

## Abstract

This note considers the decision of the Singapore Court of Appeal in *ACB v Thomson Medical* [2017] SGCA 20, in which the plaintiff sought damages for the upkeep costs of a child conceived using sperm from someone other than her husband as a result of negligence by a fertility clinic. The Court held that upkeep costs could not be recovered as a matter of public policy, but recognised a new head of loss, namely damages for loss of genetic affinity. In a controversial ruling, the Court quantified these damages at thirty percent of the upkeep costs of the child. While holding that punitive damages could be recovered outside the categories recognised in *Rookes v Barnard*, the Court rejected such an award on the facts of the case.

## Inaccurate Conception: *ACB v Thomson Medical*

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**Keywords:** Wrongful conception; wrongful birth; public policy; damages; right of genetic affinity; punitive damages.

### INTRODUCTION

Were it not for the obvious distress caused to the family concerned, one might be tempted to dismiss the facts of *ACB v Thomson Medical Pte. Limited* as having been devised by a particularly fiendish setter of moot problems.<sup>1</sup> The plaintiff ('ACB') and her husband approached the defendant fertility clinic for help in conceiving a child through in-vitro fertilisation. However a mix-up in the clinic led to the use of the sperm of an unknown male, instead of that of ACB's husband. The baby ('Baby P') was healthy, but the unknown sperm donor was of a different ethnicity to ACB's husband, with the result that the baby was of mixed Chinese-Indian, instead of Chinese-Caucasian, ethnicity.

ACB sued the clinic in contract and the tort of negligence, seeking various heads of loss including the expenses of bringing up the child until it became financially independent ('upkeep damages'). The claim for upkeep damages failed at first instance.<sup>2</sup> Choo Han Teck J was referred to decisions on claims for upkeep damages following failed sterilisations from other jurisdictions, in particular the House of Lords

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<sup>1</sup> [2017] SGCA 20.

<sup>2</sup> [2015] 2 SLR 218.

in *McFarlane v Tayside Health Board* which rejected a claim for upkeep damages,<sup>3</sup> and the High Court of Australia in *Cattanach v Melchior* in which a majority had allowed such a claim.<sup>4</sup> However, the judge noted that those were cases in which parents claimed that negligence had caused them to conceive a child when they did not want any more children, whereas the parents in *ACB* wanted to conceive a child, albeit one with their own genetic identity. On this basis, he rejected the claim for upkeep damages as a matter of causation (as the costs of bringing up a child would have been incurred even if the right sperm had been used). He also agreed with the judgment of Lord Millett in *McFarlane* that upkeep damages should not be awarded as a matter of public policy.

The case came before a five-judge Singapore Court of Appeal (SCA), where the arguments ranged considerably more widely than at first instance. The SCA rejected the judge's conclusion on causation, but upheld his decision that upkeep damages were not recoverable, whether in contract or tort, on grounds of public policy. The SCA did, however, recognise a new head of damage, namely loss of genetic affinity, for which they quantified the damages at 30 per cent of the claim for upkeep damages. Finally, the SCA reviewed the law relating to punitive damages, departing from *Rookes v Barnard* which limited such damages to three narrow categories,<sup>5</sup> and holding that punitive damages could be awarded for inadvertent conduct. It will be immediately apparent that *ACB* addresses a number of important issues as regards what Andrew Phang Boon Leong JA referred to as 'the proper limits of civil liability',<sup>6</sup> and offers some controversial responses to them. Before considering the judgment further, it is helpful to consider how claims for upkeep damages have been treated in previous UK cases.

### **WRONGFUL CONCEPTION CASES UNDER UK LAW**

After some early success in cases such as *Emeh v Kensington & Chelsea & Westminster AHA*,<sup>7</sup> claims by parents for the costs of raising an 'unwanted' but healthy child ran into the brick wall of the decision

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<sup>3</sup> [2000] 2 AC 59.

<sup>4</sup> (2003) 215 CLR 1.

<sup>5</sup> [1964] AC 1129.

<sup>6</sup> n 1 above at [1].

