DownUnderAllOver

A new regular column of developments around the country

Federal Developments

ABORTION AND NEGLIGENCE: THE SUPERCLINICS CASE

In the case of *CES v Superclinics* currently before the High Court, the plaintiff CES is suing the medical centre Superclinics, and a number of doctors, for alleged medical negligence in failing to diagnose her pregnancy until it was too late for a safe termination. As has been amply reported in the media, the case may, however, become a test case on abortion.

At first instance (*CES v Superclinics,* unreported, Newman J, Supreme Court of NSW, 18 April 1994), Newman J, without making any formal findings on the facts, and taking the woman's case at its highest (that is, assuming that she would have proved all the elements of her case) decided that she was not entitled to damages since her case depended on a lost opportunity to do something he determined was illegal, that is, having her pregnancy terminated. The Court of Appeal, by majority (Kirby A-CJ, Priestly JA; Meagher JA dissenting) reversed the decision, but could not agree on the appropriate approach to the assessment of damages (*CES v Superclinics (Aust) Pty Ltd* (1995) 38 NSWLR 47). According to Priestly JA, the expenses after the birth were not recoverable as the woman decided to keep the child instead of having it adopted. Kirby A-CJ (as he then was) would have allowed the costs of rearing the child but agreed with Priestley JA's approach for the purpose of providing guidance to the next trial judge. (As the trial judge had expressly not made any findings, the case had to go back to trial.) The medical centre and the doctors have appealed the decision, and the woman has cross-appealed on the issue of damages.

On 11 September 1996, on the first day of the hearing, the High Court granted leave to appear as amicus curiae ('friend of the court') to the Australian Catholic Health Care Association and the Australian Catholic Bishops Conference. Leave was granted by statutory majority (that is, Chief Justice Brennan cast the deciding vote) with three judges in favour and three judges against. Leave was granted notwithstanding the objection of the parties. It is also worth noting that Brennan CJ announced in Court that he knew some of the Bishops seeking intervention. Justice Kirby is not on the Bench of the High Court for the present appeal.

On the following day, the High Court granted leave to appear as amicus curiae to the Abortion Providers Federation of Australasia. The hearing was then suspended, and is set to resume on 11 November 1996. The Women's Electoral Lobby (WEL) has announced its intention to apply for leave to appear as amicus curiae when the hearing resumes.

The Catholic intervenors have expressly asked the High Court to find that *Davidson* and *Wald* (which have represented the law on abortion in Victoria and NSW for the last 25 years), were wrongly decided (*R v Davidson* [1969] VR 667 (the 'Menhennit' ruling); *R v Wald* (1971) 3 DCR (NSW) 25 (the 'Levine' ruling)). They have also asked the High Court to find that the unborn child has legal personality and legal rights, a proposition that courts in England and Australia have consistently rejected. (See, for example, *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276; *Attorney General ex rel Kerr v T* (1983) 57 ALJR 285.)

For an in-depth analysis of the case, see Reg Graycar and Jenny Morgan, '"Unnatural rejection of womanhood and motherhood": Pregnancy, Damages and the Law. A note on CES v Superclinics (Aust) Pty Ltd' (1996) 18 *SydLR* 323. This article, written before the Catholic intervenors were given leave to appear, argues strongly that the case is about medical negligence, *not abortion*; that the so-called 'defence of illegality' raised by the trial judge is doubtful and should not be applied in this case; and that damages should be recoverable for the costs of bringing up the child. The article is now available at http://www.law.usyd.edu.au/~slr/bhc.htm and a postscriptum will be added to this electronic version, addressing the new issues raised by the High Court allowing the amicus curiae application by the Catholic intervenors.

Lisa De Ferrari

Lisa De Ferrari is a researcher at the University of New South Wales.

Postscript: case settled

It was reported as we went to press that the *Superclinics* case has settled out of court. Lawyers for the two parties said they did not want their dispute clouded and costs increased in an abortion test case created by the Catholic bodies and abortion clinics that intervened in their case (the *Australian*, p.3, 10 October 1996).

