

CASE NOTE

ACB V THOMSON MEDICAL PTE LTD*

RECOVERY OF UPKEEP COSTS, CLAIMS FOR LOSS OF AUTONOMY AND LOSS OF GENETIC AFFINITY: FERTILE GROUND FOR DEVELOPMENT?

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Whether the law should permit parents to recover the costs of raising a child that they never intended to have is one of the most vexed questions in the law of negligence. In ACB v Thomson Medical Pte Ltd, the Court of Appeal of Singapore considered this issue in a unique factual context: where the complaint of the appellant was not that she did not want a child but, because of a negligently performed IVF procedure, that she did not want this particular child. The Court ultimately denied the appellant’s claims for upkeep costs and for loss of autonomy, but recognised a novel head of damage: ‘loss of genetic affinity’. In this note we deal with: (i) a preliminary issue of causation, in respect of which we argue that the Court impermissibly focused on the purpose of the loss suffered; (ii) the Court’s reasons for refusing to award upkeep costs or to recognise loss of autonomy as a compensable head of damage; and (iii) the recognition of loss of genetic affinity, which we object to for the principal reason that it is indistinguishable from an award for loss of autonomy.

CONTENTS

I	Introduction.....	1361
II	Background.....	1363
	A Facts of ACB.....	1363
	B Decision of the Primary Judge	1364
III	Decision on Appeal.....	1364

* [2017] 1 SLR 918.

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A	Claim for Upkeep Costs	1365
1	Reproductive Wrongs	1365
2	A Question of Causation?	1366
3	Recovery of Upkeep Costs	1367
B	Claim for Loss of Autonomy	1369
1	Conceptual Objection	1370
2	Coherence Objection	1371
3	Over-Inclusiveness Objection	1371
C	Loss of Genetic Affinity	1372
IV	Comment	1373
A	Causation	1373
B	Arguments against the Recovery of Upkeep Costs	1377
C	Loss of Autonomy	1378
D	Loss of Genetic Affinity	1379
E	Implications for Australia	1381
V	Conclusion	1382

I INTRODUCTION

In *ACB v Thomson Medical Pte Ltd*, the Court of Appeal of Singapore was presented with a rare opportunity to consider the proper boundaries of civil liability in the context of one of the most vexed questions in the law of negligence: whether the law should permit recovery by parents of the upkeep costs of raising a child they never intended to have.¹ The question has drawn different responses from various common law jurisdictions. In the United Kingdom, the House of Lords in *McFarlane v Tayside Health Board* overturned more than two decades of appellate and first instance authority, and held that upkeep costs were not recoverable.² In *Cattanach v Melchior*, the High Court of Australia declined to follow *McFarlane*, and awarded upkeep costs.³ Recovery has been allowed in South Africa,⁴ but not in Canada⁵ or New Zealand.⁶

¹ [2017] 1 SLR 918.

² [2000] 2 AC 59. These developments are helpfully surveyed in James Edelman, *McGregor on Damages* (Sweet & Maxwell, 20th ed, 2018) 1417–21 [40-282]–[40-288].

³ (2003) 215 CLR 1.

⁴ *Administrator, Natal v Edouard* 1990 (3) SA 581.

⁵ *Kealey v Berezowski* (1996) 136 DLR (4th) 708.

⁶ *L v M* [1979] 2 NZLR 519.

It is important to appreciate from the outset, however, that the facts of the case before the Court of Appeal in *ACB* differed from all of the above decisions in one material respect. As is explained below, the complaint of the appellant in *ACB* was not that she did not want a child, but that she did not want *that particular child*. Writing on behalf of the Court, Andrew Phang Boon Leong JA conducts an impressive review of the leading authorities in several jurisdictions and evaluates in a principled way the arguments for and against recovery. The length of the decision is testament to the complexity of the issues it raises, as is the Court's comment that the case was 'possibly one of the most difficult to come before [the] court thus far'.⁷ Ultimately the Court declined to allow recovery of upkeep costs, but instead awarded the plaintiff damages reflecting her 'loss of genetic affinity'.⁸ The Court also considered but refused to award punitive damages or damages for loss of autonomy.

In this note, we examine the decision and the implications of a number of the Court's arguments. First, we argue that the Court's reasoning with respect to causation departs from the orthodoxy of the 'but for' test as it is understood at common law and impermissibly focuses on the purpose of the loss suffered. However, we identify an alternative basis on which the result might be justified. Secondly, we explain why the Court's decision brings clarity to the arguments against the recovery of upkeep costs and elaborate on why the Court was correct to refuse to recognise loss of autonomy as a compensable head of damage. Thirdly, we address the most novel aspect of the decision, the recognition of loss of genetic affinity. This raises more questions than it answers and is susceptible to several conceptual objections. Chief among these objections is that, on the characterisation of loss of genetic affinity adopted by the Court, it is difficult to distinguish the award from an award for loss of autonomy, which was expressly rejected by the Court.

Finally, we explain the possible implications of the decision for Australian courts, particularly in light of state statutes which have sought to reverse the effect of *Cattanach*. The decision in *ACB* indicates the potential for this issue to arise in a new context, namely, cases involving wrongful fertilisation. More importantly, as we argue below, a claim for loss of genetic affinity, if it were to be recognised, would not be prohibited by any of the state statutes dealing with claims for upkeep costs. Australian courts would therefore be free to make an award of damages for loss of genetic affinity if they considered it appropriate to do so.

⁷ *ACB* (n 1) 1013 [210].

⁸ *Ibid* 919.

II BACKGROUND

A Facts of ACB

The appellant, a Singaporean-Chinese woman, and her husband, a German man of Caucasian descent, wanted to start a family. In 2006 they successfully undertook in-vitro fertilisation ('IVF'), leading to the birth of a son in 2007. In 2010 the appellant engaged the respondents to provide a further round of IVF treatment, which resulted in the birth of a daughter ('Baby P') in October 2010. The appellant and her husband noticed that Baby P had a different skin tone and hair colour from their own and from their first child. After conducting further investigation, it became apparent that Baby P's DNA did not match that of the appellant's husband. It transpired that the appellant's egg had been fertilised with the sperm of an unknown Indian donor, instead of the appellant's husband's sperm.