<sup>7</sup> [1985] QB 1012. See also *Thake v Maurice* [1986] 1 QB 655; *Benarr v Kettering Health Authority* (1988) 138 NLJ 179 and *Walkin v South Manchester Health Authority* [1995] 1 WLR 1543.

of the House of Lords in *McFarlane v Tayside Health Board*.<sup>8</sup> While the claim was rejected by all five judges, they chose different ‘placeholders’ in the tort of negligence for what was clearly a policy-driven determination. Lord Millett adopted an explicitly policy-driven analysis, holding that as a matter of ‘legal policy’ a child was to be regarded as a ‘blessing’ and that it was ‘morally offensive’ to regard a healthy child as more trouble and expense than it was worth.<sup>9</sup> Lord Clyde rejected liability because of a lack of proportion between the restitution sought and the wrong done.<sup>10</sup> Lords Slynn, Hope, and Steyn held that there was no duty of care. Lord Slynn arrived at this conclusion by categorising the claim as one for pure economic loss;<sup>11</sup> Lord Hope because of the impossibility of calculating the benefits of having such a child to off-set any upkeep cost;<sup>12</sup> and Lord Steyn, in what appeared to be concern for the cash-strapped NHS, by considerations of ‘distributive justice’.<sup>13</sup> In *Parkinson v St James and Seacroft University Hospital NHS Trust*,<sup>14</sup> where the ‘unwanted’ child was disabled, the courts were prepared to award damages measured by reference to the *additional* costs of upkeep attributable to the disability. However, in *Rees v Darlington Memorial Hospital NHS Trust*,<sup>15</sup> in a four-three majority decision, the House of Lords rejected a claim by a severely visually handicapped mother for the increased costs, due to her condition, of raising an ‘unwanted’ healthy child following a negligent sterilisation. Instead, the majority formulated a conventional award of £15,000, to compensate the mother for the loss of the right to lead her life in the way she had wished and planned.

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<sup>8</sup> n 3 above.

<sup>9</sup> *ibid* 114.

<sup>10</sup> *ibid* 106.

<sup>11</sup> *ibid* 75.

<sup>12</sup> *ibid* 97.

<sup>13</sup> *ibid* 84.

<sup>14</sup> [2002] QB 266.

<sup>15</sup> [2004] 1 AC 309.

## THE DECISION OF THE SINGAPORE COURT OF APPEAL

### **The issue of causation: the fact that ACB would have incurred upkeep costs anyway**

In *ACB*, the trial judge's finding that the claim for upkeep damages failed due to lack of causation was rejected by the SCA on the basis that the judge had ignored 'the purpose for which the expenses were ... incurred'.<sup>16</sup> The mother did not want to 'beget a child irrespective of paternity' but 'to have a child with her husband' which 'makes all the difference'.<sup>17</sup> The Court refused to follow the decision of the English Court of Appeal in *Salih and another v Enfield Health Authority*.<sup>18</sup> In that case, a mother gave birth to a severely disabled child when she would not have proceeded with the pregnancy if properly advised. The mother then decided to have no more children. At a time when upkeep damages were recoverable in England, the Court of Appeal deducted from the award of upkeep damages the costs of bringing up an otherwise healthy child which it was found the mother would have gone on to conceive but for the negligence. The criticisms of *Salih* are well-made, and echo those advanced by Professor Glazebrook in the *Cambridge Law Journal*.<sup>19</sup> The only reason that the upkeep costs of bringing up a healthy child had not been incurred was the personal decision of the family not to have any more children, once they found that the child born in consequence of the negligent advice was severely handicapped. However, the relevance of those criticisms to the facts of *ACB*, in which the causation finding did not depend on any post-negligence choice by the parents but on their pre-negligence commitment to conceiving a child, is less clear. The SCA's decision that a head of expense which a claimant would have incurred even if there had been no negligence, but for a different purpose, is nonetheless recoverable in tort is open to challenge. Laura Hoyano has suggested that 'in "wrongful birth" cases, a child was desired, and so the parents would have incurred ordinary upbringing costs had they terminated the pregnancy and conceived another healthy child'.<sup>20</sup> However, the SCA's conclusion is justifiable. In the tort of conversion, for example, it is no answer that possession would have been lost to some other

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<sup>16</sup> n 1 above at [38].