DAMAGES FOR THE LOST EARNING CAPACITY OF THE CAREER ~~MOTHER~~ PARENT: WYNN'S CASE

Where a plaintiff has suffered serious personal injury, the central and often the largest component in damages awards is for loss of earning capacity. Although the High Court has stated that, in accident cases, damages are for the loss of earning *capacity* and not for the loss of earnings, in practice, women plaintiffs who are not in the paid workforce at the time of their injury because of 'time-out' for childbearing and rearing, are usually awarded only small sums to compensate them for their loss of the *ability* to exercise their earning capacity in the future. Even where women are in paid employment at the time of injury, the fact that women earn less than men in all categories of earnings, all components of earnings, all major occupational groupings, and the majority of benefit categories and allowances, makes it likely that they will receive lower awards. In addition, in the past, courts have reduced awards to women to take account of the contingency that they were likely to marry, and withdraw from the workforce to have and care for children.

The impact of childbearing and rearing on a woman's pre-accident earning capacity, and consequently on the amount of damages she should be awarded for the loss of that capacity, was addressed

by the High Court recently in *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485.

The facts

In 1986, Wynn, then aged 30, suffered a serious spinal injury in a car accident. At the time of the accident, Wynn had been employed with American Express for five years and had been very successful — she had been promoted to a managerial position the year before the accident. After the accident, she continued with American Express for a short while and was again promoted, this time to Director of Customer Services, the step below vice-president. She was responsible for three managers and 120 staff and was paid an annual salary package equivalent to $75,556 net.

Due to a worsening of her symptoms, she had to leave her employment in 1988. Between 1988 and the trial, she worked casually for American Express for a short period, and then worked part-time in the family business. She married her long-term boyfriend in 1990 and gave birth to a son in August 1991.

The trial judge

The trial judge found that but for Wynn's accident she would have continued with American Express to at least the age of 60, and was unlikely to have retired because of marriage or motherhood given the high position she had achieved. The trial judge discounted the sum calculated as her loss of earning capacity by 5% for contingencies on the basis that the possibility that she would need to take maternity leave was balanced by the possibility that she might have been further promoted.

The NSW Court of Appeal

The Court of Appeal decided that the allowance of only 5% for contingencies was 'far too low' as it presupposed Wynn would, but for the accident, have worked full-time at the 'same hectic pace until her retirement' when 'the physical, mental and emotional strain of working indefinitely such long hours and in such a demanding job necessarily involved risks to [her] health and the possibility of loss of job satisfaction and "burn out"'. The Court held there should be a discount of 28%, being 8% for two years absence from the workforce to have two children (a plan she and her husband had discussed before the accident), and the balance of 20% for the 'prospect that the plaintiff would be unable or unwilling to remain in her job which placed such heavy demands on her time, energy and health and the love and patience of her husband'. In the Court's opinion, the award must reflect the chance she would at some stage 'have chosen or been forced to accept a less demanding job' (at 61,742).

The Court of Appeal also reduced her damages to take into account the cost of domestic help for any children she had and for other household duties for the whole of her working life. As Graycar has noted, in an admirable display of gender neutrality, the Court attributed only half of this cost to the plaintiff, with the other half expected to be paid by her husband (Graycar, R., 'Damaged Awards: The Vicissitudes of Life as a Woman', (1995) 3 *Torts Law Journal* 160, 163).

The High Court

In the application for special leave McHugh J asked 'supposing the applicant had been a male, could you imagine a judge making a finding like this?' In its decision on the appeal, the High Court made clear that it would not countenance women being treated less favourably than similarly situated men.

As to the possibility of reduced participation in the workforce, the High Court said '. . . there is nothing in the evidence to suggest that the appellant was any less able than any other career oriented person, whether male or female, to successfully combine a demanding career and family responsibilities', and noted that the evidence, on the contrary, established that she was ambitious and intended to remain in paid work (at 494). The Court essentially agreed with the trial judge's balancing of the discount for the possibility of maternity leave with the prospect for further advancement.

As to the deduction of the cost of domestic help, the Court said there was 'simply no basis for treating domestic help as necessary for the realisation of earning capacity and, to the extent that the Court of Appeal thought otherwise, it was clearly wrong' (at 495). The Court took the view that childcare costs may be incurred by men or women, and will depend on the circumstances of the individual — essentially the cost of childcare is one of the various costs associated with having children and is properly characterised as essentially private or domestic in character; it is to be treated as any other item of expenditure for personal amenity and is not to be deducted when calculating loss of earning capacity.

