

High Court Refuses Wrongful Life Claim.

TONY ROSENTHAL



The High Court of Australia was recently asked to decide whether a child born with profound disabilities, whose mother would have elected to terminate her pregnancy had she been aware of the high risk, is entitled to damages where a medical practitioner negligently failed to warn the mother of that risk. This type of action is called a "Wrongful Life" action.

In the High Court Appeal of Alexia Harriton (by her tutor George Harriton) v Paul Richard Stevens (2006) HCA15, the High Court agreed with the decision of the Court of Appeal of New South Wales to refuse the relief sought by Alexia Harriton.

Ms Harriton, who is now 25 years old, was born profoundly disabled and sought damages against her

principles of negligence law sustained a decision in favour of Ms Harriton. He believed that the doctor's negligence had led to the Appellant suffering loss and damage. He did not believe that the label of "Wrongful Life" was apt in this case and preferred "Wrongful Suffering".

The other six High Court Justices disagreed with Justice Kirby and agreed with the position taken by the primary Judge in the Supreme Court and also the Court of Appeal.

The underlying sentiment of the Court was that the notion of "sanctity of life" was still paramount in the Australian community.

There is no doubt that a general practitioner such as Paul Stevens has a duty of care towards and unborn child and that duty is not to injure the child. Even though Alexia Harriton was born disabled, this was not as a result of any breach of duty of care

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mother's general practitioner, Dr Paul Stevens. Ms Harriton's disabilities were caused by the Rubella virus. Her mother, Olga Harriton was infected by the Rubella virus in the first trimester of her pregnancy. The pathology reports ordered by the general practitioner confirmed that Olga Harriton was in fact pregnant and she was assured that she was not suffering from Rubella. This in fact proved to be incorrect and Olga Harriton was not given the opportunity to consider a termination of the pregnancy.

Alexia Harriton was born on 19 March 1981 and suffered catastrophic disabilities including blindness, deafness, mental retardation and mental spasticity. She has required care for the rest of her life due to these disabilities.

The only dissenting Judge in the High Court was Justice Kirby and he believed that the ordinary

towards her. Her disabilities were caused by the Rubella infection.

This case raised the difficult consideration of whether or not the common law should be changed to recognise the right of a foetus to be aborted as distinct from the right of a foetus not to be physically injured. The High Court was not convinced of the need for a change.

In any action for negligence a Claimant must establish some damage and a Court deciding such a matter must be able to evaluate the damage caused by the breach of duty.

Justice Crennan stated that in cases of this kind in order for compensation to be awarded "it must be established that non-existence is preferable to a life with disability".

It is difficult to see the High Court changing its position on wrongful life claims in the near future.



JOHN MULLINS
EDITORIAL

The last few months have been an exciting time for the Firm particularly with the appointment of four new Partners. All four have proved themselves as extremely talented and capable lawyers and we believe that their addition to the ranks of Partners will add a great deal to our Firm. We are committed to supporting and promoting people within the organisation and we see the appointment of these new Partners as a success not only for these individuals but also for the Firm as a whole. The challenge for these young Partners is now not only to continue to provide outstanding legal advice but to also becoming leaders in the Firm and in the wider legal community.

Often, the calling of elections has the effect of temporarily slowing the economy but the recent State Election seemed to have come and gone without as much as a hiccup. This may have been because from the outset, it was clear that the Government was going to be returned. The opposition failed to put up a worthwhile challenge and the result was fairly predictable.

This will enable the government to get on with its programs including the important changes to indirect taxation, particularly stamp duty. Residential conveyancing has always been a controversial topic in Queensland because of the exclusivity that the legal profession has. Over recent times, we have seen specialist conveyancing businesses run by lawyers created with all sorts of marketing hoopla including radio and television advertising. The Queensland Law Society has now implemented the conveyancing protocol which sets a standard as to the matters which need to be attended to by lawyers in Queensland attending to residential conveyancing. In this Firm, the residential conveyancing is undertaken by the Personal Legal Services section and undertaken by lawyers not a fleet of paralegals. We believe that residential conveyancing has many potential pitfalls and it is important that standards are maintained so we applaud the implementation of matters which set standards. Our view is that consumer protection is better served by professions maintaining high standards than through the imposition of consumer protection legislation. However, the combination of both should ensure a good result for clients.

report

MULLINS

Newsletter of Mullins Lawyers

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Meet Our New Partners

July 2006 heralded the announcement of four new partnership appointments at Mullins Lawyers. Andrew Nicholson, Mark Madsen, Rebecca Castley and Louise Wallace all willingly accepted the offer and the opportunity presented to them.