The appellant commenced proceedings against the respondents in negligence.⁹ Although the appellant could not identify a particular negligent act, she relied on the doctrine of *res ipsa loquitur* to establish her claim. The appellant claimed:

- damages for 'pain and suffering relating to the pregnancy as well as damages for mental distress'; and
- damages reflecting the upkeep costs of, among other things, enrolling Baby P in an international school in Beijing, tertiary education in Germany, medical expenses, and feeding and caring for Baby P ('the upkeep claim').¹⁰

The respondents admitted that they were liable to pay damages for pain and suffering, and mental distress, but sought to strike out the portion of the statement of claim relating to the upkeep claim. This was allowed at first instance by an assistant registrar, but reversed on appeal.¹¹ In 2014, interlocutory judgment was entered against the respondents, with damages to be assessed. Prior to the hearing on the assessment of damages, the respond-

⁹ The appellant also proceeded against the second respondent, the company which operated the fertility clinic, for breach of contract. That aspect of the proceeding was not the subject of the appeal and will not be considered in this note.

¹⁰ *ACB* (n 1) 931 [11]. The appellant also sought provisional damages for any damage arising from any genetic condition or disease that Baby P might have due to her donor's genes; however, this claim was subsequently removed by an amendment to the statement of claim: at 931–2 [11].

¹¹ *ACB v Thomson Medical Pte Ltd* [2014] 2 SLR 990.

ents sought to have determined whether upkeep costs could be claimed by the appellants.¹²

B *Decision of the Primary Judge*

The primary judge (Choo Han Teck J) held that the appellant was ‘not entitled in law to claim damages for ... upkeep [costs]’.¹³ His Honour rejected as a ‘mere afterthought’ an argument that the respondents had failed to detect and inform the appellant of the error ahead of time, thereby denying her the opportunity to have an abortion.¹⁴ In relation to the substantive argument, his Honour held that the upkeep claim failed because the appellant ‘had wanted a second child all along’.¹⁵ His Honour distinguished ‘wrongful birth’ cases, concerning claims by parents for upkeep costs after one parent had been negligently advised that a sterilisation procedure had been successful. Here, ‘Baby P was not an unwanted birth in the sense that the [appellant] did not want to have a baby at all’; rather the appellant ‘just wanted a baby conceived with her husband’s sperm’.¹⁶ As such, it could not ‘be said that the [appellant] and her husband [had] not contemplat[ed] having to expend money’ on the costs of raising a child.¹⁷ In effect, his Honour rejected the claim on the basis that the loss suffered could not be causally linked to the respondents’ negligence, in that the same upkeep costs would have been incurred if there had been no negligence.

III DECISION ON APPEAL

The Court of Appeal considered four issues:

- whether the appellant could, as a matter of law, maintain the upkeep claim;
- whether the appellant could maintain a claim for loss of autonomy;

¹² *ACB* (n 1) 932 [13]. This was pursuant to Ord 33 r 2 of the *Rules of Court* (Singapore, cap 322, 2014 rev ed).

¹³ *ACB v Thomson Medical Pte Ltd* [2015] 2 SLR 218, 228 [17].

¹⁴ *Ibid* 226 [14]. The plaintiff had not pleaded, nor deposed in any affidavit material, that she would have aborted Baby P. In any event, the primary judge considered that such a claim would go ‘beyond what should constitute a reasonable restitution for the wrong done’: at 226 [14] (citations omitted).

¹⁵ *Ibid* 226 [15].

¹⁶ *Ibid* 227 [15].

¹⁷ *Ibid*.

- whether the appellant could recover on another basis, namely for her loss of genetic affinity; and
- whether the appellant could maintain a claim for punitive damages.

This note considers the Court's conclusions in respect of the first three issues. The Court's treatment of punitive damages in tort is not considered.¹⁸

A Claim for Upkeep Costs

1 Reproductive Wrongs

The Court began with an overview of the decided cases concerning claims for 'reproductive wrongs'.¹⁹ It noted that, in general terms, the cases fell into three categories:

- 'wrongful life' cases, involving claims by children where a healthcare professional's wrongful act caused the a child to suffer from a disability or some disadvantage;
- 'wrongful birth' cases, involving claims by parents where the negligent act involves either a failure to inform the mother that she was pregnant, or to advise her while pregnant that the foetus would be born disabled; and
- 'wrongful conception' cases, involving claims arising out of failed sterilisation operations, brought by parents who did not want to conceive against the medical professional who either failed to perform the operation properly or who informed the parents that the procedure was successful when it was not.²⁰

The Court immediately noted that the present case did not fit neatly into any of the above categories.²¹ Although the case resembled wrongful conception cases in that, but for the negligence of the respondents, Baby P would not have been born, '[t]he appellant, unlike the plaintiffs in the wrongful conception

¹⁸ See *ACB* (n 1) 991–1013 [153]–[209]. The Court ultimately decided not to grant punitive damages. A detailed treatment of this aspect of the Court's decision would also need to consider *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129, where the same Court addressed the issue of punitive damages in contract.

¹⁹ The Court here was contemplating not 'the full breadth of claims that may arise out of surgical or medical procedures which relate to reproductive medicine, but only those where the damage or loss relates to the unplanned birth of a child': *ACB* (n 1) 937 [28] (emphasis omitted).

²⁰ *Ibid* 937–8 [29].

