Raising the stakes in nervous shock claims

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On 14 August 1998 Mr Justice Dowd of the NSW Supreme Court awarded a record $200,00 in general damages in a nervous shock claim. In ***Marchlewski v Hunter Area Health Service*** *Roman and Lamphud Marchlewski sued for damages arising from the death of their daughter, Maria, at John Hunter Hospital, Newcastle.*

The facts

Maria was born on 29 September 1992. The delivery was complicated by shoulder dystocia. The delivery staff followed the hospital guidelines but were unable to deliver Maria for about 11 minutes after the shoulder dystocia emergency occurred. When help was finally summoned the head nurse arrived and cut a large episiotomy and a senior registrar performed the McRobert's manoeuvre, a technique not known to the delivery staff. Maria was delivered less that two minutes later.

After aggressive resuscitation Maria survived but was severely brain damaged. She lived for about four weeks before her condition deteriorated and she died.

A coronial inquest found that the hospital guidelines were outdated and, had the McRobert's manoeuvre been known and followed by the delivery staff, Maria would probably have been born alive and well. The guidelines were amended to include the McRobert's manoeuvre just days after Maria died.

The coroner found that the delivery staff should have summoned help much earlier than they did. Furthermore, there were many clinical indications of an increased risk of obstructed labour as a result of which a senior registrar or obstetrician ought to have been present at the delivery. Those indicators included the fact that the mother was small of stature, had previously delivered a large baby, was large for dates, had an elevated fundal height, polyhydramios and symptoms of pre-diabetes.

In the days following Maria's birth the doctors told the parents that the situation was hopeless. But Roman and Lamphud insisted that every available measure be taken to keep Maria alive.

Despite the doctors' dire predictions Maria was eventually weaned off ventilator support and was breathing room air two weeks after her birth. The parents believed that she was improving. But unbeknownst to them, and against their express wishes, the hospital staff made a decision that Maria was "not a candidate for re-ventilation" if her condition worsened.

On 27 October Maria's condition did worsen and the "no re-ventilation" plan was put into effect. She was suctioned and bagged but not re-intubated and ventilated. The expert evidence confirmed that without re-intubation the bagging could provoke aspiration pneumonia and death. The autopsy confirmed that Maria died from aspiration pneumonia.

Nervous shock

Just hours before the delivery Roman had left Lamphud at the hospital having been assured by the staff that all was well. They said that he would be called in time to be present at the birth. Roman took his other daughter, Delores, then three and a half years old, home to bed. Once there he received a call that there had been "problems".

Roman rushed back to the hospital to confront what the trial judge described as "the bloody aftermath of the delivery". The situation deteriorated from there. Roman accused the hospital staff of incompetence. The head of the Department defended the actions of the delivery staff saying - as is always said in shoulder dystocia emergencies - that the emergency could not be anticipated and the staff did everything possible.

Roman and Lamphud refused to accept the medical realities. They refused to give up hope. They were offended by the exhortations of the doctors, admitted at the trial, that they wanted Maria taken off life support because it was a waste of taxpayers' money.

Two weeks later when Maria was finally extubated and breathing on her own Roman and Lamphud felt they had further proof of the doctors' incompetence. Contrary to what they had been told would happen Maria was getting better. For Roman, a Polish Catholic, and Lamphud, a Thai Buddhist, Maria's apparent recovery was evidence of divine intervention. In the circumstances Maria's death came as a further shock. With it came the unshakeable belief that the hospital had a hand in her demise.

Exemplary and aggravated damages

The legal claim sought not only compensatory damages for nervous shock but also exemplary and/or aggravated damages.

At the trial the doctors defended the "not for re-ventilation" order saying that their duty was to Maria and they acted in her best interests. His Honour said that the hospital had a duty to the parents as well:

"The fact that the decision not to re-ventilate Maria was made in her best interests is irrelevant to the question of aggravated damages, which Roman and Lamphud claim. The hospital wilfully and deliberately disregarded the wishes of the parents with the knowledge that any non-ventilator resuscitation would probably be ineffective to preserve Maria's life...It meant that the damage which the defendant has admitted was cruelly exacerbated."

Judge Dowd noted that in the circumstances where the wishes of the parents conflicted with those of the doctors an application to the court might have been made to resolve the impasse.

Roman wanted a "complete investigation" into Maria's death. It was not explained to him, however, that a coronial inquest would necessarily involve an autop-

sy. An autopsy would have been out of the question for Lamphud since in her Buddhist faith this would have jeopardised Maria's reincarnation. When she later learned what had been done (she was told that Maria's heart weighed so much, her liver so much etc) she fainted.

