

She thought that both cases showed significant physical similarities to that of Debra Greco.

Badgery-Parker J was satisfied on the balance of probabilities, that a causative link existed between Debra's condition and the vascular compromise resulting from the failed D & C. She was, therefore, entitled to damages in respect of the deformities inflicted upon her as a result of the negligence of the first and second defendants.

It necessarily followed that Mariella was entitled to damages for the unnecessary D & C procedure.

His Honour also found it established, on the balance of probabilities, that Joseph and Mariella sustained injury by way of mental or nervous shock consequent upon Debra's injury.

In relation to the case against the third defendant, Dr Peter Elliott (a past President of the Royal Australian College of Obstetricians and Gynaecologists), a case which essentially rested on findings as to credit, His Honour accepted the evidence of the plaintiffs.

The judgment of Badgery-Parker J is long (127 pages). Anyone interested can contact the writer on (02) 241 1466.

Passive Smoking Claim

Eugene Arocca, VIC

The media recently reported that an out of court settlement had been achieved in a passive smoking claim that was for a non respiratory condition. The background to the claim is as follows:

1. The plaintiff was a 45 year old nurse employed at a country hospital from approximately 1985.
2. During his time at the hospital it was alleged that the plaintiff was exposed to excessive amounts of cigarette smoke from other staff members and the patients. The area of the hospital within which the plaintiff worked was primarily concerned with the care of long term patients such as the elderly and those with mental disabilities.

3. The plaintiff first noticed symptoms with his eyes soon after he commenced work, however, by August 1991 his eyes were watering and he also suffered from a sore throat. A claim for workers' compensation benefits was lodged in September 1991 and accepted. Thereafter the plaintiff primarily claimed medical expenses although he did take the odd day off when he symptoms were at the worst.

4. The plaintiff instructed our office to issue proceedings at common law for his condition, which was diagnosed as conjunctivitis. There was also some evidence that he suffered a form of vascular insufficiency in his left eye and although this condition was claimed in the writ, there was little medical support for any relationship between that condition and passive smoking. The writ was issued in June 1994 and under Victorian law the plaintiff was only permitted to seek damages for pain and suffering.

5. It is the Victorian Government's policy to make a "final" offer in work related common law claims as soon as possible. In many cases the Government has made "nil" offers. In this particular case, the specialist who examined the plaintiff for the defendant confirmed that his conjunctivitis was at least aggravated by prolonged exposure to cigarette smoke. As the plaintiff had never smoked, the case against the hospital became stronger with this evidence. An offer of \$4000 plus costs was put as the "final" offer and the plaintiff accepted his offer on the basis that his condition was not serious and was only of a transient nature which might flare from time to time.

6. This settlement represents the first of its kind in that it is for an eye condition. To date all of the reported settlements have been for respiratory conditions such as lung cancer or asthma.

Despite the Tobacco Institute's commitment to continue investigating the "passive Smoking" issue with a view to exposing it as a sham (note the recent release of a study convened by Dr Julian Lee and funded by the institute), it is a fact that there are many medico legal experts who are prepared to accept the link between passive smoking and certain conditions. In this case, the specialist for the Defendant, Dr Paul Donoghue, referring to the plaintiff's condition conceded that the cigarette smoke "at least aggravates the problem, and even possibly has caused it originally".