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AN ANALYSIS OF GENETIC AFFINITY AS AN ACTIONABLE HEAD OF DAMAGES – *ACB V THOMSON MEDICAL PTE LTD*

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I. INTRODUCTION

In the recent case of *ACB v Thomson Medical Pte Ltd* [*ACB*][1], the Singapore Court of Appeal recognised a new head of damages for parents of children born out of medical negligence – that of "genetic affinity".[2] This article seeks to summarise the case for recognising genetic affinity as an actionable head of damages, and discuss some potential objections to this recognition.

II. BACKGROUND

A. *Facts*

The appellant underwent an in-vitro fertilisation ("IVF") procedure and delivered a daughter ("Baby P"). Baby P's skin colour was noticeably different from that of her parents. It was subsequently discovered that the appellant's ovum had been fertilised with sperm from an unknown third party, instead of sperm from her husband. The appellant brought a suit in the tort of negligence and for breach of contract, and sought damages for, *inter alia*, the full costs of raising the child ("upkeep costs").[3]

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[1] [2017] SGCA 20, [2017] 1 SLR 918.
[2] *Ibid* at [135].
[3] *Ibid* at [3].

B. *Decision on upkeep costs and loss of autonomy*

The Court of Appeal did not allow recovery of upkeep costs[4] because:

1. The obligation to maintain one's child is at the heart of parenthood. Parenthood is a relationship that is intrinsically incapable of valuation, and therefore its obligations cannot be a legally recognised head of damage.[5]
2. It would be inconsistent with the nature of the parent-child relationship; parents' personal interests as litigants would conflict with their duties as parents since they would be encouraged to show that their child is a "net loss" by exaggerating their infirmities and downplaying any benefits.[6] A loving parent would therefore receive less in damages than a parent willing to "disparage and reject [his or her] child".[7]

The court also rejected recovery for "loss of autonomy" because:

1. The concept of "autonomy" is nebulous;[8] some conceptions of autonomy only take into account an individual's current desires, some additionally take into account their long-term desires, and others consider the importance of social relations in accounting for "autonomy".[9]
2. Damages for loss of autonomy would be vindicatory, rather than compensatory; damages could be awarded even if the defendant's act made a plaintiff better off. This would be incoherent with the compensatory concept of damage in the tort of negligence.[10]
3. It would be over-inclusive, since any form of damage can "be reconceptualised in terms of a damage to autonomy".[11] This undermines "control mechanisms which keep recovery in the tort of negligence within sensible bounds".[12]

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[4] *Ibid* at [86].
[5] *Ibid* at [87]–[94].
[6] *Ibid* at [95].
[7] *Ibid* at [99].
[8] *Ibid* at [115].
[9] *Ibid* at [116]–[118].
[10] *Ibid* at [120]–[121].
[11] *Ibid* at [123].
[12] *Ibid* at [115].

However, the court was prepared to award damages for loss of "genetic affinity".[13] On the facts of *ACB*, the court quantified this loss as 30% of the full cost of raising Baby P.[14]

C. *"Genetic affinity"*

The court began from the premise that a person's desire to have a child of their own (with their spouse) is a basic human impulse.[15] In the "ordinary human experience", parents and children are related by blood and share physical traits.[16]

Such blood relations are often significant to parents for several reasons. Firstly, parents may want children who are the literal physical manifestation of their parental union.[17] Secondly, common traits may, for some, play a part in forging an emotional bond between parent and child.[18] Thirdly, shared ancestry and genetic continuity can be important to religious and cultural belonging[19] – for instance, there are often adverse social implications when a child has a different skin tone from their parents.[20] These interests can be collectively referred to as "genetic affinity".

The court was clear that it was not making a prescriptive definition of what a family should be or denigrating adoption.[21] However, since the vast majority of people are biologically related to their families, there is a widely shared social construction of what a family is. Despite the fact that participation in different socially constructed units (families that do not share physical traits) may be rewarding, it might not provide the experience of blood relations that many people seek and value.[22] People who undergo IVF treatment often do so at great difficulty and expense due to a conscious desire go through this "ordinary" experience of parenthood. In the court's view, being denied this experience due to others' negligence constituted a profound loss.[23]

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[13] *Ibid* at [135].
[14] *Ibid* at [150].
[15] *Ibid* at [127].
[16] *Ibid* at [128].
[17] Fred Norton, "Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages" (1999) 74 NYU L Rev 793 at 798.
[18] *Supra* note 1 at [128].
[19] *Ibid* at [128].
[20] *Ibid* at [131].
[21] *Ibid* at [129].
[22] *Ibid* at [129].
[23] *Ibid* at [129].

