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Molloy v El Masri [2014] SADC 53 (4 April 2014)

Key Points

- This recent decision of the South Australian District Court provides a useful summary of the relevant case law on failure to diagnose and wrongful birth claims.
- It also deals with the South Australian equivalent of section 5PB of the Civil Liability Act 2002 (WA) - the standard of care for health professionals.

Background

The first plaintiff, Therese Molloy, and the second plaintiff, Ms Molloy's husband, commenced proceedings against the defendant, the first plaintiff's general practitioner, Dr El Masri, for damages and the costs of raising a child with Down Syndrome which resulted from the defendant's failure to diagnose the first plaintiff's pregnancy.

On 13 December 2005, the first plaintiff attended the defendant's practice, complaining of a number of symptoms including, amongst others, vaginal bleeding which had persisted for several months. The defendant provided the first plaintiff with some information about menopause and suggested she return for a further appointment if the symptoms persisted.

In April 2006, the first plaintiff undertook a home pregnancy test, which was returned positive. On 20 April 2006, the defendant confirmed the pregnancy and referred the first plaintiff to a gynaecologist. The first plaintiff, who was 48 years of age, said that she did not want to have another child. She was advised by her gynaecologist that she was 33 weeks pregnant and therefore had no option but to continue the pregnancy.

The plaintiffs' child, James, was born on 13 June 2006 with Down Syndrome.

The claim

The plaintiffs brought a claim for damages against the defendant in respect of the consequences of undergoing childbirth and the increased costs of raising a child with Down Syndrome. The first plaintiff alleged that, had she known she was pregnant back in December 2005, she would have had been able to test for Down Syndrome and exercised the option to terminate the pregnancy.

The plaintiffs alleged that the defendant's failure to diagnose the first plaintiff's pregnancy and failure to exercise due care and skill as a medical practitioner was the result of the defendant's failure to make enquiries, including into the history of the first plaintiff's vaginal bleeding; changes in the first plaintiff's periods, her pregnancy and birth history, pap smear test history, contraceptive use and weight changes in the preceding months. In particular, the defendant failed to recommend the first plaintiff take a pregnancy test to exclude it as a potential cause of the bleeding, failed to conduct an abdominal and vaginal examination, failed to provide advice as to the possibility of pregnancy and failed to arrange a follow up appointment with the first plaintiff.

In response, the defendant submitted that the first plaintiff only complained of her bleeding at the end of the 13 December consultation. She advised the first plaintiff that if her bleeding persisted,

that she ought to make an appointment in about a month's time. There was otherwise no clinical imperative to perform an abdominal or vaginal examination. It was possible that a vaginal examination would have failed to reveal an enlarged uterus as the first plaintiff was overweight. The defendant further submitted contributory negligence on the part of the first plaintiff in failing to advise the defendant that she had not had a menstrual period since August 2005, not providing a complete history of her condition and failing to undergo a home pregnancy test before April 2006.

The plaintiffs claimed damages for the following:

- pain, suffering and trauma associated with pregnancy and the after effects, including psychological trauma;
- medical expenses associated with the pregnancy, birth and post-pregnancy treatment as well as counselling and psychiatric assistance;
- increased costs of care for a child with Down Syndrome, including additional medical and therapeutic treatment on an indefinite basis;
- the first plaintiff's inability to return to full time work as a teacher; and
- the second plaintiff claimed for a loss of consortium (deprivation of the benefits of a family relationship).

The Law

His Honour, Judge Soulio observed that the High Court had conclusively determined that whilst a child has no claim in action for unintended birth, the parents of such a child were entitled to damages. He referred to Cattanach v Melchior (2003) 215 CLR 1, in which the High Court held that the parents of a child born following the provision of negligent advice and resulting in loss of a chance to have a lawful abortion, were entitled to the following categories of damages:

- pain and suffering, and loss of amenities of life, los of earnings, and various expenses;
- loss of consortium (by the father); and
- costs of raising and maintaining the child.

Referring to the High Court judgment in Rogers v Whitaker (1992) 175 CLR 479, his Honour readily accepted that the defendant owed the plaintiffs a duty of care to exercise reasonable skill and judgment in her professional advice and treatment, including in the examination and diagnosis of the first plaintiff.

In light of extensive expert testimony, his Honour concluded that, had the defendant obtained a proper history of the first plaintiff's condition, it would have prompted further investigation and examination, and ultimately a diagnosis of the pregnancy. The defendant would have made the diagnosis either at the examination on 13 December or at a follow up examination, which the defendant ought to have arranged. Even the defendant's expert witnesses conceded that whilst the risk of pregnancy was potentially one of a number of possibilities, it was not so remote that an examination for pregnancy could reasonably have been dispensed with. If time did not permit, a

follow up consultation should have been scheduled at the very most within a month's time. Had this occurred, the pregnancy would have been detected within time to enable the first plaintiff to undergo a therapeutic abortion.

The defendant said that she had advised the first plaintiff to return within a month's time if her symptoms persisted. However, his Honour held even this would have fallen below the requisite standard of care expected from the defendant. It was incumbent on the defendant to have arranged a follow up appointment with the first plaintiff. Ultimately, by the defendant's version of events, the defendant had left the first plaintiff to decide for herself whether she ought to return, depending on the persistence of the symptoms.

His Honour also considered section 41 of Civil Liability Act 1936 (SA), which provides that a person who provides professional services incurs no liability in negligence if it is established that he or she acted in a manner that was widely (although not necessarily universally) accepted by their peers as competent professional practice. His Honour held that, in light of his earlier findings as set out above, the defendant was not entitled to rely on this exclusion of liability.

Conclusion

The defendant accordingly was held to have breached her duty to the plaintiffs. Her breach of duty was found to have caused the plaintiffs' losses. His Honour rejected the defendant's assertion of contributory negligence. The plaintiffs were entitled to damages for losses sustained.

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