<sup>17</sup> *ibid* at [41].

<sup>18</sup> [1991] 3 All ER 400.

<sup>19</sup> P. Glazebrook, 'Unseemliness Compounded by Injustice' [1992] CLJ 226.

<sup>20</sup> L. Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 MLR 883, 903.

wrongdoer,<sup>21</sup> and in false imprisonment, it is no answer that the claimant could have been detained lawfully.<sup>22</sup> Even in the tort of negligence, majorities of the House of Lords in *Chester v Afshar*,<sup>23</sup> and of the High Court of Australia in *Chappel v Hart*,<sup>24</sup> were prepared to vary the ordinary principles of causation in a claim for breach of a doctor's duty to warn a patient of an inevitable risk of surgery, even though there was no finding that the patient would, if warned, have refused to have the surgery altogether (as opposed to on the specific occasion on which the risk materialised). Lord Steyn suggested in *Chester* that 'a patient's right to an appropriate warning from a surgeon when faced with surgery ought normatively to be regarded as an important right which must be given effective protection whenever possible'.<sup>25</sup> The SCA's conclusion on causation can therefore be justified on a number of bases.

### **The recoverability of upkeep damages as a matter of public policy**

Having rejected the 'no causation' defence, the SCA had to grapple with the policy issues concerning an award of upkeep damages. After surveying the leading authorities from both the UK and Australia, the SCA cleared the ground. They rejected any suggestion that the issue turned on whether the claim was categorised as one for pure or consequential economic loss.<sup>26</sup> As Singapore has not adopted a general exclusionary rule against the recovery of pure economic loss in negligence,<sup>27</sup> this was a relatively straightforward determination. By contrast, English tort law attaches considerable significance to the conceptual characterisation of the loss, with a much greater reluctance to recognise a duty of care in respect of pure as opposed to consequential economic loss. The characterisation of a claim for

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<sup>21</sup> *Kuwait Airways Corp. v Iraq Airways Co* [2002] 2 AC 883.

<sup>22</sup> *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [65] (Lord Dyson JSC).

<sup>23</sup> [2005] 1 AC 134.

<sup>24</sup> (1998) 195 CLR 232.

<sup>25</sup> n 23 above at [17].

<sup>26</sup> n 1 above at [81(a)].

<sup>27</sup> *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [73].

the upkeep costs of a healthy child has proved problematic. In unwanted pregnancy cases, the costs were initially categorised as economic loss consequential on personal injury.<sup>28</sup> Subsequent decisions have offered less clarity: differing categorisations were offered in *McFarlane*, in which the possibility of different approaches for the father's and mother's claims was noted but rejected, and the High Court of Australia was similarly divided in *Cattanach*. The attempt to categorise upkeep damages as consequential economic loss is problematic. The mere fact that some compensable physical damage or personal injury has occurred is not sufficient to render any accompanying economic loss consequential – the suggestion that pure economic loss could be recovered parasitically on independent physical damage occurring at the same time was rejected in *Spartan Steel & Alloys Ltd v Martin & Co.*<sup>29</sup> Analytically, upkeep costs are not consequential on the inconvenience and discomfort of pregnancy, or the pain and suffering of childbirth; they would not be incurred if the child was stillborn, but would still be incurred if, by some miracle of modern medicine, the birth experience could be rendered entirely pain and stress-free.

The SCA was persuaded that upkeep damages were not recoverable as a matter of public policy, whether in contract or in tort, for two reasons: because the obligation to maintain one's child was 'at the heart of parenthood and cannot be a legally cognisable head of loss', and because the recognition of such a claim would be inconsistent with the nature of the parent-child relationship and place the mother in a position where her personal interests as a litigant conflicted with her duties as a parent.<sup>30</sup> The first finding reflected the fact that 'the duty to maintain one's child is a duty which lies at the very heart of parenthood, and thus the expenses which are incurred towards the discharge of this estate are not capable of characterisation as a loss'.<sup>31</sup> This reasoning would also preclude recovery of the additional costs of maintaining a severely disabled child whose conception or birth could have been avoided (which is every bit as much a parental duty as maintaining a healthy child). Such damages are

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<sup>28</sup> eg *Walkin v South Manchester Health Authority* n 7 above.

