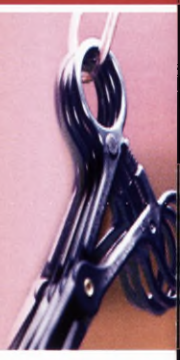
'Twins' lesbian mothers lose compo case[1]

G and M v Armellin



By David Hirsch

This trial captured the attention – and raised the ire – of the public for weeks when it ran in the Supreme Court of the ACT in September 2007. A lesbian couple sued their obstetrician, Dr Armellin, for damages for wrongful birth after two embryos rather than one were implanted during an IFV procedure leading to the birth of twins rather than the desired single child.

On 24 July, Justice Annabelle Bennett found that Dr Armellin was not negligent and the couple's claim was dismissed with costs.[2]

Setting aside the sensationalised circumstances, the case raised a number of points of interest to practitioners contemplating a wrongful birth claim and, in particular, a claim involving assisted conception treatment.[3]

THE FACTS

The facts were reasonably straightforward. The plaintiffs, Ms G and Ms M, had consulted Dr Armellin for the purposes of falling pregnant through artificial means. Dr Armellin referred them to a fertility clinic to which he was a consultant. It was accepted that the couple only ever wanted one baby. The fertility clinic arranged the procedure and provided the embryologist who was to implant the desired embryo at an operation performed by Dr Armellin.

The couple filled in the necessary forms at the fertility clinic. These included a direction to implant '*one to two embryos*'. Although they only wanted one baby, it is standard practice to offer to implant two embryos because of the strong probability that one might not survive. By implanting two embryos the chances of having at least one baby were increased; of course, so, too, was the likelihood of having twins should both embryos survive. The couple was told by the fertility clinic that a final decision on whether to implant one or two embryos could be made just before the procedure was performed.

The couple did not decide until the very last moment that they wanted only one embryo implanted. Dr Armellin was told this by Ms G in the operating theatre just before she was given a general anaesthetic and just before the embryologist walked in to perform the actual implantation. Dr Armellin believed, wrongly as it turned out, that the decision to implant only one embryo had also been conveyed to the fertility clinic and that the embryologist knew to implant only one embryo.

Moments after the implantation, Dr Armellin said to the embryologist, "*I understand she only wanted one embryo*", to which the embryologist responded, "*No, there were two. She signed for two.*" The judgment records Dr Armellin's reaction to this: "*Oh fuck.*"[4]

It was clear that a mistake had been made and, like so many mistakes in the team-oriented practice of modern medicine, this was a failure of communication. It seems obvious on reading the judgment that the problem was with the system used by the fertility clinic, which permitted an open-ended direction on the number of embryos to implant, coupled with advice that a decision could be made at the last minute on whether to implant one or two. The court found that Dr Armellin reasonably believed that the embryologist would have been informed of this decision.

The failure of the plaintiffs to sue the fertility clinic for deficiencies in its system of operation was decisive to the outcome. There may have been a tactical reason for not suing the clinic, but this is not apparent from the judgment.[5] The importance of having a sound theory of the case in a medical negligence claim cannot be overstated.

REASONING

In a careful and thorough decision, Justice Bennett considered most of the complex issues that arise in wrongful birth claims and reviewed the High Court's decision in *Cattanach v Melchior*.[6]

Dr Armellin said that this case was different to most wrongful birth cases, where the objective was not to become pregnant at all. He argued that no harm was suffered because the couple wanted to be pregnant and pregnancy occurred, albeit a multiple pregnancy. Her Honour rejected Dr Armellin's argument, saying that there was injury to the couple's legally protected interest in their '*reproductive future*' and there was the physical injury of an unwanted multiple pregnancy.[7]

Dr Armellin then sought to capitalise on the fact that while there was a 20 per cent chance of twins with two embryos, there was still a 0.1 per cent risk of twins even with implantation of a single embryo. Having accepted the risk of twins, Dr Armellin said, the couple could not complain that twins were born. Justice Bennett made short shrift of this. Citing *Chappel v Hart* and the discussion by Gaudron J about the consequences of negligently increasing the risk of a harm that eventually occurred,[8] her Honour said that the couple '*may have submitted to a risk of 0.1 per cent but did not submit to a risk of 20 per cent*'.[9] >>

Following a lengthy discussion of the case law, Justice Bennett also rejected the submission that the couple's decision not to try to abort one of the embryos, or not to adopt out one of the twins, amounted to a failure to mitigate their loss or to a break in the chain of causation.[10]

Justice Bennett accepted that the birth of twins negatively impacted on Ms G, who endured the pregnancy, and on the couple's relationship thereafter. General damages were assessed at $55,000.