Managing Partner John Mullins, says 'The appointments are an indication that strong growth within the firm is meeting demand in Queensland's thriving commercial sector. The appointment of four new partners marks a significant milestone for the firm and takes the number of partners to fifteen.'

The appointments have been made from within Mullins lawyers - all four were Senior Associates before the 1st of July and Rebecca and Louise can also be credited as Mullins Lawyers first female partners. John Mullins commented, "The delay in securing female partners has not been from the firm's lack of desire to achieve this but rather from a matter of timing and individual pursuits."

Andrew Nicholson has developed extensive experience in dispute resolution and commercial litigation including trade practices; business and corporate and property matters. He has particular expertise in the

conduct of large and complex commercial disputes and the development and protection of intellectual property rights. Andrew was admitted as a solicitor in 1995 and joined Mullins in 2003. He is a Member of the Intellectual Property Society of Australia & New Zealand, the Urban Development Institute of Australia and a Member of Rotary Club of Stones Corner.

A Queensland Law Society accredited specialist in property law, Rebecca Castley was admitted as a solicitor in Queensland in 1998 and in England and Wales in 2000. She was appointed as an associate in 2001 after joining Mullins in 1998. Rebecca operates a general property law practice involving a wide range of transactions for commercial and residential property. She is a member of UDIA - Women in Development and Queensland Women Lawyers.

A specialist in hospitality law and property, Louise Wallace has returned from maternity leave to take up her position as partner. Louise began her career at Mullins in 2001. She is an experienced practitioner in all aspects of the law relating to the hospitality sector, including liquor licensing, gaming and the sale and acquisition of licensed premises, including hotels, bottleshops and restaurants. Louise is a Member of Queensland



L to R: Andrew Nicholson, Louise Wallace, Rebecca Castley, Mark Madsen

Mark Madsen, who joined Mullins in 2001, has a varied practice in both commercial disputes and insolvency. Mark advises and represents clients from all areas of commerce and business including official liquidators, major accounting firms, banks and corporate clients. Mark is an Associate Member of the Insolvency Practitioner's Association of Australia.

Women Lawyers, UDIA Women in Development and a Volunteer for the Women's Legal Service.

Mullins Lawyers continue to operate as a leading CBD-based commercial law practice offering specialist legal services to a range of industry areas including business services, property, hospitality, commercial litigation, insolvency and sports law.

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Review of the LIQUOR ACT

IRENE HEBBLEWHITE



The Liquor Act 1992 is under review to ensure the Act reflects community attitudes,

recent changes in serving practices and the rapid growth of the tourism and hospitality industry. In April 2006, the Beattie Government released the Review of the Liquor Act-Discussion Paper. By way of background, Queensland's first Liquor Act was introduced in 1912 and in 1935 a Licensing Commission was established to centralise all administration and decision making. It was not until the late 1980's that the *Liquor Act 1912* was reviewed and replaced with the current *Liquor Act 1992*. This Act provided for greater flexibility for licensing arrangements and focussed on responsible serving practices within the community.

The Liquor Act was amended in 2001 following a national competition

policy review. The greatest change was that applicants for new licences no longer needed to establish there was a public need for their venue, but had to provide an assessment that it was in the public interest.

The Hospitality industry has seen massive growth in the past 5 to 6 years. This has been partly due to the interest of large corporate entities getting involved in the liquor industry. This involvement has brought a level of corporate understanding to the industry that historically did not exist to the same extent. Queensland, and in particular the south east region, has seen prosperity with property values doubling and tripling. This has brought investors into the industry that previously were not there.

The Government has placed a spotlight on the community and safety issues surrounding the hospitality industry. The focus of the review has been to provide streamlined processes for licensees, avoiding duplication of government agencies in the application process, especially for greenfield sites. It will

also provide safe and responsible service of alcohol regimes through the new lock-out provisions and operating conditions placed on licensees who trade after 1am.