²¹ *Ibid* 938 [30].

cases, *did* want a child'.²² The case thus fell into a fourth category, 'wrongful fertilisation', in which, hitherto, the issue of upkeep costs had been considered in only one case.²³ As the Court explained, the essence of such a claim is that 'the plaintiffs never planned to have *this child* ... but instead planned for and desired to have a child with whom they would share genetic kinship'.²⁴

2 A Question of Causation?

The Court disagreed with the primary judge's conclusion that the fact that the appellant had wanted a second child all along was sufficient to dispose of the claim on the basis that the appellant's loss could not be causally linked (in the 'but for' sense) to the respondents' negligence.²⁵ The Court described this analysis as involving the 'fundamental error' that it 'ignore[d] the *purpose* for which the expenses were (and would have been) incurred'.²⁶

The Court was of the view that the reasoning of the primary judge could only be correct 'if the claim [were] regarded as one "made on behalf of the "family unit", rather than as one made in respect of an individual"'.²⁷ The error lay in treating the costs of raising one child as identical in purpose and *in pari materia* with the costs of raising another. In the present case the appellant's purpose in seeking IVF was *not* 'to beget a child *irrespective* of paternity (just so that she could have an addition to "her family unit") but to have *a child with her husband*'.²⁸ In short, although it could be said that the appellant would have been perfectly willing to bear the costs of raising a child genetically related to her and her husband, it could not be said that 'she or her Husband ever contemplated (let alone intended) having to raise a child that was not completely theirs'.²⁹ The difficult issue of 'whether upkeep costs are an actionable head of damage' could not, therefore, be avoided by treating the issue as one of causation.³⁰

²² Ibid 939 [31] (emphasis in original).

²³ *Andrews v Keltz*, 15 Misc 3d 940 (2007), discussed in *ACB* (n 1) 939–40 [33]. Wrongful fertilisation occurred in *Leeds Teaching Hospitals NHS Trust v A* [2003] 1 FLR 1091, but the issue in that case was the legal parentage of the child: see *ACB* (n 1) 939 [32].

²⁴ *ACB* (n 1) 940 [34] (emphasis in original).

²⁵ Ibid 941 [37].

²⁶ Ibid 941 [38] (emphasis in original).

²⁷ Ibid 943 [40], quoting *McLelland v Greater Glasgow Health Board* 2002 SLT 446, 457 (Lord Morison).

²⁸ *ACB* (n 1) 943 [41] (emphasis in original).

²⁹ Ibid.

³⁰ Ibid 944 [43].

3 Recovery of Upkeep Costs

The Court conducted a review of the foreign authorities on the issue, focusing in particular on decisions from the United Kingdom and Australia.³¹ It noted that there was ‘no path [completely] free from difficulties.’³² However, the Court identified three reasons upon which it would *not* decide the matter: (i) by classifying the claim as either pure economic loss or consequential loss; (ii) on the basis of ‘the contention that the arguments against recovery rest on dubious factual propositions and should be rejected out of hand’; or (iii) by accepting the suggestion that ‘the [a]ppellant’s decision to accept Baby P constitute[d] a *novus actus interveniens*.’³³

First, the Court ‘consider[ed] that it [did] not matter whether the upkeep claim [was] classified as ... [one] of pure economic loss’, or consequential economic loss, because in Singapore ‘there is no general exclusionary rule against recovery for pure economic loss.’³⁴ Secondly, the Court emphasised that the debate on this issue is not concerned with factual arguments, but normative ones.³⁵ It recognised that ‘[t]he claim[s] that all children are a “blessing” or that the well-being of the unplanned children will suffer as a consequence of the making of an award for upkeep are ... contestable factual propositions.’³⁶ However, it denied that those who make such arguments are making factual claims. Rather, ‘their claim is that the award of upkeep costs would be *antithetical to settled legal policy concerning the value human life or the character of a parent–child relationship*.’³⁷ As for the third proposition, the Court noted that this was

one point on which there is near universal agreement: almost without exception, all jurisdictions hold that that the decision of the parent to accept the child and raise him/her after birth *cannot* be taken as an act which breaks the chain of causation.³⁸

³¹ Ibid 949–60 [55]–[80].

³² Ibid 960 [81].

³³ Ibid.

³⁴ Ibid 960 [82]. See *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100, 129 [69].

³⁵ *ACB* (n 1) 960–1 [83].

³⁶ Ibid.

³⁷ Ibid 961 [83] (emphasis added).

³⁸ Ibid 961 [84] (emphasis in original). One notable exception is the judgment of Priestley JA in *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, 84–5.

The Court agreed with the observation of Lord Steyn in *McFarlane* that it would be “difficult to envisage any circumstances in which it would be right” to challenge the parents’ decision’ to adopt or abort the child.³⁹ Ultimately, the Court was persuaded that the claim for upkeep costs should not be allowed, either in tort or in contract.⁴⁰ It gave two key reasons for this conclusion:

- ‘[t]he obligation to maintain one’s child is an obligation at the heart of parenthood and cannot be a legally cognisable head of loss’; and
- ‘[t]o recognise the upkeep claim would be fundamentally inconsistent with the nature of the parent–child relationship and would place the [a]ppellant in a position where her personal interests as a litigant would conflict with her duties as a parent.’⁴¹

Turning to the first reason, the Court explained that, unlike claims for pain and suffering associated with the IVF procedure, an upkeep claim

is an action seeking relief in respect of a particular consequence of parenthood — the duty to provide material support for one’s child — and its success therefore necessarily depends on the recognition of the obligations of parenthood as actionable damage.⁴²

This was not a step that the Court was prepared to take. Instead, focusing ‘on the notion of parenthood as an institution’,⁴³ the core of which is the ‘duty to maintain one’s child’,⁴⁴ the Court held that parenthood gives rise to no obligations ‘which are capable of valuation as “loss” in any meaningful sense’ and therefore could not ‘be the subject of a claim for damages.’⁴⁵ The Court emphasised that this was a *normative* claim (as opposed to a *factual* claim) ‘about the paradigm of family relationships which exists in the law’ and ‘the meaning of legal parenthood.’⁴⁶ Further, the Court did not consider it to be an answer to this objection to state that the loss being compensated ‘was not the unplanned child *per se*, but the unplanned ... *financial expenses*’ — ‘no parent

³⁹ *ACB* (n 1) 961 [85], quoting *McFarlane* (n 2) 81.