<sup>29</sup> [1973] QB 27.

<sup>30</sup> n 1 above at [86].

<sup>31</sup> *ibid* at [90].

recoverable in England and Australia,<sup>32</sup> but —in light of the above dictum— it may be that wrongful conception or birth damages for the additional costs of raising a disabled child are no longer recoverable in Singapore.

The SCA's conclusion that the obligations of parenthood cannot be a legally cognisable head of loss will strike many as sound, and requiring no real elaboration.<sup>33</sup> The subsidiary contention that the parents could not accept Baby P as their own while at the same time arguing that they should not be responsible for maintaining her is less persuasive.<sup>34</sup> The parents were not denying their responsibility to maintain the child, but arguing that the defendants were obliged to compensate them for the loss they incurred in discharging their parental responsibility. The argument based on conflict of interest — that 'the very nature of such an exercise encourages the exaggeration of any infirmities and the diminution of benefits as might exist in their children'<sup>35</sup> — is equally unpersuasive. In wrongful conception cases involving a seriously disabled child, no doubt it might be said that larger damages would follow from an exaggeration of the child's disability, but it has not been suggested that that of itself provides a reason for refusing recovery. The SCA itself fixed the damages for loss of genetic affinity which it did compensate at 30 per cent of the upkeep claim without being troubled by any question of conflict of interest. Indeed a claim for upkeep damages requires no evidence from the parents as to the lack of capacity or emotional worth of the child. If anything, the financial interest of the claimant is enhanced by exaggerating the child's abilities, with claims for the cost of expensive schools, universities, music lessons and so forth. It is suggested that the real and legitimate concern here is the inability to bring the incalculable benefits of parenthood into the court's evaluation, and the concern about awarding damages for loss caused by a particular wrong in circumstances in which the quantification exercise is inherently incapable of addressing many of the important consequences of the wrong. While the SCA's conclusion in refusing recovery of upkeep damages seems correct, and accords with the views of courts

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<sup>32</sup> *Parkinson v St James and Seacroft University NHS Trust* [2002] QB 266; *Rand v East Dorset Health Authority* [2000] Lloyd's Rep Med 181 and *Hardman v Amin* [2000] Lloyd's Rep Med 498. The SCA summarised the position in Australia, n 1 above at [80].

<sup>33</sup> *ibid* at [86].

<sup>34</sup> *ibid* at [93].

<sup>35</sup> *ibid* at [95].

in the UK and legislatures in Australia (who have largely reversed the result of *Cattanach*),<sup>36</sup> the reasoning which led to that conclusion may prove problematic when applied in other tort contexts.

### **Damages for loss of genetic affinity**

That left the issue of whether some other form of loss might be recoverable. As noted above, in *Rees* the House of Lords approved a fixed sum conventional award to reflect the loss of the parents' autonomy occasioned by an 'unwanted' child. The SCA reviewed the concept of damages for loss of autonomy, and noted the divergence within *Rees* as to the nature of the injury the award was intended to address, and whether it was vindicatory or compensatory in nature.<sup>37</sup> The SCA did not recognise loss of autonomy as an actionable interest in its own right, but accepted that the concept did have a role in determining whether compensation should be awarded for interference with other legally protected interests.<sup>38</sup> In the Court's view 'autonomy' was 'too nebulous' a concept – it did not comport well with the generally harm-based rather than rights-based concepts of injury and damage in negligence, and the general recognition of a compensable autonomy right would undermine existing control mechanisms which kept the tort of negligence within reasonable bounds. Instead, the SCA sought to identify the nature of the interest which gave rise to the parents' 'true loss', and concluded that this was their loss of genetic affinity with Baby P.<sup>39</sup> As an identification of the specific aspect of the loss of parental autonomy which gave rise to the claim, the analysis seems correct, and it allows Singapore to respond incrementally to the difficult issues of social policy and morality which wrongful and inaccurate conception cases entail. However, the interest of genetic affinity would not provide a basis for compensation in wrongful conception cases such as *Rees*, or in inaccurate conception cases where a non-parental sperm donation was intended to be used, but the clinic mistakenly uses sperm of inappropriate ethnicity. These were the facts in the Northern Irish case of *A v A Health and Social Services Trust*,<sup>40</sup> in which sperm of a mixed-race donor instead of a Caucasian donor was mistakenly

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<sup>36</sup> Civil Liability Act 2003 (Qld), ss 49A, 49B; Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 2002 (NSW), ss 70, 71; Civil Liability Act 1936 (SA), s 36.

