



HIGH COURT OF AUSTRALIA

Public Information Officer

9 May 2006

ALEXIA HARRITON (BY HER TUTOR GEORGE HARRITON) v PAUL RICHARD
STEPHENS

KEEDEN WALLER (BY HIS TUTOR DEBORAH WALLER) v CHRISTOPHER JAMES AND
SYDNEY IVF PTY LIMITED

KEEDEN WALLER (BY HIS TUTOR DEBORAH WALLER) v BRIAN HOOLAHAN

Two severely disabled people who claim they should not have been born do not have a case for negligence against their mothers' doctors, the High Court of Australia held today.

Alexia Harriton's mother, Olga Harriton, contracted rubella early in her pregnancy. After suffering fever and a rash, she told her GP, Dr Max Stephens, the late father of Dr Paul Stephens, that she thought she was pregnant and also ill with rubella. She had a blood test and the pathology service reported that if there were no recent contact or rubella-like rash further contact with the virus was unlikely to produce congenital abnormalities. Dr Paul Stephens confirmed Mrs Harriton's pregnancy and ruled out rubella but did not prescribe a follow-up "IgM" blood test and did not advise that a pregnant woman who had had rubella in the first trimester had a very high risk of having a child with congenital abnormalities. Mrs Harriton says that, had she received proper advice, she would have terminated the pregnancy. Alexia, now 25, suffers from blindness, deafness, mental retardation and spasticity and requires constant care. She claimed damages for past and future medical and care costs, general damages for pain and suffering and loss of income.

Keeden Waller, now five, was born after his parents underwent IVF. His father, Lawrence, had an anti-thrombin 3 (AT3) deficiency which meant his blood had a propensity to clot for which he took medication. Dr James, the Wallers' infertility specialist, arranged for tests on Mr Waller but these did not cover the genetic basis for the AT3 deficiency or the likelihood of it being passed on. The IVF went ahead. Dr Hoolahan, an obstetrician, oversaw Mrs Waller's pregnancy but the tests he ordered did not relate to the AT3 deficiency and its possible consequences. After Keeden was born he was found to have a cerebral thrombosis. He has permanent brain damage, suffers from cerebral palsy, has uncontrolled seizures and requires constant care. Had the Wallers known the AT3 deficiency could be passed on to Keeden, they say they would have deferred IVF until methods were available to ensure AT3 deficiency was not passed on, used donor sperm, or, if told of the high risk that the foetus would have the AT3 deficiency, would have terminated the pregnancy.

In the New South Wales Supreme Court, Justice Timothy Studdert dismissed Alexia and Keeden's claims for damages, holding they had no cause of action. The Court of Appeal, by majority, dismissed each appeal. Alexia and Keeden then appealed to the High Court which, by a 6-1 majority, dismissed each appeal. To have a cause of action in negligence each needed to show damage had been suffered and a duty of care on the doctors to avoid that damage. No legally recognisable damage – loss, deprivation or detriment caused by an alleged breach of duty – could be shown. The Court held that comparing a life with non-existence for the purposes of proving actual damage is impossible as it could not be determined that the children's lives represented a loss, deprivation or detriment compared with non-existence. It also held that damages could not be assessed because in all the circumstances comparisons with able-bodied children or with a notional life without disabilities could not be made. The damage claimed by Alexia and Keeden is not amenable to being determined by a court by the application of established negligence principles. Consequently, their claims could not succeed.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*