Analysis

In argument before the Court, Brennan CJ is reported as having asked counsel why there should be any difference between the assessment of actual loss of earning capacity in the case of a single woman without children and a married woman with two children. The Chief Justice questioned why a *woman who chooses not to work* because she has domestic responsibilities and places the value of those responsibilities at the same level as her earning capacity should not be compensated on the same basis as *another woman* who would have elected to continue at work (at 487; emphasis added).

All that was really won by Ms Wynn was the right to have the 'motherhood discount' removed. The Court failed to take full advantage of the opportunity identified by Graycar to scrutinise a number of the gender-biased assumptions about women which lead damages assessments to be inappropriately depressed, including women's presumed lack of attachment to the paid workforce and the inability to combine careers and children. There have been some workforce changes designed to accommodate the family responsibilities of both women and men (Graycar, p.164) but the Court did not take these into account.

Further, the Court did not address, nor apparently even consider, the issue of why it was that no similar 'fatherhood factor' has ever been taken into account in assessing the damages of an injured male plaintiff in comparable circumstances.

Susanne Liden

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DEATH, DRUGS AND DISCRIMINATION: THE DIBBLE CASE

In a decision with interesting ramifications for anti-discrimination law generally, and the *Sex Discrimination Act 1984* (Cth) (the SDA) specifically, the Full Federal Court has recently decided that a complaint can continue after the death of a party to the complaint. In doing so the Court made some interesting observations about the purpose of sex discrimination legislation.

Background

Alyschia Dibble was a 50-year-old woman who was HIV positive. She was refused permission to join some clinical trials on the grounds that, because she was still menstruating, she was classified as being at risk of pregnancy. (She denied being at risk of pregnancy, having not engaged in sexual activity with men for many years and offered to undergo a tubal ligation.) Ms Dibble made a complaint to HREOC that she was being discriminated against on the grounds of 'sex, marital status or pregnancy or potential pregnancy' (s.22 of the SDA). The Sex Discrimination Commissioner attempted conciliation of the matter but this was unsuccessful.

Ms Dibble died before the Commission moved on from a conciliation to a hearing, however her executrix decided to pursue the complaint.

Consideration of the case

Sir Ronald Wilson, the Human Rights Commissioner, decided that the complaint could not continue after Ms Dibble's death. He said that, while a hearing into such a complaint could serve 'a useful public purpose', actions under the SDA are similar to personal actions. The common law rule with respect to personal actions is that they terminate on the death of the person suing.

A single Judge of the Federal Court affirmed Sir Ronald's view, but the Full Court found that complaints under anti-discrimination law are *not* similar to personal actions.

One of the common criticisms of Australia's anti-discrimination laws is precisely that they are based on individual complaints. The problem with such a system is that the onus is put on individuals, regardless of their resources, to make a complaint when faced with discriminatory behaviour. Furthermore, a system which relies on individuals to initiate complaints may mean there is an insufficient focus on the responsibility of society (as opposed to those specific individuals subject to discriminatory behaviour) to ensure that discriminatory behaviour is prevented. According to this argument the common law analogy which should be developed is the state-enforced criminal law rather than the privately initiated civil law.

The Full Court said that the Act's objectives — which include the 'recognition and acceptance within the community of the principle of the equality of men and women' (s.3(d)) — must be taken into account when interpreting the Act, so as to promote the hearing of test cases. The Court concluded that, despite the fact no *personal* remedy could be sought, the case did not cease to have significance.

Wilcox J also pointed out that Ms Dibble's valuable evidence would be lost if the Commission refused to hear the case. Even if the Commission subsequently instituted a more general enquiry it would not have this evidence before it — and the evidence of other witnesses and parties would have to be given again.

The approach of the Full Court is useful in articulating background principles of anti-discrimination law — especially given other Commonwealth anti-discrimination legislation (for example, race and disability) is silent on whether a complaint can continue after the death of a complainant. Furthermore, the outcome of the case after HREOC's hearings will have important consequences for women with a biological childbearing capacity who are currently barred from drug trials by drug companies and ethics committees.