On the costs of raising a second child, her Honour allowed private school costs but refused to allow the costs of university education after the age of 18. She said that while the parents should be '*applauded*' for intending to support their children at that stage of life, it was more than would be considered reasonable and that this should not be visited on Dr Armellin.[11]

In the end, the costs of raising the child, with a 15 per cent discount for vicissitudes, was assessed at $234,600.

CONCLUSION

This case represents an important addition to the case law in birth tort claims. It gives guidance on some legal and practical issues that is important to lawyers representing clients in such claims. As it should have, the case ignored the media spectacle of '*ungrateful lesbians with twins*' and focused on the rights of individuals to bring to account health professionals whose management is alleged to have been inadequate, and to seek lawful compensation for the consequences. ■

Notes: **1** This was the headline in the *Sydney Morning Herald*, 24 July 2008. http://news.smh.com.au/national/twins-lesbian-mothers-lose-compo-case-20080724-3kd0.html **2** *G and M v Armellin* [2008] ACTS 68 (24 July 2008). **3** The High Court permitted wrongful birth claims in *Cattanach v Melchior* (2003) 215 CLR 1 but claims for the economic consequences of the birth of normal, healthy child have since been outlawed in Qld, NSW and SA. **4** Judgment [32]. **5** One possible reason might be that it would have highlighted the couple's own contributory negligence in failing to inform the clinic of their last-minute decision to have only one embryo implanted. Had negligence been established, Justice Bennett would have assessed the plaintiffs' own negligence at 35% – the amount argued for by Dr Armellin. Interestingly, her Honour said, '*This represents, in my view, the minimum percentage that should apply.*' Judgment [125]. **6** (2003) 215 CLR 1. **7** Judgment [139]. **8** (1998) 195 CLR 232 [11]-[13]. **9** Judgment [140]. This same, spurious argument is sometimes raised in failed sterilisation cases. It is put that the plaintiff knew that there was some risk of failure, a failure occurred, and so they could not complain. But the risk of failure accepted was the risk inherent in a properly performed procedure, not a negligently performed one. **10** Judgment [160]-[195]. **11** Judgment [224]-[225].

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Costs issues in m

By Phillipa Alexander

Medical negligence proceedings give rise to a number of specific costing issues that practitioners may need to consider when acting for a plaintiff.

COUNSEL'S CANCELLATION FEES

Medical negligence matters may involve a lengthy hearing for which counsel may have been briefed at an early stage. Counsel's cost agreements often incorporate cancellation fees that are claimable if the matter settles prior to the trial, or if the estimated number of hearing days are not required. Cancellation fees are often disallowed or substantially reduced on a party:party assessment so that the client is left to fund the shortfall. In any settlement negotiations, it is essential to consider the amount of cancellation fees that may be claimable by counsel or expert witnesses and factor these fees into the negotiations, and into the advice to the client as to the net settlement amount s/he is likely to receive after party:party costs have been agreed or assessed.

It is not uncommon for clients to seek an assessment of their solicitor's costs and disbursements (including counsel's fees) some time after the matter has concluded.

A client, or third-party payer, has 12 months to apply for assessment of the solicitor's costs (which usually include counsel's fees as a disbursement) after:

(a) the solicitor's bill was given or the request for payment was made to the client or third-party payer; or
(b) the costs were paid if neither a bill was given nor a request was made.

In addition, the client, if not a 'sophisticated client' within the meaning of the Act, has the further right to apply to the Supreme Court for an assessment to be made out of time.

However, under s351 of the *Legal Profession Act* 2004 (NSW) (the Act), where counsel has been retained by a solicitor on behalf of a client (rather than directly by the client), the solicitor has only 60 days to apply for assessment after:

(a) counsel's bill was given or the request for payment was made; or
(b) the costs were paid if neither a bill was given nor a request was made.

This discrepancy in the time-limits to apply for assessment means that, once the 60-day period has expired, the solicitor is no longer entitled to challenge the fairness and reasonableness of counsel's fees. However, the client retains the right to challenge these fees as a disbursement in the solicitor's bill of costs for an additional 10 months or more. Should counsel's fees then be reduced on the