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M NO 334/83

IN THE HIGH COURT OF NEW ZEALAND

WELLINGTON REGISTRY

731

BETWEEN R THORNTON

Appellant

AND W MIDDLEMISS

Respondent

Hearing: 14 June 1984

Counsel: F Miller for Appellant
Ms S Taylor for Respondent

Judgment: 29 June 1984

JUDGMENT OF JEFFRIES J

This is an appeal from a paternity order made in the District Court at Lower Hutt on 29 June 1983. The child was born on 1978 and the application to the court was dated 27 June 1978. It came on for first hearing on 29 June 1983, which was five years after it was filed. It reached this court on apeal almost one year later.

It must be said immediately this delay is deplorable, but particularly from filing to the hearing. In this court counsel from the bar were not able to give adequate explanations for the delay and I requested a memorandum be filed on the issue. That has been done and

it was to be expected the causes of the delay are multiple, and it is not possible to distribute fairly blame on the information before the court. However it is inescapable that much lies with the solicitors on both sides. Because the court has reached the decision this application can now only be disposed of adequately by way of rehearing the delay up to this point is all the more regrettable.

As stated in the previous paragraph the court orders a rehearing of the original application and following the usual course only sufficient will be said in this judgment to justify that course and unnecessary comment (some comment must be made) on the evidence will as far as possible be avoided so as to leave the court rehearing the application its full discretion.

A complainant woman who formally applies to the court for a paternity order must present to the court concrete evidence to support her application. Such evidence necessarily calls for an account of sexual relations, and if the application is contested, as much information and detail to support her allegation as is available and required by the facts. The evidence of sexual relations ought not be attenuated by the use of elegant variations such as "relationships" and "affairs", however useful those, and similar words, may be elsewhere. It would be quite inappropriate for the court to say more other than to emphasise the necessity for legal advisers and courts to face squarely issues that arise in such applications without demur. A declaration of paternity contained in an order of the court can have

far reaching consequences in human relationships, and the significance of the result should not be neglected. It is important judicial work.

The difficulties with this case begin with the evidence of the complainant herself. Her evidence in chief is contained in barely three pages of typed record. She does state that sexual intercourse took place on 1977 as a result of which she became pregnant with the child born on 1978. There is no other evidence from her which might support that date of conception. It must be recalled that complainant's evidence is briefed and presented on the understanding this was a fully contested application with a denial of paternity. In her own evidence she said she had had sexual intercourse with appellant (respondent) on the first night she went home with him, about a year prior to conception date. She frankly admitted about the relationship it "was purely sexual". Her evidence generally was of meeting with him occasionally, the meetings seemingly unplanned, which not infrequently occurred over the year, and which meetings ended in sexual intercourse. She said she had not seen him for 2 1/2 months prior to 1977. That evidence must be weighed against her other evidence about the year in which she had been associating with the defendant:

> "During that time I did not have any other kind of association with another man or men. I did not have sexual intercourse with any other man or men."

Through the complainant a report purportedly emanating from the New Zealand Blood Transfusion Service

of Auckland dated 16 April 1981 was produced and admitted into evidence over the objection of appellant's counsel. Little evidence was led from complainant on how this report came about excepting that the tests were done at the request of appellant.

I now reproduce the entire cross examination by appellant's counsel in the court below, but who did not appear in this court:-

> "In relation to these maternity expenses, you don't have any receipts for any of those, do you ... No.
>
> Your baby was born five years ago ... Yes."

The court then asked a few questions unrelated to the issue of paternity.

I wish to say very little of the complainant's corroborative witnesses's evidence other than it contributed to the overall unsatisfactory state of this case. It was before the court in the form of a deposition dated 25 July 1979 which was nearly four years prior to the hearing in the lower court. It had been taken in Tokoroa and there had been no appearance on behalf of respondent (appellant) notwithstanding his solicitors had been served with notice of the hearing. After giving an account of opportunity for sexual intercourse on the night of her deposition finished with this statement:-

> "To the best of my knowledge no one else apart from Mr Thornton stayed at the flat or slept with Miss Middlemiss when her child was conceived."

At the very least that is an ambiguous statement which should have been clarified. In fact on the document itself there is no record of any appearances on behalf of the parties.

Appellant did not attend the hearing in the lower court, and needless to say there was no evidence from him, or on his behalf. It was hardly to be expected a legal argument, no matter how skilful, could achieve for a respondent in a paternity case a satisfactory result when no challenge at all had been mounted to confront complainant's evidence.

About the judgment, because there is to be a rehearing, I say even less. I simply record the Judge in the court below said he believed the complainant, accepted the other witnesses's evidence as amounting to corroboration and made orders. He did not mention the report of the blood tests.

Mr Miller, who appeared for appellant in this court but did not in the court below, now seeks to attack the decision by way of an extensive legal argument mobilised around three main points, namely, identity of appellant as the father of the child, inadmissibility of report on blood tests and inadequacy of the alleged corroborative evidence.

I have already been critical of the manner in which this application was dealt with both on the grounds of inexcusable delay, and the incompetent manner it was conducted in the lower court. However, the comment cannot be avoided that the major share of the responsibility for the unsatisfactory conduct of the case in the lower court must rest with solicitor for appellant. She had been engaged to represent the respondent there and failed to challenge by a single question in cross examination complainant's sworn evidence on paternity. The very best appellant could hope for in such circumstances is a rehearing. That has been granted because the overriding function of the court system is to endeavour to do justice between litigants if at all possible. I might add if there had not been many unsatisfactory features in the complainant's own case, apart altogether from the conduct of the defence, a rehearing for appellant would not have been possible.

This court has not overlooked the arguments about admission of a report on blood tests and what amounts in law to corroboration but because of the court's order those issues are left to be dealt with at the rehearing.

The orders made in the lower court are vacated and the application is remitted there for rehearing and I direct that it be given an urgent fixture.

Solicitors for Appellant: Chapman Tripp

Solicitors for Respondent Castle Pope