<sup>37</sup> n 1 above at [111].

<sup>38</sup> *ibid* at [115].

<sup>39</sup> *ibid* at [127].

<sup>40</sup> [2011] NICA 28.

used, although the claim for damages (brought in that case by the child rather than by the mother) failed. Nevertheless, the SCA may well have felt that in this sensitive and policy-laden area, the law should be developed by reference to the specific issues of the case at hand, rather than by trying to provide a single response for all inaccurate conception cases.

Much more controversial will be the SCA's quantification of damages for loss of genetic affinity. The Court held that adopting a fixed figure, as in *Rees*, was contrary to the 'value of individual autonomy' which the Court was seeking to protect.<sup>41</sup> In any event, it was not appropriate in the first such award to fix an amount for all future cases.<sup>42</sup> The Court decided to award a 'conventional sum' which was 'tailored to the unique facts of each case',<sup>43</sup> and which took into account 'the unique types of harm suffered by a person when his/her reproductive plans are disrupted'.<sup>44</sup> So far so good. However, the decision to 'benchmark the eventual award as a *percentage* of the financial costs of raising Baby P' – in the event 30 per cent – is very difficult to justify. It seems to cut across the very reasons that the Court gave for holding that upkeep damages were not recoverable as a matter of public policy. It is difficult to identify *any* logical connection between the parents' loss of genetic affinity with their child, and, for example, 30 per cent of the cost of enrolling Baby P in an international school in Beijing or of tertiary education in Germany. The approach would tend to place a greater value on genetic affinity the more parents intend to spend on their child's upbringing (which might itself be a product of their socio-economic status or the number of other children they had). The Court's recognition that their solution is not 'theoretically elegant' does not seem a sufficient answer to these difficulties.<sup>45</sup>

### **The claim in contract**

Unlike many of the English cases, *ACB* also offered the mother a claim in contract. In *McFarlane v Tayside Health Board*,<sup>46</sup> Lord Steyn had made it clear that he was addressing only a claim in tort, and

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<sup>41</sup> n 1 above at [117].

<sup>42</sup> *ibid* at [142].

<sup>43</sup> *ibid* at [145].

<sup>44</sup> *ibid* at [147].

<sup>45</sup> *ibid* at [149].

<sup>46</sup> n 3 above, 76-77. Lord Clyde also acknowledged the potential for a different outcome in contract:

*ibid*, 99.

making no comment on whether the position in contract was the same. Lord Scott in *Rees v Darlington Memorial Hospital* rejected the suggestion that the extent of liability to an NHS patient could be 'any different from the extent of the duty and of the liability for the breach of duty that would apply in the case of a private patient with whom the doctor had a contractual relationship'.<sup>47</sup>

The policy placeholders which, at least under English law,<sup>48</sup> form part of the duty of care inquiry (eg whether the imposition of a duty is 'fair, just and reasonable') provided the legal hooks for the considerations of moral or distributive justice which underpinned the decision not to allow upkeep damages in the English cases.<sup>49</sup> If the same conclusion is to apply in contract, it is necessary either to ground the inability to recover on an overt public policy analysis,<sup>50</sup> or else to use considerations of 'assumption of responsibility' which have provided a basis for refusing contractual recovery for certain kinds of loss. It is noteworthy that Lord Clyde had relied on very similar reasoning in finding that there was no liability in tort in *McFarlane*, noting that 'the cost of maintaining the child goes far beyond any liability which in the circumstances of the present case the defendants could reasonably have thought they were undertaking'.<sup>51</sup> In *Waller v James* in New South Wales,<sup>52</sup> Hislop J. considered a claim for upkeep damages brought in contract as well as tort, and concluded that the test of legal causation was not established,<sup>53</sup> or alternatively the loss was too remote on foreseeability grounds.<sup>54</sup> Neither seems a wholly satisfactory vehicle in which to address the policy issues raised by wrongful conception cases. Although controversial in the field of its immediate application, the approach of the majority of the House

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<sup>47</sup> n 15 above at [131], [133].

