Assessing damages in unwanted pregnancies

M v Dr McCormack & Anor, Simpson J, NSW Supreme Court, 24 February 1997

Catherine Henry, Sydney

A case run to trial before Justice Simpson in the NSW Supreme Court in February of this year has tested the law established in the NSW Supreme Court, Court of Appeal *CES v Superclinics*.

The plaintiff in the case before Justice Simpson was Laotian with minimal English language. The issue of language was relevant as there were significant communication issues which became relevant to the issues of liability in the trial. The plaintiff had had four children prior to the subject pregnancy and also had had three previous terminations of pregnancy. She sought advice from the first defendant, an obstetrician and gynaecologist, regarding contraceptive measures. The first defendant recommended a tubal ligation and the plaintiff accepted that advice. The tubal ligation was not successful and a pregnancy followed.

Following the tubal ligation, the plaintiff experienced normal menstrual bleeding for two consecutive months. She then had no period. The case against the first defendant was that the doctor had not given a proper warning concerning the risks of the procedure, namely, its known failure rate. The defendant said that he had warned the plaintiff and was ultimately on that factual issue believed by Justice Simpson.

The second defendant was the family GP. He had treated all members of the plaintiff's family including her husband, two of her four children and her mother for ten years. There was just one critical visit by the plaintiff. At this visit, the plaintiff alleged that she had told the GP that she was suffering the following symptoms: headaches, nausea and amenorrhoea. The second defendant knew that the plaintiff had had a tubal ligation because of the longstanding doctor/patient relationship. No attempt was made by the second defendant to investigate the symptoms, it being alleged by the plaintiff that proper medical practice dictated that a pregnancy test be performed.

"Would the same conclusion have been drawn... in the situation of a young, unmarried mother?"

Some three weeks later, the pregnancy was diagnosed. At this stage, the plaintiff was 12 weeks pregnant. Another obstetrician, the practitioner of the one who had performed the tubal ligation, advised the plaintiff, curiously, that it was too late to terminate the pregnancy. The plaintiff structured her claim in the same way as the plaintiff had in *CES v Superclinics* in that she had been denied the opportunity to terminate her unwanted pregnancy.

Clearly there was the potential for a rerun of *CES v Superclinics*.

It is clear from the judgment that the lawyers representing the defendant GP had not attempted to plead the illegality argument and although Justice Simpson noted in her judgment that she had not been asked to reserve any question concerning the legality of the hypothetical termination, it was raised during the evidence.

Thus, Dr Ken Atkinson, a Sydney based obstetrician and gynaecologist had given evidence for the plaintiff and in a report stated that "the termination of pregnancy could have been easily performed in view of *her known social and economic status*".

Interestingly enough and by way of contrast to the way in which the criteria for the assessment of lawfulness was dealt with at first instance in *CES v Superclinics*, Justice Simpson referred to some of the difficulties facing the plaintiff given the news of the pregnancy including her husband's recent diagnosis with pulmonary tuberculosis, her elderly mother (who was living with the plaintiff and her family) suffering from Parkinson's Disease and also the fact that the plaintiff was the sole breadwinner in the family. Her Honour noted:

"A further pregnancy would have been disastrous for her"

and also;

"I have no hesitation in accepting that she would have had the pregnancy terminated given the evidence of her present circumstances".

One might speculate whether the same conclusion would have been drawn had Justice Simpson been considering the situation of a young, unmarried mother such as the plaintiff in *CES v Superclinics*.

On the question of assessment of damages, Her Honour noted that the decision in *CES v Superclinics* precluded the award of damages to compensate the plaintiff for the costs incurred in keeping and rearing the child. The damages were, rather, to be limited to those which would compensate her for out-of-pocket expenses incurred in the birth of the child (a very nominal sum), for the economic loss attributable to the pregnancy and confinement, and for the physical pain and discomfort of the pregnancy, birth and aftermath, as well as the emotional and mental anguish suffered by the plaintiff on learning of her pregnancy. General damages were assessed at $50,000. ■

Catherine Henry, a partner with Craddock Murray & Neumann in Sydney, and is NSW President of APLA.

Thank you to Roland Everingham

Special thanks are due to Roland Everingham of Cashman & Partners in Sydney for his role as Managing Editor of *Plaintiff* since the inception of APLA Update in November 1993!

This role will be filled in 1998 by Bill Madden of Blessington Judd, Sydney.

Roland Everingham will continue as National Secretary of APLA. The National Council and APLA Secretariat express their appreciation to Roland for his guidance and hard work in the production of this publication over the last four years.