Kirsty Magarey

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ACT

SURROGACY AGREEMENTS

Recently a baby was born in Canberra under a surrogacy agreement. The baby was the result of IVF — the gametes being those of a couple ('the genetic parents'). The birth mother and her husband did not contribute any gametes.

Soon afterwards the Chief Minister presented a Bill to the ACT Legislative Assembly that would provide that the Supreme Court may make an order (a 'parentage order') allowing genetic parents to obtain legal parentage of a child who has been born to another woman as the result of a non-commercial surrogacy agreement. The Bill has been referred to the ACT Community Law Reform Commission for consideration.

According to the Bill, a 'parentage order' can be made by the court if:

- it is satisfied that the making of the parentage order is in the best interests and welfare of the child;
- at least six weeks and no more than six months have elapsed since the birth (giving a 'cooling off' period);
- the child's home is with the genetic parents;
- the birth parents are in agreement freely, and with full understanding of what is involved;
- the genetic parents are domiciled in the ACT when both the application and the order is made;
- both the genetic and birth couple have received assessment and counselling from an independent service (unless the court is satisfied that it is not otherwise contrary to the welfare and interests of the child).

Once an order has been made, it is proposed that the Registrar will enter the details of a parentage order in the Parentage Register, and then re-register the birth of the child.

Currently, the law says the woman who gives birth to a child and her husband are the legal parents of that child, and that the commissioning parents have no legal claim on the child, despite the fact that they are the genetic parents. The *Substitute Parent Agreements Act 1994* prohibits commercial surrogacy agreements. It also prevents facilitation of pregnancy for the purpose of commercial surrogacy. However, it does not prohibit non-commercial agreements or the facilitation of pregnancy where there is a non-commercial agreement.

As a result, doctors at the IVF Clinic in John James Hospital have developed a surrogacy program which involves facilitating the pregnancy of the birth mother through IVF where the genetic material has been totally donated by another couple (the genetic parents).

For further information contact Meg Wallace, Legal Policy Division, ACT Attorney-General's Department, GPO Box 158, Canberra, ACT 2601. tel (06) 207 0536, fax (06) 207 0538. **MW**

NSW

REGULATING WATER

The Sydney Water Corporation (SWC) was created in 1995 out of the old Water Board and made subject to an elaborate regulatory framework to ensure it achieved set economic, social and environmental objectives. (See 'Sydney Water Inc' in (1995) 20 *Alt.LJ* 67).

In particular, an industry-specific Licence Regulator was created to oversight the Corporation, especially to ensure it complied with the terms of its

operating licence (granted for five years).

Recent events in NSW, following the release of the first audit report by the Licence Regulator, will provide a test of the framework created. Already various cracks have appeared, including alleged undermining of the process by SWC itself by publishing misleading advertisements about the conclusions reached by the Regulator.

One significant aspect of the audit report on SWC was the way it classified consumer complaints: simply put, it claimed only to have received 180 complaints, according to its definition of what constituted a complaint, compared to 'several thousand customer complaints', according to the Regulator, which observed:

> In terms of customer service and some other responsibilities the audit revealed a tendency by Sydney Water to apply narrow and strained definitions which prejudice the interests of citizens.

Complaints have been made to the ACCC, the NSW Ombudsman and the NSW Department of Fair Trading about a number of issues, and the NSW Nature Conservation Council has called for more public involvement in the annual licence review, especially of SWC's environmental performance.

The public profile of the Licence Regulator itself is also in need of some action as a public meeting called in September to discuss its report attracted one single solitary citizen.

Advertisements in the Sydney press in October have now called for public submissions on the 1996 audit by 22 November 1996. Meaningful accountability has a long hard road ahead of it. **PW**

Queensland

GOVERNMENT STOUSHES

The Borbidge Coalition Government is involved in a number of significant legal stoushes at present. In particular, the Government is at loggerheads with the Criminal Justice Commission (CJC). The politics can be hard to follow at times but the controversy appears to centre on cuts to the CJC budget and the forthcoming release of the Report of the Carruthers Inquiry into matters related to the Mundingburra bielection. It has been suggested that the Government is eager to discredit the CJC before the release of the Carruthers Report. CJC Chair, Frank Clair, is resisting strong Government calls for an immediate Public Inquiry into his recent allegations on high-level police involvement in drug trafficking. The Parliamentary Criminal Justice Committee is supporting Clair in this regard.