III. DISCUSSION ON GENETIC AFFINITY

This author submits that the court's decision on genetic affinity is to be welcomed for pinpointing the true loss suffered by the appellant, in the process recognising a head of loss unprecedented in any jurisdiction. This enabled the court to avoid an outcome which "most non-lawyers would doubtless find rather surprising"[24] without having to ignore the concerns raised here and elsewhere[25] regarding an award for upkeep costs or loss of autonomy. However, some objections have been raised[26] as regards the recognition of an interest in genetic affinity.[27] This section seeks to discuss these objections and highlight possible responses to them.

A. *Issues related to discrimination*

Firstly, it could be argued that an interest in "affinity" is inherently discriminatory. Although parents might possess an interest in having children with whom they share traits, the kind of traits they value often include things like physical appearance (such as skin colour). These are the very traits that modern society regards as illegitimate grounds for discrimination.[28]

This problem can be dealt with by drawing a distinction between discrimination in the public sphere and discrimination in private decisions about kinship and reproduction.[29] The former usually has no legitimate purpose, and is motivated either by hostility to people who possess certain traits, or mistakenly uses these traits as a proxy for other qualities. On the other hand, choices motivated by affinity tend to emphasise *symbolic* traits which are significant due to their role in personal and social identity. They are not motivated by hostility towards people who do or do not possess such traits; rather, they merely celebrate characteristics that reinforce a sense of group identity. Neither are they proxies for any quality apart from membership of that group.[30] Therefore,

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[24] Margaret Fordham, "An IVF Baby and a Catastrophic Error - Actions for Wrongful Conception and Wrongful Birth Revisited in Singapore" [2015] Sing JLS 232 at 240.

[25] *Supra* note 1 at [61]–[66].

[26] *Supra* note 17 at 810–818.

[27] Hairul Hakkim and Kevin Ho Hin Tat, "Genetic affinity as a novel remedy for wrongful fertilisation – a case of assessing the incalculable?" (9 April 2017), *Singapore Law Blog* (blog) online: <(http://www.singaporelawblog.sg/blog/article/182>.

[28] *Supra* note 17 at 810–811.

[29] *Ibid* at 810.

[30] *Ibid* at 811.

discrimination in decisions related to offspring appear not to be illegitimate in the way that discrimination is in the public sphere.

B. *The importance of genes*

A second argument questions the significance of genes in determining traits. Recognition of affinity as an actionable form of damage is premised on the idea that genes do, in fact, determine traits – however, some scientists have opined that the role of genes in determining traits is exaggerated and frequently misunderstood (this is essentially the age-old "nature vs nurture" debate).[31]

Nevertheless, even the strongest critics of genetic determinism concede that genes do play some role in determining personal identity, however small this may be. This is especially so for aesthetic traits, which are usually the ones emphasised by parents with an interest in affinity.[32]

It is also important to be clear that damages for affinity are not being awarded on the basis that one set of genes are somehow "less desirable" than another – rather, they are being awarded because the genes of the child are not similar to those of the parents.[33]

This is especially relevant in cases where a parent is having a child with a donated egg or sperm, rather than with one from their own spouse. In such cases, parents' genetic choices sometimes stem not from a desire to have a child in their own image through common *symbolic* traits (affinity interests), but from a desire to impart *functionally* desirable traits to their children (eugenic interests). For example, the practise of advertising for egg donors in prestigious universities suggests that some parents seek children of high intelligence.[34] If a parent seeks to impart in their children traits which they themselves lack, they are motivated by eugenic rather than affinity interests – their claim should not be allowed.