⁴⁰ As for why the outcome did not differ in contract, see *ACB* (n 1) 969–71 [102]–[105].

⁴¹ *Ibid* 962 [86].

⁴² *Ibid* 963 [87].

⁴³ *Ibid* 963 [88].

⁴⁴ *Ibid* 964 [90].

⁴⁵ *Ibid*.

⁴⁶ *Ibid* 964 [90], 966 [93].

can claim a legal entitlement to be free from the responsibilities of parenthood (whether financial or otherwise).⁴⁷

As for the second reason, the Court noted that to successfully recover costs, parents would need ‘to prove that their children represent[ed] a net loss to them.’⁴⁸ It considered that this would be conduct ‘fundamentally at odds with the overarching duty that parents have to provide, care for, and love their children.’⁴⁹ The Court took the view that an award of upkeep costs would have to be set off against ‘the benefits brought by the child.’⁵⁰ This in turn, would ‘open the door for all manner of perverse incentives to enter into the parent–child relationship and taint its essential character.’⁵¹ Even in the absence of some form of set-off, parents would still have an interest in ‘emphasis[ing] the detriments brought about by the child’, an interest which would conflict with their fundamental duty to love their children.⁵²

B *Claim for Loss of Autonomy*

The Court also considered whether it should recognise a novel head of damage for ‘loss of autonomy’. In order to understand this aspect of the Court’s decision, it is first necessary to give a brief overview of the decision of the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust*.⁵³ In that case, the House dealt with the case of a physically disabled woman who had undergone a negligent sterilisation operation and had subsequently given birth to a healthy child. Declining an invitation to overrule *McFarlane*,⁵⁴ the House held that upkeep costs, even to the extent that they were exacerbated by the mother’s disability, were not recoverable. Instead, the House took the unprecedented step of recognising a ‘conventional award’ in the amount of £15,000, which would be awarded to recognise the legal wrong done to the mother. For Lord Bingham, the purpose of this award was to rectify the mother’s loss of ‘the opportunity to live her life in the way that she wished and

⁴⁷ Ibid 966 [94] (emphasis in original).

⁴⁸ Ibid 966 [95] (emphasis omitted).

⁴⁹ Ibid 967 [95].

⁵⁰ Ibid 968 [98].

⁵¹ Ibid 969 [99].

⁵² Ibid 969 [100] (emphasis omitted).

⁵³ [2004] 1 AC 309.

⁵⁴ Given that *McFarlane* (n 2) had been decided only four years earlier, it is not surprising that the House declined to overrule it.

planned'.⁵⁵ For Lord Nicholls, it recognised 'a legal wrong having a far-reaching effect on the lives of the parent and any family she may already have'.⁵⁶ Lord Millett was of the view that the award was 'for the denial of an important aspect of [the mother's] personal autonomy, viz the right to limit the size of [her] family'.⁵⁷ Lord Scott considered that the award was for the 'frustration of her expectation that her sterilisation operation would safeguard her against conception'.⁵⁸

After considering the competing arguments, the Court in *ACB* concluded that it would not recognise loss of autonomy 'as an actionable injury in its own right'.⁵⁹ The Court gave three reasons for this conclusion:

- 'the concept of "autonomy" is too nebulous and too contested a concept to ground a claim' (the 'conceptual objection');
- 'the notion of a loss of autonomy does not comport with the concept of damage in the tort of negligence' (the 'coherence objection'); and
- 'recognition of such a head of damage would undermine existing control mechanisms which keep recovery in the tort of negligence within sensible bounds' (the 'over-inclusiveness objection').⁶⁰

1 *Conceptual Objection*

The conceptual objection arose largely from the fact that '[a]utonomy is a slippery concept'.⁶¹ At a basic level, autonomy is 'the liberty to live one's life free from external interferences or control'.⁶² However, the Court noted that there are both 'thin' and 'thick' views of autonomy.⁶³ The 'thicker' version of autonomy is concerned with giving effect not just to the short-term desires of the decision-maker, but also to long-term desires. For example, a drug addict who is prevented from using drugs at a rehabilitation centre would certainly have his or her ability to make short-term decisions impaired. However, this restriction ultimately respects his or her long-term desires.

⁵⁵ *Rees* (n 53) 317 [8].

⁵⁶ *Ibid* 319 [17].

⁵⁷ *Ibid* 349 [123].

⁵⁸ *Ibid* 356 [148].

⁵⁹ *ACB* (n 1) 975 [115].

⁶⁰ *Ibid* 976 [115].

⁶¹ *Ibid* 976 [116].

⁶² *Ibid*.

⁶³ *Ibid* 976-7 [116]-[117].

The Court also noted that there are other conceptions of autonomy that reflect communitarian, as opposed to individualistic, traditions. These differences showed that ‘the very concept of “autonomy” itself is the subject of rigorous theoretical and conceptual disagreement as well as controversy.’⁶⁴ The Court concluded that ‘without a workable concept of autonomy, it is impossible to say that autonomy can, in and of itself, be the subject matter of legal protection.’⁶⁵

2 Coherence Objection

The more convincing objection that the Court noted was that, in tort at least, loss of autonomy would be difficult to reconcile with the requirement of damage ‘in terms of objective detriment’ that is usually required.⁶⁶ Many restrictions of autonomy, such as forcing someone to wear a seatbelt, would ‘technically constitute an interference with autonomy, *even if* it made the person *better off*.’⁶⁷ As the Court explained, ‘the notion of an action for “loss of autonomy” is more compatible with a rights-based vindicatory model of tort law.’⁶⁸ However, the Court considered that it would be a step too far to say that ‘the infringement of a “right” can be a ground — in and of itself — for the award of damages.’⁶⁹ We address this point further below.