The Carruthers Inquiry may make findings likely to embarrass both sides of politics in Queensland. There is the possibility of adverse findings against:

- the Police Minister and former Premier, Russell Cooper, in relation to the Memorandum of Understanding signed by Police Union president, Cooper and then Opposition leader Borbidge; and
- Queensland Labor Party Secretary, Mike Kaiser, in relation to the Party's arrangements with the Queensland Sporting Shooters Association.

A range of concerns have been expressed in relation to the Government's proposed public service legislation which would see a wide range of public servants placed on employment contracts. The Government has also been strongly criticised in relation to moves to reduce access to workers compensation entitlements and common law negligence actions for work related injuries. The Litigation Reform Commission has been merged with the Law Reform Commission following the State budget. ● **JG**

South Australia

CASTRATION, CURFEWS AND CAPITAL PUNISHMENT

The State Parliament will be presented with a number of Private Members' Bills in its Spring session including Bills to reintroduce the death penalty for certain crimes, to allow for the chemical castration of repeat sex offenders and to establish a curfew for children. Bills to reform prostitution laws are also on the agenda. Media speculation is that many (if not all) of the Bills will lapse — there is a State election due by the end of next year and it is considered that the Government is concerned to avoid controversy. Nevertheless the Bills will no doubt invite much public discussion.

What is unlikely to receive the same level of debate is the recently released Planning Strategy for country South Australia. The Strategy is required to be produced under the *Development Act* and provides the broad objectives for the development of that part of the State which it covers. The document includes many points which relate to the rights of people in rural communities. While much of the Strategy is concerned with narrow economic matters, the Strategy also documents the implications of the changing demographic profile of rural South Australia — in particular a rapidly ageing population as older people retire to the country and the young drift to Adelaide. The Strategy states:

> The main issues facing families in rural areas suffering population decline are isolation, unemployment, low incomes and ageing. These, with increasing numbers of single parent pensioners, place demands on community services. These not only include those provided by the State Government, but support services from local government and the non-government sector. Such services are particularly important in helping in times of personal stress such as family breakdown, or health, education and welfare problems. [South Australia, Planning Strategy: Country South Australia, August 1996, p.27]

In the context of a State (and Federal) Government driven by the ideology of small government this point must provide some discomfort for our lawmakers. It is only one step away from asserting the right of country people to expect a certain level of state support in coping with their situation. Such radical thinking might spread to the cities!

Perhaps debating the three C's — chemical castration, curfews and capital punishment — is a lot easier than tackling the issues raised in the Strategy Plan. ● **BS**

Victoria

CRIMINAL SENTENCES

In the 'Government by the People' style that the Kennett Government does so well, the Attorney-General Jan Wade recently commissioned a survey in the Murdoch paper, the *Herald-Sun,* to garner the public's opinions about criminal sentencing. Defending the Government's decision, Ms Wade argued that the legal system has failed the community and that radical changes were necessary. However, a study released by the University of Melbourne may give the Government encouragement. The study indicated that Victorian judges have been imposing longer sentences in sexual offences cases — with rape sentences rising by almost 70% over three

years. Although Victoria's imprisonment rate is still relatively low, the increased gaol sentences have contributed to a 10% rise in Victoria's prison population. However, it is interesting to note that the indefinite sentences introduced by the Kennett Government in 1993 have been used in only two instances — each involving a sexual offences case.

It was in this climate that a 14-year-old boy became the youngest person to be convicted of murder in Victoria, as well as the youngest Victorian to be sent to prison. Sentenced by Justice Philip Cummins to 13 years imprisonment with an 8 year minimum, the boy was convicted of the murder of a taxi driver, and the armed robbery of another. Comments by Justice Cummins during the trial raised questions about the responsibility of the now renamed Department of Human Services for the actions of those in its care (the boy had been a ward of the state since aged 6) and the adequacy of government services in this area. The evidence of a parade of young witnesses in the trial brought to light what many in the welfare sector have known for a long time — that there are severe problems in the provision of child protection services, problems which are exacerbated by the lack of funding from the Victorian Government.