<sup>48</sup> Singapore law has not adopted the three-part test from *Caparo Industries plc v Dickman* [1990] 2 AC 605, with its 'fair just and reasonable' component: see *Spandeck Engineering*, n 27 above, at [73].

<sup>49</sup> *McFarlane v Tayside Health Board*, n 3 above, 76 (Lord Slynn); 83 (Lord Steyn); 97 (Lord Hope); *Rees v Darlington Memorial Hospital NHS Trust* n 15 above, [17] (Lord Nicholls); [105] (Lord Millett).

<sup>50</sup> The approach adopted by Lord Millett in *McFarlane* n 3 above, 114 and Lord Scott in *Rees*, n 15 above, [140].

<sup>51</sup> n 3 above, 105.

<sup>52</sup> [2013] NSWSC 497; *affd.* [2006] HCA 16; (2006) 226 CLR 136.

<sup>53</sup> *ibid* at [259].

<sup>54</sup> *ibid* at [265].

of Lords in *Transfield Shipping Inc. v Mercator Shipping Inc.*<sup>55</sup> of asking whether the risk in question was one which the other party could reasonably have been regarded as assuming, might provide a more satisfactory approach.<sup>56</sup>

In *ACB*, the SCA rejected any suggestion that the claim for upkeep damages could succeed in contract where it had failed in tort.<sup>57</sup> The SCA noted that public policy in relation to the irrecoverability of heads of loss had an important role in the law of contract as well as the law of tort, instancing the limitations on recoverability of non-pecuniary loss for breach of contract.<sup>58</sup> The gist of the claim for upkeep costs was the same in contract and tort, and therefore the public policy considerations were the same. Whatever the appropriate label, the ability to recover upkeep damages in wrongful conception cases should not differ between concurrent claims in contract and tort. In *Wellesley Partners LLP v Withers LLP*,<sup>59</sup> Floyd LJ noted of a claim for economic loss that ‘it would be anomalous, to say the least, if the party pursuing the remedy in tort in these circumstances were able to assert that the other party has assumed a responsibility for a wider range of damage than he would be taken to have assumed under the contract’. In relation to negligently performed sterilisation or reproductive services, the reverse proposition seems equally valid. The SCA left open the question of whether upkeep damages would be recoverable where there had been a contractual warranty guaranteeing a particular outcome – what in French law would be characterised as an *obligation de résultat*<sup>60</sup> – and the difficult position where the

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<sup>55</sup> [2009] 1 AC 61.

<sup>56</sup> This approach was not open in Singapore, as the principle propounded by Lords Hoffmann and Hope in *The Achilleas* is not part of Singapore law: *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another* [2011] 1 SLR 150 at [140]; and *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [38].

<sup>57</sup> n 1 above at [102].

<sup>58</sup> *ibid* at [53].

<sup>59</sup> [2015] EWCA Civ 1146 at [68].

<sup>60</sup> On the distinction between ‘result’ and ‘means’ obligations in the law of contract see D. Alessi, ‘The Distinction between *Obligations de Résultat* and *Obligations de Moyens* and the Enforceability of Promises’ (2005) 13 *European Review of Private Law* 657. The position will be different where such a liability has been contractually assumed (eg by an express obligation to pay upkeep expenses in a

contract specifically provided for the recovering of this head of damages. The SCA noted that this last example would involve a conflict between two important policies, that of *pacta sunt servanda* and the public policy which made upkeep damages ordinarily irrecoverable.<sup>61</sup>

