes may be more interesting than those it directly answers. These questions go far beyond the three key objections raised in response to the damages award in this case: namely, that this result will exacerbate Australia's so-called 'medical indemnity crisis'; it involved unjustified judicial activism; and it devalues and commodifies human life. None of these

three claims is clearly substantiated. Yet there are elements of some truth in all three claims, which should be used to interrogate the broader neo-liberal socio-economic project. Responsibility for correcting the excesses and shortfalls of that project is properly a matter for the legislature, not the courts. In meeting this wider responsibility, our elected representatives might usefully be guided by the sentiment underlying these words of Justice Hayne in *Melchior* (Hayne J, 2003:para 222):

... 'choice' is an expression apt to mislead ... For some, confronted with an unplanned pregnancy, there is no choice which they would regard as open to them except to continue with the pregnancy and support the child that is born. For others there may be a choice to be made. But in no case is the 'choice' one that can be assumed to be made on solely economic grounds. Human behaviour is more complex than a balance sheet of assets and liabilities. To invoke notions of 'choice' as bespeaking economic decisions ignores that complexity.

Postscript

Around one month after the High Court's ruling in *Melchior*, the Queensland Attorney-General introduced the *Justice and Other Legislation Amendment Bill 2003 (Qld)*, clause 41 of which aims to deny recovery for the costs of raising a healthy child in future cases of this kind arising in Queensland. At the time of writing, the Queensland Parliament had not yet debated the proposed legislative change and its stated rationales. Namely, that *Melchior* 'has exposed medical practitioners to an indeterminate liability in relation to any claim for costs associated with raising [a child born pursuant to negligence in relation to sterilisation]', that the High Court's ruling 'has cast doubt on the future of medical sterilisations in Queensland', and that it 'threatens to undo the benefit of the historic reforms ... passed last year', that is, the Ipp reforms (Welford, 2003). The content, quality and outcome of that debate remains to be seen.

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