Judge Dowd said that

"Although Newcastle lies in a multicultural area...the failure to outline in detail what an autopsy involves is probably something which sadly occurs quite frequently... "

"Multicultural Australians include people from diverse religions nations and cultures. Sensitivity should be shown to different burial rituals."

- Judge Dowd

The Decision

Despite the critical findings of the coronial inquest in 1994, and despite exhortations to do so throughout the civil proceedings, the hospital refused to admit liability for Maria's death until just before the trial began in February 1998. At issue was the quantum of damages for nervous shock and the exemplary and aggravated damages claims.

Prior to the *Marchlewski* case the highest award for general damages for nervous shock in Australia was $130,000. This was awarded in *Strelec v Nelson* (unreported, NSW Supreme Court 6 February 1996, Smart J), another case involving a neonatal death. The evidence in support of the psychiatric injury in that case paled in comparison to the over 35 reports from psychiatrists, psychologists, counsellors and general practitioners tendered in the *Marchlewski* case.

Judge Dowd was satisfied that the pathological grief reactions, PTSD, severe depression and changes of personality were so entrenched that neither Roman nor Lamphud was likely to be able to return to the workforce.

General damages were assessed at $180,000 for Roman and $200,000 for Lamphud.

His Honour was satisfied that the hospital's conduct regarding the not for re-ventilation order justified the claim for aggravated damages and accordingly he increased the general damages award by 20% for each parent.

Although the actions of the hosptal with respect to the "no re-ventilation" order were insensitive, His Honour did not consider that they warranted moral retribution or deterrence and so the claim for exemplary damages was dismissed.

The failure to adequately explain the details of an autopsy was found not to be the responsibility of the hospital since the autopsy was done pursuant to a coroner's order and not at the instigation of the hospital.

A nervous shock claim was also pursued on behalf of the Marchlewskis' daughter Delores. Although only three and a half at the time of her sister's death she suffered the effects of living in a household so rife with depression and anger. His Honour said of Delores:

"What is most sad however, is the fact that she has been denied the opportunity to continue with her life, due to her obsessive father and his not unreasonable desire to have the Hospital admit liability."

Despite the sympathies the nervous shock claim for Delores was dismissed on the basis that she did not suffer the kind of "shock" contemplated by the High Court in *Jaensch v Coffey*. An allowance for past and future counselling costs, however, was made on the basis that these would be costs incurred by her parents on her behalf. Judge Dowd added:

"The counselling is a function which would be substantially within the province of parents, but the parents have been deprived of the capacity to provide that counselling, notwithstanding that obligation to Delores."

At the time of the writing of this article the final quantification of damages was to be determined. Costs of fund management and sundry other matters will be added to the verdict. Total damages on the basis of the interim judgment exceed $850,000.

The Marchlewskis, through a Court appointed tutor, offered to settle their claim in July 1996 for $385,000 plus costs. The GIO offered $320,000 plus costs, expecting the plaintiffs' to compromise their claim further. They would not. Indemnity costs, including those of a 10 day trial, are likely to be ordered. In the end the GIO's refusal to increase its offer by $65,000 is likely to cost them a further $650,000.

Conclusion

The *Marchlewski* case sets a new benchmark for general damages in a nervous shock claim. These claims, particularly when they involve the death of a child, have been undervalued in Australia compared with, say, damages in defamation cases. The common law has traditionally put a higher value on the loss of a person's reputation than on the loss of a person's child. Perhaps this judgment should be seen as a statement in favour of "family values".

We sometimes hear of people from non-English speaking backgrounds complaining of inferior treatment in hopitals and other institutions. Studies by the NSW Department of Health confirm that complaints about the quality of service received by people of non-English speaking background are not without foundation. Those complaints were voiced loudly in this case. Indeed, Roman's dissatisfaction with Australia (he said that immigrants like he and his wife were treated as "fifth class citizens") formed a central part in the defence strategy to undermine the Marchlewskis' claims. That strategy misfired badly.

Judge Dowd's decision boldly asserts that Australia's multicultural status must be respected. Judicial comments about the need for cultural sensitivities should be welcomed in the present political climate.

As plaintiffs lawyers I believe we should dare to pursue exemplary and aggravated damages in appropriate cases. Most solicitors and barristers shrink from these claims saying that "it is not the done thing". This decision demonstrates that such claims can succeed.

Finally - and this is a sentiment with which I am sure many plaintiffs' lawyers are familiar - when I explained to the Marchlewskis that they had won a record verdict they told me that that was all very well, but they were still waiting on an apology from the hospital. ■

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