### **Punitive damages**

That left the issue of whether an award of punitive damages could provide a mechanism for meeting the SCA's obvious desire to reflect 'the value of the interest at stake',<sup>62</sup> while recognising the difficulty of identifying any criteria by reference to which compensatory damages could be assessed. The SCA decided to depart from the rule restricting the award of punitive damages to the three categories recognised in *Rookes v Barnard*,<sup>63</sup> bringing the law of punitive damages in tort in Singapore to a similar state to that which prevails in Australia, Canada and New Zealand. The SCA held that punitive damages could be awarded in tort where 'the totality of the defendant's conduct is so outrageous that it warrants punishment deterrence and condemnation'.<sup>64</sup> For this purpose, it was necessary to consider the adequacy of any compensatory award, and of any criminal or disciplinary sanctions already imposed. However, the fact of criminal or disciplinary sanction did not *preclude* a power to award punitive damages, although it was likely as a matter of discretion to condition its exercise.<sup>65</sup> The Court also held that inadvertent conduct could, in principle, meet the test for awarding punitive damages,<sup>66</sup> preferring in this regard the reasoning of the majority in the Privy Council decision of *A v Bottrill*<sup>67</sup> over the subsequent departure from that decision by a majority of the Supreme Court of New Zealand in *Couch*

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particular situation). This is presumably what Lord Slynn had in mind when stating that a client seeking to recover such expenses 'must do so by an appropriate contract': *McFarlane* n 3 above, 76.

<sup>61</sup> n 1 above at [105].

<sup>62</sup> n 1 above at [150].

<sup>63</sup> n 5 above, 1129.

<sup>64</sup> n 1 above at [176].

<sup>65</sup> *ibid* at [187].

<sup>66</sup> *ibid* at [201].

<sup>67</sup> [2003] 1 AC 449.

v *Attorney-General (No. 2)*.<sup>68</sup> However, as all parties accepted, *ACB* was not a case in which an award of punitive damages was appropriate on the facts.

### ALTERNATIVE APPROACHES TO COMPENSATORY DAMAGES

The SCA's decision to award damages for loss of genetic affinity quantified at 30 per cent of the upkeep costs appears in part to have been influenced by the distress which *ACB*, her husband, and family suffered as a result of the ethnic discrepancy between *Baby P* and her parents.<sup>69</sup> If so, it is possible that compensation for that distress would have been an alternative response. An analogy might be drawn with the claim for mental distress caused by knowledge that a sperm sample had been destroyed considered in *Yearworth v North Bristol NHS Trust*,<sup>70</sup> in which such damages were held to be recoverable in bailment by analogy with the recovery of damages for breach of contracts which had as their object the provision of non-pecuniary, family, or personal benefits. In the New York case of *Andrews v Keltz*,<sup>71</sup> sperm from someone other than the mother's husband was mistakenly used in the course of fertility treatment. While a claim for upkeep damages was refused, damages for emotional distress were awarded, including the distress which might result from fear of a future attempt by the biological father to claim parental rights. One possible benefit of this approach, as opposed to the approach adopted by the SCA, is that it focusses on the anguish to the parents in the context of what is ordinarily an occasion of great joy, and provides a basis for embracing other inaccurate conception cases which are not premised on loss of genetic affinity, such as the use of donor sperm of the wrong ethnicity.

Margaret Fordham has suggested that a claim like *ACB*'s might be brought either based on, or analogous to, trespass to the person, on the basis that the implantation of an egg wrongly fertilised with third party sperm was in the nature of an invasion of *ACB*'s bodily autonomy.<sup>72</sup> That analysis would

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<sup>68</sup> [2010] 3 NZLR 149.

<sup>69</sup> *ibid* at [131]-[133].

<sup>70</sup> [2010] QB 1.

<sup>71</sup> 838 NYS 2d 363 (2007).