Curt Schatz, Partner in our Hospitality Law group, has been heavily involved with the review process. In addition to submitting our own response to the Discussion Paper, Curt was invited to attend the Liquor Industry Consultative Forum and the Liquor Licensing Consultants Forum to discuss and present his recommendations and the feedback the Hospitality group has received from clients on this issue.

The Government has been busy collating and considering the submissions by the stakeholders and has been putting together the proposed amendments to the Liquor Act. Curt continues to be involved in this process.

It is anticipated that the amendment bill will be released by mid 2007.

Conveyancing Protocol Further Protection for Queenslanders

SARAH LUDWIG



The passing of the Property Agents and Motor Dealers Act 2000 (PAMDA) saw Queenslanders given unprecedented protection as buyers in the residential property market. The Act introduced the cooling off period, Warning Statement requirements and more recently, complex requirements for the delivery of Contracts of Sale and the associated directions given to the buyer. These changes have led to further complexity in the procedural steps necessary to complete a

conveyancing transaction.

Recent fluctuations in the property market have resulted in the following occurring:-

- an increase in the types of services available to people purchasing or selling property. This increase has occurred in the budget price conveyancing sector and in some instances has led to a perception that restricted services are being provided to clients;
- an increase in the level of complexity in completing a conveyancing transaction; and
- an increase in the sale and purchase of properties for investment purposes.



To assist in addressing these issues the Queensland Law Society along with Prof. Bill Duncan and Prof. Sharon Christensen have developed the Queensland Conveyancing Protocol which came into effect from the 1st of July 2006. The Protocol is to be adhered to by all Queensland lawyers and provides the standard that a diligent lawyer acting in a conveyance must comply with.

The Protocol includes an objective to encourage and foster good conveyancing practices and standards in Queensland and covers both residential and commercial transactions. It contains a general guide, Standards of Conduct for lawyers, questions for clients and checklists to be utilised. As a result complying with the Protocol will entail additional work for lawyers (and a commensurate increase in the cost of conveyancing services) however, client's who engage lawyers who diligently follow the Protocol will have the advantage of:-

- increased understanding of the effect of PAMDA on Contracts of Sale on an individual basis;
- detailed explanations of recommended searches, associated benefits and results;
- increased complex understanding of the terms of the Contract of Sale; and
- peace of mind that the lawyer engaged is performing in accordance with the standards set by the Queensland Law Society.

Mullins Lawyers believe the Protocol is a necessary and positive step in the regulation of the conveyancing process in Queensland. We will be adhering to the Protocol and look forward to providing our clients with a conveyancing service that exceeds expectations.

CHANGES TO FAMILY LAW IN AUSTRALIA

KIRSTIE COLLIS



On 1 July 2006 some of the most significant and extensive reforms to Family Law in Australia

were brought about with the commencement of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

The Federal Government has developed and implemented the reforms in an effort to create a shift to more collaborative, informal and child-focussed methods when dealing family relationship breakdowns rather than by resorting to litigious methods.

Key points of the reforms include the presumption of shared parenting with equal, substantial and significant allocated time.

Shared parental responsibility means that parents make joint decisions

regarding major long-term issues involving, their children's health, education and religion and is the starting point for all courts exercising jurisdiction under the new legislation.

The presumption does not apply in circumstances where there are reasonable grounds to believe that a parent of a child has engaged in child abuse or family violence. The presumption may otherwise be rebutted by satisfying the court that to make such an order would be contrary to a child's best interests.

Other significant changes to the law include an overhaul of the compliance regime, which will hopefully reduce the number of breaches of Orders, and marked changes in terminology. "Residence" and "contact" become "lives with" and "spends time with and communicates with".

The reforms also see a shift in the way children's matters are dealt with in the Family Court with the introduction of the Children's



Cases Program.

This program aims to move away from the traditional adversarial environment of a court so that matters are conducted without undue delay and with as little formality and legal technicality as possible.

We also see an increase in the resources available to parties when dealing with family relationship breakdowns. The government has opened many new Family Relationship Centres around the country and has introduced a Family Relationship Advice Line. Parties are encouraged to utilize these resources to aid them in obtaining advice and assistance with regard to these issues.

Overall, the Government is attempting to create a massive shift in the generational culture around family law and family relationships. The major focus is obviously that parents are required to raise the bar when it comes to exercising joint responsibility for ensuring that the needs and best interests of their children are met. The reforms are intended to target all areas of family law and family relationship breakdown including family violence and child support.