3 Over-Inclusiveness Objection

The last argument recognised by the Court against awarding damages for loss of autonomy was, in essence, a floodgates argument. The Court expressed its concern that ‘any form of damage can, with some ingenuity, be reconceptualised in terms of a damage to autonomy.’⁷⁰ To recognise ‘loss of autonomy’ would ‘allow the requirement of actionable damage to be side-stepped almost at will.’⁷¹

⁶⁴ Ibid 977 [119].

⁶⁵ Ibid.

⁶⁶ Ibid 978 [120].

⁶⁷ Ibid (emphasis in original).

⁶⁸ Ibid 978 [121] (emphasis omitted).

⁶⁹ Ibid 979 [122].

⁷⁰ Ibid 979 [123].

⁷¹ Ibid 979 [124].

C Loss of Genetic Affinity

Although the Court denied the appellant's claim for upkeep costs and for loss of autonomy, it did ultimately recognise a novel head of damage: loss of genetic affinity. The Court held that the appellant had suffered a loss of 'affinity', in the sense of 'the chance to have a family structure which comport[ed] with her aspirations'.⁷² The appellant had desired to have a child of her own, with her husband, and the respondents' negligence denied her this. In holding that the damage to the appellant's interest in 'affinity' was a cognisable injury sounding in damages, the Court said:

In our judgment, the Appellant's interest in maintaining the integrity of her reproductive plans in this very specific sense — where she has made a conscious decision to have a child *with her Husband* to maintain an intergenerational genetic link and to preserve 'affinity' — is one which the law should recognise and protect.⁷³

The next difficult issue concerned the quantification of damages. The Court recognised three possibilities: (i) 'the "conventional award" in *Rees*'; (ii) 'an award for "necessary expenses in avoiding or coping with restrictions on autonomy"'; and (iii) 'a conventional sum for general damages for non-pecuniary loss tailored to the particular motivations ... for seeking IVF'.⁷⁴

Whilst recognising the benefits of 'consistency, uniformity, [and] expediency' that the *Rees* conventional award approach brings, the Court thought it would be 'contrary to the value of individual autonomy, which lies at the heart of the current award'.⁷⁵ The Court noted that the vice in the award of a uniform sum was that it presupposed that 'all parents are identically situated and would be impacted in the same way by the disruption of their reproductive plans'.⁷⁶ The 'creation of a uniform award' would only be appropriate where the harm in each case is the same and where there is a basis to fix the sum awarded.⁷⁷ As this was the first time the Court was making the award, no such comparison existed.

The Court also rejected the second approach, which would have assessed damages by reference to the expenses incurred in overcoming the restrict-

⁷² Ibid 982 [130].

⁷³ Ibid 984 [135] (emphasis in original).

⁷⁴ Ibid 985 [138].

⁷⁵ Ibid 986 [141].

⁷⁶ Ibid.

⁷⁷ Ibid 986 [142].

ions on autonomy as a result of the unplanned pregnancy. The Court explained that this approach came too close to the recovery for the obligations of parenthood, which, for the reasons above, the Court held to be inappropriate.⁷⁸

This left the third approach, an award of a conventional sum, tailored to the facts of each case.⁷⁹ In the absence of any comparable precedents, the Court chose to make the award 'as a percentage of the financial costs of raising Baby P'.⁸⁰ Although not entirely satisfactorily, the Court reasoned that, aside from these costs, 'there would be no other criterion or standard by which to assess the quantum of damages that ought to be awarded'.⁸¹ In the result, the Court awarded 30% of the upkeep costs sought, and remitted the case to the High Court of Singapore for the assessment of quantum.⁸²

IV COMMENT

ACB is a welcome decision bringing an insightful analysis to an area of law that is fraught with difficulty. It brings clarity to many of the arguments for and against recovery of upkeep costs, and has paved the way for further analysis and debate of the potential for claims for loss of autonomy and loss of genetic affinity. Below we consider the wider implications of several of the conclusions reached by the Court and, in particular, the significance for Australian courts considering these issues.

A Causation

A curious aspect of the decision in *ACB* is the Court of Appeal's conclusion on causation. The Court was presented with a claim that, at first blush, did not pass the 'but for' test. Applying that test, had the respondents not been negligent, the appellant would have incurred upkeep costs in any event. This was the reason the primary judge dismissed the claim. The Court of Appeal, however, focused on the fact that had the negligence not occurred, the upkeep costs would have been incurred in respect of a *different* child. It therefore reasoned that the *purpose* for which those upkeep costs were (or would have

⁷⁸ Ibid 987 [144].

⁷⁹ This can be contrasted with a conventional 'award', which does not vary from case to case.

⁸⁰ *ACB* (n 1) 989 [148] (emphasis omitted).

⁸¹ Ibid (emphasis omitted).

⁸² Ibid 990 [150]–[151].

been) incurred was different. Had the respondents not been negligent, and had the appellant given birth to a child that was genetically related to her and to her husband, she would still have incurred the upkeep costs. But the *purpose* of those costs would have been the purpose of raising a child genetically related to the appellant and her husband. As a result of the respondents' negligence, the appellant incurred these costs for a very different purpose: namely, the raising of a child that was not genetically related to her husband. The Court concluded that, like wrongful conception cases, 'but for the [r]espondents' negligence, Baby P would not have been born and the [a]ppellant would not [have] be[en] put to the expense of raising her'.⁸³

The Court's decision on causation was not essential to the result of the case, as the Court ultimately refused to take the step of awarding upkeep costs. Nonetheless, the Court's analysis on this point is important because it runs counter to the common law's orthodox approach to the 'but for' test. Traditionally, the common law has never had any regard to the 'purpose' of the loss suffered by claimants. A claimant in negligence will be denied damages if it can be established that the same or equivalent loss would have been suffered had the negligence not occurred. Take the following example:

A purchases a car from B, which is stated to be an original 1967 Chevrolet Impala. The car is not roadworthy, a fact known to A at the time of purchase. A intended to spend several thousand dollars to get the car approved as roadworthy. A later finds out that the car is not a 1967 Chevrolet Impala, but a 1971 Chevrolet Chevelle. In addition to claiming the difference in market value (the normal measure), A seeks to claim (as a form of consequential loss) the costs that will be incurred in making the car roadworthy, because, notwithstanding that these costs would have been incurred in any event, A never contemplated spending, and would not have been willing to spend, money on a car other than a 1967 Chevrolet Impala.