LACK OF CARE

Raising similar questions, the Government is facing litigation regarding its provision of care for the disadvantaged. So far the Kew Cottages and St Nicholas Parents Association have been successful in their attempts to keep litigation on foot which claims that the Government has failed to provide a proper standard of care to the residents of Kew Cottages and to observe other obligations under the *Intellectually Disabled Persons Services Act.* Following a Writ lodged last year, the Supreme Court rejected the State Government's application to have the action dismissed. Appealing to the Court of Appeal this year, the Government argued that the Courts do not have jurisdiction to query Government spending. The Court of Appeal dismissed the appeal, awarding costs against the Government.

POLICE COMPLAINTS

Eager to repair its tarnished reputation, the Victoria Police have initiated wide ranging changes to their system for investigating complaints against police, including a completely revamped Ethical Standards Department. The new program, entitled Project Guardian will involve ethics training, including honesty programs, and will encourage police to transfer to the ethics department as a step to further their careers. However, the Victorian Council for Civil Liberties has called for a separate and independent body to investigate police, suggesting that a judicial inquiry into the police force was inevitable — an inquiry which would have many interested onlookers!

UNFREE SPEECH

On a different note, Victoria has sought leave to bring an action in the High Court which will challenge the implied rights to freedom of speech found in the Constitution in the cases of *Theophanous* and *Stephens.* Victoria is arguing that these cases should be reopened and overturned as they are based on bad constitutional law. The case concerns the right to freedom of political expression, and was originally brought in the Victorian Courts by Laurie Levy, the well known animal rights activist. Opinions are divided as to the direction that the High Court will take, considering the changes on the bench since *Theophanous* and *Stephens* were handed down. The case will be an important indication of whether the High Court will proceed any further down the implied rights path which it paved under Sir Anthony Mason. Attention will be focused in particular on the decisions of Justice Kirby and Justice Gummow, the new additions to the bench, as it is considered unlikely that those involved in the previous decisions, such as Chief Justice Brennan, will alter their original opinions. ● **EC**

Western Australia

SEXUALITY DISCRIMINATION

The Western Australian Government recently rejected a Bill submitted by Opposition spokeswoman Yvonne Henderson to outlaw discrimination against those who identify or who are identified as lesbian, gay, bisexual or transgendered.

In 1984 the WA Commissioner for Equal Opportunity released an extensive report encouraging the State Government to extend human rights protections to those who face discrimination on the basis of their sexuality. Outlining the at times horrific discrimination faced by lesbians and gay men, the report concluded that to fail to do so would be both unjustified and inexcusable. Then Attorney-General, Cheryl Edwardes rejected the Report's findings and refused to amend the States equal opportunity laws. This time around, although not denying that discrimination does exist, Attorney-General Peter Foss rejected the Opposition's proposal, arguing that he did not want to be the Attorney-General remembered for encouraging 'the homosexual lifestyle'.

While the absurdity of Mr Foss' reasoning is all too evident, perhaps the best response to statements like the above, is offered by Chief Justice Nicholson of the Family Court who, speaking at a conference on Law and Sexuality recently held at Murdoch University School of Law, noted the following:

> To the degree that sexuality is a fluid human characteristic, it strikes me as absurd to imagine that the achievement of limited legal protections would induce someone to re-orient their sexuality. It seems to me that politicians take themselves far too seriously if they really believe that any legislation they pass will have any effect one way or another.

Western Australia and Tasmania remain the only two States without human rights protections for lesbians and gay men. Copies of the Chief Justice's paper, as well as the other papers presented at the conference, are available on *E-Law — Murdoch University Electronic Journal of Law*, which can be accessed via the internet at URL — HTTP://www.murdoch.edu.au/elaw ● **CK**

The States/Territories roundup was compiled by Elena Campbell, Jeff Giddings, Chris Kendall, Brian Simpson, Peter Wilmshurst and Meg Wallace.