In any case, a claim for affinity seems unlikely to succeed in cases involving donated sperms or eggs, even where a mix-up affects symbolic rather than functional traits. In the Northern Ireland Court of Appeal decision of *A and B by C (their mother and next friend) v A – Health and Social Services Trust* ("*A and B*")[35], a mix-up in donated sperms caused the appellants (the children) to be born

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[31] *Ibid* at 812–813.
[32] *Ibid* at 813.
[33] *Ibid* at 814.
[34] *Ibid* at 814.
[35] [2011] NICA 28.

with a different skin colour from their parents.[36] The Court of Appeal in *ACB* agreed with the decision in *A and B* that a difference in skin colour could not constitute an actionable form of damage.[37] It should, however, be noted that this was a case where the children (rather than the parents) brought a suit; genetic affinity, as recognised in *ACB*, is a parental interest.[38] Also, the court in *ACB* felt that the decision in *A and B* failed to consider the true harm – the lack of physical resemblance to parents – suffered by the appellants.[39]

Additionally, it is worth noting that in addition to the mother, her husband (the legal father) could also be eligible for an award for genetic affinity, especially since (unlike the mother) he has no genetic connection with the child.[40]

C. *Quantification of damages*

Thirdly, there are difficulties with the way the Court of Appeal chose to quantify the damages in *ACB* by benchmarking them against upkeep costs. The first issue here is that this results in the same policy objections that led to the Court of Appeal rejecting an award for upkeep costs; parents would be incentivised to exaggerate detriments and downplay any benefits gained from their children.[41] The second issue is that benchmarking damages against upkeep costs is arguably incoherent with the nature of the damages being awarded; it is not clear how a percentage of a pecuniary award for upkeep costs takes into account the particular non-pecuniary harms suffered by the appellant due to loss of genetic affinity.[42]

Quantification of genetic affinity is undoubtedly difficult; the court accepted that its solution was not theoretically elegant, but stated that an elegant solution which attempted to quantify the appellant's actual losses would require it to engage in complex and controversial issues[43] (some of which could be racially sensitive[44]). One alternative, proposed by a case comment that raised the

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[36] *Supra* note 1 at [132].
[37] *Ibid* at [133].
[38] *Ibid* at [135].
[39] *Ibid* at [133]–[134].
[40] K.C. Vijayan, "New award for loss of genetic affinity a gain for IVF law", *The Straits Times* (11 April 2017), online: <http://www.straitstimes.com/opinion/new-award-for-loss-of-genetic-affinity-a-gain-for-ivf-law>.
[41] *Supra* note 27.
[42] *Ibid.*
[43] *Supra* note 1 at [149].
[44] *Supra* note 27.

above concerns, is to set a uniform award through parliamentary intervention, with the amount determined by consultation and studies.[45] Being uniform, such an award would not compensate a particular plaintiff for the particular harms suffered. However, the authors of the case comment argue that a loss of genetic affinity is "abstractly incalculable" and that value judgments should not be made that genetic affinity is more important to some parents than others.[46]

D. *Harm to children*

Additionally, allowing an action for genetic affinity may cause psychological harm to a child – the litigation involved may make them feel that their parents do not value them, and that they are less desirable than a child with the parents' own genes.[47] Similar arguments have been made against an award of upkeep costs both in Singapore[48] and in other jurisdictions.[49] The High Court of Australia in *Cattanach v Melchior*[50] dismissed this argument; it held that in addition to being speculative (the harm caused to the child is uncertain, and children may discover the truth of their birth regardless of any litigation or lack thereof), there are also "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".[51] The court in *ACB* seemed to agree with the High Court of Australia on this point, giving the concern little weight with regard to upkeep costs.[52]

IV. CONCLUSION

The facts of *ACB* were tragic, and the legal issues complex; the case was described by the Court of Appeal as "possibly one of the most difficult" to come before it.[53] As unfortunate as the circumstances were, it is probably not the last time that courts will have to deal with such issues,

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[45] *Ibid.*
[46] *Ibid.*
[47] *Supra* note 17 at 816–817.
[48] *ACB v Thomson Medical Pte Ltd*, [2015] SGHC 9, [2015] 2 SLR 218 at [16].
[49] *McFarlane and Another v Tayside Health Board*, [1999] UKHL 50, [2000] 2 AC 59 at 69D.
[50] (2003) 199 ALR 131.
[51] *Supra* note 1 at [77].
[52] *Ibid* at [83].
[53] *Ibid* at [210].

especially given the rising number of people relying on IVF to have children.[54] In light of this, the decision on genetic affinity is extremely significant as it provides a substantial remedy for parents in cases of wrongful fertilisation.

[54] Human Fertilisation & Embryology Authority, "Fertility treatment 2014: Trends and figures" (2016) at 49.