The analogy is not perfect,⁸⁴ because of course A can sell the car and purchase a 1967 Chevrolet Impala. But assuming that A was not willing to do this, or was precluded from doing so, would A's claim for the costs of making the car roadworthy succeed? As a matter of common sense, the answer must be no. It would be difficult to argue that A should be able to recover his or her costs, even if the *purpose* of applying them to the Chevelle is different to A's

⁸³ Ibid 943–4 [41].

⁸⁴ This analogy might be criticised, not least for comparing the birth of a child to the purchase of a car. That it is a claim in contract is of no moment, as the test for factual causation is uniform in tort and contract.

intended purpose of applying them to the Impala. Looking at A's net position in both scenarios, and putting to one side the difference in market value which could be recovered as part of the normal measure, he or she is no worse off as a result of B's breach.⁸⁵

Returning to the facts in *ACB*, it is difficult to see why the standard 'but for' test should not have been applied. Indeed, this was the result reached by the English Court of Appeal in *Salih v Enfield Health Authority*.⁸⁶ In that case, a child, Ali, was born with congenital rubella syndrome. Ali's parents sued the Enfield Health Authority for failing to diagnose and warn the parents that Ali might be affected by the syndrome. If the mother had been warned she would have terminated the pregnancy and sought to become pregnant with a healthy child. As a result of the difficulties involved with raising Ali, the plaintiffs decided not to have any further children.

The primary judge awarded the plaintiffs £68,000, including an amount capitalised at £8,400 for the costs of maintaining Ali. The authority appealed in relation to the latter head of damages, arguing that 'but for the authority's negligence, [the plaintiffs would] have incurred the basic cost of maintaining at least one further child in any event'.⁸⁷ The Court of Appeal agreed, finding that the effect of the plaintiffs' decision not to have further children was to avoid the loss they would otherwise have suffered. Butler-Sloss LJ (with whom Sir Christopher Slade agreed) refused to distinguish between the upkeep costs in respect of Ali and the hypothetical upkeep costs which would have been incurred in respect of the healthy child that the plaintiffs would have had. He noted that '[t]he contemplated cost in this case ... would be spent on an *identical purpose*, in pari materia with the costs of Ali and cannot be said to be merely collateral'.⁸⁸ Mann LJ went further, and explicitly analysed the case as one of causation:

Had the defendants not been negligent, Mrs Salih's pregnancy would have been terminated and she would have sought another pregnancy. It is probable she would again have become pregnant. That it is probable is shown by the occurrence of the unplanned pregnancy which was terminated. The loss represented by the capitalised cost of maintenance would thus probably have been incurred

⁸⁵ At least in respect of the costs of bringing the car to a roadworthy standard.

⁸⁶ [1991] 3 All ER 400.

⁸⁷ Ibid 400.

⁸⁸ Ibid 405 (emphasis added).

by the plaintiffs in any event. That being so the negligence is not causative of the loss.⁸⁹

The Court of Appeal in *ACB* was critical of *Salih* for ‘ignor[ing] the purpose for which the expenses were (and would have been) incurred’.⁹⁰ Irrespective of whether *Salih* is treated as an issue of causation or avoided loss, the supposed problem with the reasoning of the majority was that ‘it rests on a tenuous equivalence: that the costs that they would have incurred in raising another child are “identical [in] purpose [and] *in pari materia* with the costs of Ali”’.⁹¹ Such a claim could only be correct in the Court’s opinion, if regarded as one ‘made on behalf of the “family unit”, rather than as one made in respect of an individual’.⁹² But even if one accepts these arguments, it does not explain why the *purpose* for which a cost is incurred should make any difference.

There are two features of *ACB* which might distinguish it from ordinary cases of negligently caused loss, and justify the conclusion of the Court of Appeal. The first is that, unlike other cases of financial loss, the loss in *ACB* was the imposition on the appellant of the legal responsibility of raising the child, as a result of the creation of a parent–child relationship. The upkeep costs were incurred because of that legal responsibility, but did not themselves form the loss suffered by the appellant. As the Court explained, a claim for upkeep costs is for relief in respect of the ‘duty to provide material support for one’s child’, and requires recognition of the *obligations* of parenthood, as opposed to the strict financial consequences thereof, as actionable damage.⁹³ In *Cattanach*, McHugh and Gummow JJ stated that it is ‘the burden of the legal and moral responsibilities which arise by reason of the birth of the child that is in contention’.⁹⁴ The second distinguishing feature was that the appellant would have been willing to assume those obligations had she had a child with her husband’s sperm. However, as the Court in *ACB* held, it could not ‘be said that she or her [h]usband ever contemplated (let alone intended) having to raise a child that was not completely theirs’.⁹⁵

Keeping those two features in mind, the ‘but for’ test then operates in the following way. The appellant was unwillingly saddled with the legal

⁸⁹ *Ibid* 406.

⁹⁰ *ACB* (n 1) 941 [38] (emphasis omitted).

⁹¹ *Ibid* 943 [40], quoting *Salih* (n 86) 405.

⁹² *ACB* (n 1) 943 [40], quoting *McLelland* (n 27) 457.

⁹³ *ACB* (n 1) 963 [87]. Cf *Cattanach* (n 3), of which more is said below.

⁹⁴ *Cattanach* (n 3) 32 [68].

