CES & Anor v Superclinics Australia Pty Limited & Ors

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Unreported, NSW Supreme Court. Newman J, 18 April 1994

A Judge of the NSW Supreme Court has found against the plaintiffs in an "unwanted pregnancy" case basing his decision on the principle that a plaintiff cannot claim damages for the loss of an opportunity to perform an illegal act. The illegal act in this case was said to be the abortion, the plaintiffs' claim for damages having been structured around the lost opportunity to discontinue the pregnancy.

The plaintiffs (" 'CES' and 'Anor' ") were the parents of a child who was born in Sydney on 30 August 1987. Over an eight week period between the end of November 1986 and the end of January 1987, CES consulted three different doctors from the Superclinic (operated by the first defendant, Superclinics Australia Pty Limited) on five separate visits to investigate whether the reason for her lack of menstrual periods was a pregnancy. CES gave evidence at the hearing that on each visit she had expressed her desire to proceed to have an abortion in the event that a pregnancy was diagnosed.

At the relevant time, CES was 21 years of age. She was in a relationship with the second plaintiff although the two did not live together. She was working in a small craft business which was owned by her mother and which generated a very small amount of income. She was also a part-time student of photography. She lived in rented accommodation with her sister.

The plaintiffs claimed that on each of the five consultations, each of the defendants had failed to diagnose the pregnancy and was therefore in breach of his duty of care and/or contract to perform medical treatment in a competent manner. It was claimed that each defendant doctor had either failed to undertake a blood test or to perform a physical examination. It was further claimed in regard to the defendant Superclinics that as the alleged employer of the defendant doctors, it was vicariously liable for the negligent acts of its employees. It was further claimed that the defendant Superclinics had negligently communicated as 'negative' a positive pregnancy result to CES.

Some two months later, CES consulted a different general practitioner who diagnosed a pregnancy of $19^1/_2$ weeks on the basis of a physical examination. This diagnosis was confirmed the same day by ultrasound. Medical evidence given to CES at the time was to the effect that an abortion could not have been safely performed.

Newman J found that there had been a breach of duty on the part of each defendant with the exception of the defendant whom CES consulted on the last occasion. The question of this defendant's culpability was left open. Also left open was the question of whether, in each case, the evidence established that there had been a breach of the contract which was alleged to have existed between the plaintiffs and each defendant.

The plaintiffs had by their action sought compensation not only for the costs associated with raising the child but for the shock and anxiety caused by an unwanted pregnancy, the pain of childbirth and the loss of earnings which had been facilitated by time away from the work force.

There have been a number of negligence actions in recent years brought against health providers as a result of failed sterilisation procedures leading to unplanned or unwanted pregnancies. These cases have highlighted the difficult policy consideration involved in quantifying the parent's claim. The more traditional view, that a parent's love for his/her healthy child, even though unplanned or unwanted, should be set off against the difficulties, inconvenience and financial disadvantages which naturally accompany parenthood, is exemplified by the decision of Jupp J in the English case Udale v Bloomsbury Area Health Authority [1983] 2 All ER 522. Later English cases have, in effect, suggested that "the birth of a healthy child is not always a blessing": see Peter Pain J in Thake v Maurice [1984] 2 All ER 513 at 527. Other English cases where this issue has been discussed are: Emeh v Kensington and Chelsea and Westminster Area Health Authority [1985] 3 All ER 1044 and Allan v Bloomsbury Health Authority [1993] 1 All ER 651.

The Australian courts have considered this issue on only two occasions: see the judgment of Mohr J at first instance in F v R (1982) 29 SASR 437 (overturned on appeal) and Pratt J in Dahl v Purnell, unreported, Queensland District Court, 24 September 1992 but it has yet to be considered by a superior court. In the present case, Newman J made no remarks at all concerning quantum of damages presumably due to his conclusions on the liability issue.

Ultimately, liability was determined in the defendants' favour on the question of illegality. It was raised in the context of CES' wish to discontinue the pregnancy and although not specifically pleaded by the defendants, was raised as a defence. It was said that it could not be shown that CES, at the relevant time, could have obtained an abortion that would have come within the law. This was the illegality. Newman J accepted this proposition and said that on the basis of the High Court decision in Gala v Preston (1991) 172 CLR 243, he could not award damages for the loss of an opportunity to perform an illegal act.

The law in NSW regarding abortion in NSW is essentially that which was set down in Levine J in R v Wald (1971) 3 DCR (NSW) 25. Known as the "Levine ruling", it has not been the subject of appellate scrutiny. It is there stated that for an abortion to be lawful, the doctor performing it must have an honest belief on reasonable grounds that the termination is necessary to preserve the woman from serious danger to her life, or physical or mental health. It is clear that economic or social grounds may be taken into account by the doctor when assessing the potential danger to a woman's physical or mental health: see Wald at 29.

In the present case, evidence was given by two doctors as to the stage of CES' mental health during the early stage of her pregnancy. One had diagnosed the pregnancy. The other, the Director of Family Planning in NSW, had been asked to give her opinion as to the lawfulness of an abortion in the circumstances of CES based on certain assumptions. Newman J found that the evidence did not satisfy the Levine ruling and, accordingly, that had the termination proceeded, it would have contravened the relevant provisions of the NSW Crimes Act.

The Newman decision is now the subject of an appeal to the NSW Supreme Court, Court of Appeal and can expect to be heard in the first half of 1996.

Total And Permanent Disablement Clauses In Insurance Policies: How Strictly do the Courts Interpret Them?

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In the recent case of Edwards v. The Hunter Valley Co Op Dairy Co Ltd (unreported decision of the NSW Supreme Court, delivered 22nd June 1992), McLelland J considered the interpretation of a "total and permanent disablement" clause in a life insurance policy. At its broadest, this term is defined in the policy so as to require the assured to be unable to engage in "any profession, business, or occupation whatsoever". This raises a question of interpretation - just how extensive must the assureds disablement be before he/she can claim under the policy? Duffy v. City Mutual General Insurance Ltd [1977] QdR 94 3, demonstrates the strict approach taken by the Courts in interpreting such a clause. In Duffy. the plaintiff was rendered a paraplegic as a result of personal injuries. He was clearly unable to continue his usual occupation as a carpenter. However, the Court held there was no "total and permanent disablement" as required by the insurance policy. Kneipp J noted at 96 that :

"despite the seriousness of [the plaintiff's] injuries, I do not think that I can assume that he is disabled from engaging in any profession, business or occupation. It is well known that paraplegics .. engage in permanent occupations."

Therefore, it is sufficient that the plaintiff can theoretically gain ANY type of employment based on his current condition.

It must be stressed that the "total and permanent disablement" clause in Duffy was defined very broadly, with no apparent limitations. However, many insurance policies do contain a limitation as to when alternative employment is available to the assured. These policies require that the alternative employment must be "reasonably open" to the assured based on his/her "education, training or experience".