<sup>72</sup> M. Fordham, 'An IVF Baby and a Catastrophic Error – Actions for Wrongful Conception and Wrongful Birth Revisited in Singapore' (2015) *Singapore Journal of Legal Studies* 232, 237.

provide a basis for awarding damages for indignity, discomfort, or inconvenience falling short of psychiatric illness, or simply to vindicate the interference with the claimant's liberty.<sup>73</sup> In some jurisdictions, at least, there is (through commercial surrogacy arrangements) a means of allocating a commercial value to the carrying of and giving birth to someone else's child, and by analogy with trespass to land, the reasonable value of that service might provide a means of quantifying damages for trespass.<sup>74</sup>

Another approach, at least so far as the contractual claim is concerned, would have been to consider awarding damages for 'loss of amenity' to reflect ACB's inevitable disappointment at not having the birth and maternal experience that she contracted for. In *Ruxley Electronics and Construction Ltd v Forsyth*,<sup>75</sup> an award of damages for breach of contract was made in these circumstances where the breach of contract in the construction of a swimming pool had not reduced the pool's value, and in which it was wholly disproportionate to re-build the pool from scratch. Lord Mustill noted that:

[T]he law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance entails [...] a personal, subjective, non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away.<sup>76</sup>

A similar award, in this case for £10,000, was made in *Farley v Skinner (No. 2)* when a surveyor negligently advised a potential purchaser that a house was not affected by aircraft noise when it was, although the value of the property was not affected.<sup>77</sup>

If this approach is available for the non-commercial consequences of contracts essentially concerned with the enjoyment of property, there is no good reason why it should not also be available in a contract

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<sup>73</sup> M. Jones (ed), *Clerk & Lindsell Torts* (London: Sweet & Maxwell, 21st ed, 2014) para. 15.139;

*Richardson v Howie* [2004] EWCA Civ 1127; *Rowlands v Chief Constable of Merseyside* [2007] 1 WLR 1065 at [28]; *Beckett v Walker* [1985] CLY 129.

<sup>74</sup> *Penarth v Pounds* [1963] 1 Lloyd's Rep 359.

<sup>75</sup> [1996] AC 344.

<sup>76</sup> *ibid* 360.

<sup>77</sup> [2002] 2 AC 732.

of an infinitely more personal nature, in which the financial consequences of breach are either incalculable or would involve an enquiry on which the law, for reasons of policy, is unwilling to embark. The objection that it was not sufficiently part of 'the object' of the contract in *ACB* to confer amenity on the plaintiff and her husband does not seem convincing: the Thomson Medical website proclaims that it takes 'women and their families on the amazing journey of familyhood' and refers to its timeless adage, 'the gift of life is a rich and meaningful experience – and nothing can be more joyous than bringing a child into the world.'<sup>78</sup> Another objection is that there would be an element of arbitrariness in quantifying such damages, just as there was in the £2,500 figure which His Honour Judge Diamond QC arrived at in *Ruxley*. However, as Lord Mustill noted, 'in several fields the judges are well accustomed to putting figures to intangibles'.<sup>79</sup> Nevertheless, such an award would still be open to the objection that it 'commodifies' children,<sup>80</sup> and seeks to quantify the parental disappointment in the unwanted child – something the courts in wrongful conception cases are reluctant to do.

## CONCLUSION

The SCA's conclusions on punitive damages are likely to prove the least controversial aspect of *ACB*, and will be broadly welcomed. The reasoning which underpins the finding that upkeep damages are not recoverable in contract or tort as a matter of public policy, and in particular the basis and quantification of the award of damages for loss of genetic affinity, may generate a more mixed reaction. But consensus in this area of the law, in what the SCA described as 'one of the most difficult cases to come before this court thus far',<sup>81</sup> was always going to be difficult to achieve. In *McFarlane*, Lord Steyn reasoned to his conclusion by asking what the traveller on the London Underground – a reincarnation of the man on the Clapham omnibus – would say about the proposed legal remedy.<sup>82</sup> *ACB* may be one of those cases that the traveller on the Underground, or the Singapore MRT, would find too difficult to answer at all.

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<sup>78</sup> <http://www.thomsonmedical.com/about-us/overview/> (last accessed 9 October 2016).

<sup>79</sup> n 75 above, 361.

<sup>80</sup> cf the comment of Hale LJ in *Parkinson*, n 14 above, at [89]; and in *Cattanach v Melchior*, n 4 above, at [21] (Hayne J), [353] (Heydon J).

<sup>81</sup> n 1 above at [210].

<sup>82</sup> n 3 above, 76.