⁹⁵ *ACB* (n 1) 943 [41].

responsibility of raising a child which did not share genetic material with her husband. But for the respondents' negligence, the appellant would willingly have assumed the legal responsibility of raising a child which was related to both herself and her husband. On the facts as they transpired, the appellant suffered a loss, in the sense of an adverse consequence, by being unwillingly saddled with legal obligations. On the counterfactual required by the 'but for' test, she did not suffer a loss because these obligations were voluntarily assumed. In this way, once the appellant's loss is properly characterised, a straightforward application of the 'but for' test supports the Court of Appeal's conclusion that the appellant's loss was causally connected to the respondents' negligence.

B Arguments against the Recovery of Upkeep Costs

The decision is of great value for its explanation of the true nature of the arguments against claims for awards of upkeep costs. In particular, what *ACB* makes clear is that those who seek to deny upkeep costs are not making a *factual* claim, but a *normative* one.⁹⁶ This appears to be a response to the comments of the majority Justices of the High Court of Australia in *Cattanach v Melchior*. That case concerned a claim for upkeep costs by the parents of a healthy, but unintended, child following negligent advice by a doctor. A bare majority (McHugh, Gummow, Kirby and Callinan JJ, with Gleeson CJ, Hayne and Heydon JJ dissenting) overturned the Queensland Court of Appeal, finding that the claimants were entitled to damages for upkeep costs.

McHugh and Gummow JJ said that '[t]o suggest that the birth of a child is always a blessing, and that the benefits to be derived therefrom always outweigh the burdens, denies ... the widespread use of contraception by persons such as the [claimants].'⁹⁷ Their Honours also described the possibility of disruption to familial relations by the child becoming aware of the litigation as 'at best speculative.'⁹⁸ On this point, Callinan J said 'there are many harsher truths which children have to confront in growing up than the knowledge that they were not, at the moment of their conception, wanted.'⁹⁹ Kirby J described '[t]he notion that a child might be hurt emotionally' as a result of finding out that his or her parents had recovered damages for the failure of the defendant

⁹⁶ Ibid 960–1 [83].

⁹⁷ *Cattanach* (n 3) 36 [79].

⁹⁸ Ibid.

⁹⁹ Ibid 108 [301].

‘to prevent the child’s birth’ as ‘unconvincing.’¹⁰⁰ Similarly, his Honour rejected the argument that ‘in every case, and for all purposes, the birth of a child is a “blessing”,’ stating it was a ‘fiction’ which should not be acted upon in the absence of objective evidence.¹⁰¹

The judgment of the Court of Appeal in *ACB* recognises, as Kirby J did, that it is a dubious proposition to claim that the birth of a child is always a blessing.¹⁰² But as the Court explained, that misses the point. No reasonable person who argues against recovery of upkeep costs suggests that a child will always result in more benefits than burdens, or that children are always ‘blessings’, or that parents will enjoy parenthood. The claim is made at a normative level; it is a claim that an ‘award of upkeep costs would be antithetical to settled legal policy concerning the value [of] human life or the character of a parent–child relationship.’¹⁰³ The Court is to be commended for exposing the normative considerations which govern the question of whether or not recovery of upkeep costs should be allowed, and for addressing those considerations directly.

C *Loss of Autonomy*

The Court of Appeal’s ultimate decision *not* to recognise loss of autonomy as an actionable head of damage in its own right is also commendable. It is worth noting that the Court’s concerns have long been recognised by commentators as powerful arguments against compensating for loss of autonomy. For example, Edelman J, writing extra-judicially, has pointed out two key difficulties with recognising loss of autonomy.¹⁰⁴ First, there is ‘not yet any *generalised* principle of damages for loss of autonomy.’¹⁰⁵ If loss of autonomy were to be recognised, courts would need to explain why damages would be recoverable in some cases but not others. Secondly, and more importantly, loss of autonomy ‘is not necessarily a *loss* in the sense of an adverse consequence.’¹⁰⁶ Many interferences with a person’s autonomy will, in fact, leave the person better off. The Court of Appeal, as noted above, gave the example of

¹⁰⁰ *Ibid* 56 [145] (citations omitted).

¹⁰¹ *Ibid* 57 [148].

¹⁰² *ACB* (n 1) 960–1 [83].

¹⁰³ *Ibid* 961 [83].

¹⁰⁴ James Edelman, ‘Vindictory Damages’ in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 343, 362.

¹⁰⁵ *Ibid* (emphasis in original).

¹⁰⁶ *Ibid* (emphasis in original).

forcing someone to wear a seatbelt in a car.¹⁰⁷ Another example, given by Edelman J, is that of a person about to step into oncoming traffic. The Good Samaritan who pulls the person back will have restricted the person's autonomy, but it would be absurd to describe the 'loss of the autonomy to be run over by a car as a loss in the sense of being factually worse off'.¹⁰⁸ If the concern of an award of damages in tort is to compensate the victim of wrongdoing for *factual* losses, then it is clear that loss of autonomy by itself should not sound in damages — something more is required. Of course this does not deny that an award of damages in tort might be for another purpose, eg to *vindicate* a right that has been infringed.¹⁰⁹ But the proposition that vindicatory damages can be awarded in tort is, to say the least, controversial, and it has not found favour with courts,¹¹⁰ including the Court of Appeal in *ACB*.¹¹¹

D *Loss of Genetic Affinity*

At first glance, the Court of Appeal's recognition of loss of genetic affinity as a compensable head of damage appears to be a logical and principled way of compensating a deserving plaintiff, while avoiding the issues raised by the recovery of upkeep costs. However, on closer inspection, the supposed head of damage raises more questions than it answers.

As a starting point, it is difficult to see how the appellant can be said to have suffered a loss of genetic affinity, when she is the biological mother of Baby P. The appellant still shares the same amount of genetic material with Baby P that she would have, even in the absence of the respondents' negligence. It is the *husband* that has suffered a loss of genetic affinity, if indeed there is any. It is he and not the appellant who, as a result of the respondents' negligence, does not share any genetic material with Baby P.

The real loss suffered by the appellant (and this was how it is characterised by the Court of Appeal) was the loss of 'the chance to have a family structure

¹⁰⁷ *ACB* (n 1) 978 [120].

¹⁰⁸ Edelman (n 104) 362.

¹⁰⁹ *Ibid.*

¹¹⁰ See, eg, *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245. The position in Australia is unclear following the revocation of special leave in *Fernando by His Tutor Ley v Commonwealth*: Transcript of Proceedings, *Fernando by His Tutor Ley v Commonwealth* [2015] HCATrans 286.

¹¹¹ *ACB* (n 1) 978–9 [121]–[122].

which comport[ed] with her aspirations.¹¹² This raises two issues. First, how does the law assess which familial aspirations are worthy of legal protection? In *ACB*, the aspiration was the appellant's wish to have a child with her husband. Given the law's recognition and protection of marriage as an institution, it is hardly surprising that the Court was willing to protect that aspiration. On the other hand, would the aspiration of a woman to have a child with her *de facto* partner be any less worthy of protection? Indeed, to take an extreme example, one can well imagine a situation where a woman wished to undertake IVF with sperm from a donor of her choosing, but is negligently impregnated with sperm from a different donor. Is the woman's interest in having a child with a particular donor an interest worthy of legal protection? Clearly there is a need for line-drawing. Furthermore, even if *all* such aspirations are protected, how is the law to distinguish the *quantum* that is awarded to each of the plaintiffs in the above circumstances? The decision to award damages for loss of genetic affinity in *ACB* is, in many ways, merely the tip of the iceberg — the complete implications of that decision will only be revealed over time.

The second issue that arises from characterising the loss in this way, which it must be if it is to be understood as the *appellant's* loss of genetic affinity, is that it is very difficult to distinguish from an award for loss of autonomy. The 'interest' being protected by the Court is not the appellant's interest in sharing genetic material with her child, but the appellant's 'interest in maintaining the integrity of her reproductive plans.'¹¹³ In other words, the Court is protecting her ability to choose the person with whom she planned to have a child. That is indistinguishable from directly protecting the appellant's autonomy. But why should the appellant's interest in maintaining her reproductive plans be any more protected than the interest of parents maintaining their reproductive plans in 'wrongful birth' cases (ie the plan *not* to have further children)? If the former is worthy of protection, no reason of policy or principle precludes the latter from being protected. The Court did acknowledge this possibility in its judgment:

Of course, this is not to say that plaintiffs in wrongful conception and wrongful birth cases have not suffered a disruption to their reproductive plans — they clearly have. However, the types of harm which result from that disruption are qualitatively different from those raised in this case. We therefore reserve for

¹¹² *Ibid* 982 [130].

¹¹³ *Ibid* 984 [135].

another day the question of whether plaintiffs in those types of cases may bring a claim such as that which we are allowing here.¹¹⁴

The possibility of even bringing such a claim confirms what we have argued above: namely, that the award for loss of genetic affinity is, in reality, a wolf in sheep's clothing, disguising the ultimate purpose of the award, which is to protect the claimant's autonomy. Loss of genetic affinity, if it is truly a unique head of damage, must be confined to wrongful fertilisation cases.

E *Implications for Australia*

An interesting aspect of *ACB* and the recognition of loss of genetic affinity is its potential implication for Australian courts dealing with 'wrongful fertilisation' cases. In the aftermath of *Cattanach*, New South Wales, Queensland and South Australia swiftly passed legislation prohibiting awards of damages for 'costs associated with rearing or maintaining the child that the claimant has incurred or will incur in the future',¹¹⁵ 'costs ordinarily associated with rearing or maintaining a child',¹¹⁶ and 'costs associated with the child's care, upbringing, education and advancement in life'.¹¹⁷ The position in the other states and territories remains unaffected.

Each of these provisions, while inconsistent with any claim for the recovery of upkeep costs, would not extend to cover a claim for loss of genetic affinity. Indeed, the Queensland provisions apply only to claims following failed sterilisation procedures, contraceptive procedures or the giving of contraceptive advice to an individual. They would not apply at all (even to preclude upkeep costs) in wrongful fertilisation cases. Therefore, there is scope for Australian courts in those jurisdictions to consider, unrestrained by the statutory prohibitions, whether loss of genetic affinity ought to be recognised as a compensable head of damage. The same position applies in Victoria, Tasmania, Western Australia and the territories, where the common law still governs such claims. In these jurisdictions, however, courts must be mindful of the possibility that awarding damages for loss of genetic affinity might result in double recovery, particularly where, as in *ACB*, damages are measured by reference to the costs of upkeep.

¹¹⁴ *Ibid* 984 [136].

¹¹⁵ *Civil Liability Act 2002* (NSW) s 71(1)(a).

¹¹⁶ *Civil Liability Act 2003* (Qld) ss 49A(2), 49B(2).

¹¹⁷ *Civil Liability Act 1936* (SA) s 67(2).

V CONCLUSION

ACB v Thomson is a landmark case. Not only is it the first decision of the Court of Appeal of Singapore to consider the vexed question of upkeep costs, it is one of the few decisions worldwide to address the possibility of an award reflecting a claimant's loss of autonomy. In respect of the former issue, the Court's outcome accords with that of the House of Lords in *McFarlane*, but its reasoning goes further in exposing the normative justification for that position. The Court, commendably in our view, also refused to recognise loss of autonomy as an independent head of compensable damage. Nonetheless, and despite the importance of both of these issues, the *pièce de résistance* of the case is undoubtedly its recognition of loss of genetic affinity as a compensable head of damage. For the reasons given, we doubt whether loss of genetic affinity, as characterised by the Court, is anything more than loss of autonomy by another name. However, were a similar issue to arise in Australia, it would remain open for Australian courts to follow the decision in *ACB* and recognise loss of genetic affinity as an actionable head of damage. Whether they will take this approach remains to be seen.