



InsuranceCaseNote

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G and M v Sydney Robert Armellin

The Australian Capital Territory Supreme Court recently handed down the decision in *G and M v Sydney Robert Armellin* [2008] ACTSC 68. The Court found that Dr Armellin was not negligent when he inserted two embryos into Ms G following an IVF procedure in 2003 contrary to her wishes. This is part of a growing trend of cases in Australia where courts are called upon to consider the concept of "wrongful life" claims, as distinguished from "wrongful birth" claims.

Facts

In 2002 Ms G and her partner Ms M, approached Dr Armellin seeking his assistance as a specialist obstetrician gynaecologist, to facilitate their wish to have a child either by artificial insemination (AI) or by IVF. Following two unsuccessful attempts at AI, Ms G consented to undergoing IVF.

Prior to undergoing IVF, Dr Armellin explained the risk of multiple pregnancies and noted that the chance of becoming pregnant with twins varied depending on the number of successful embryos implanted in the uterus. In this regard, if one embryo was implanted, there is a 0.7% chance of twins, however, with two embryos, the risk increases to 20%.

During the lead up to the procedure Ms G, in accordance

with the accepted practice, simply endorsed a consent form provided by the Fertility Centre for the procedure which read "Embryo transfer of one or two embryos." Until the day of the procedure Ms G's instructions, insofar as the Fertility Centre and Dr Armellin were concerned, were no more precise than this.

On 12 November 2003, the day of the procedure, Dr Armellin had a conversation with Ms G while in the operating theatre and asked "are we going to implant two?". Ms G responded "no, only one." Dr Armellin advised that there was still a chance that one embryo could produce two children. Following Ms G being sedated, Dr Armellin called the embryologist from the Fertility Centre into the theatre to insert the embryo. Following insertion by the embryologist, the embryologist informed Dr Armellin that two had been inserted.

On 20 July 2004, Ms G gave birth to healthy twins.

The claim

A claim was made against Dr Armellin alleging negligence which resulted in the birth of two children contrary to the wishes of Ms G. Ms G and Ms M sought damages for the additional pain and anxiety resulting from the birth of an additional child, out of pocket expense, economic loss and for the

cost of raising an additional child.

The plaintiffs alleged that Dr Armellin breached his duty by:

- (a) Failing to comply with Ms G's direction after she told him to implant only one embryo
- (b) Failing to communicate with the embryologist that only one embryo was required for transfer; and
- (c) Knowing that Ms G was under sedation, failing to make sure that only one embryo was transferred.

In establishing whether Dr Armellin breached his duty owed to Ms G, the Court focussed on the consultation process in the lead up to the IVF procedure which involved communications between Ms G, Dr Armellin and the Fertility Centre. Relevantly, the nomination by Ms G as to embryo transfer of one or two embryos was made to the Fertility Centre and they were to be contacted in the event that Ms G changed her mind. The Court determined that the conversation that Ms G had with Dr Armellin immediately prior to the procedure was not one in which it would be evident that the instructions Ms G was providing were inconsistent with her previous instructions to the Fertility Centre. On that basis, the court found that Dr Armellin did not breach his duty of care to the plaintiff.

It was also found that in any event, as Ms G failed to advise the Fertility Centre nurse or the embryologist of her intent to have only one embryo transferred, despite having a reasonable opportunity to do so, she contributed to her own loss by 35%.

Damage

Despite finding Dr Armellin was not negligent, the court nevertheless went on to consider damage.

Dr Armellin submitted that the assessment of damages in the case of *Harriton v Stephens* (2006) 226 CLR 52 should apply, ie that there was no damage. Justice Bennett found difficulty with this submission given that *Harriton* was a wrongful life case, not a wrongful birth case. A wrongful life case is brought by a disabled child when his or her disabilities resulted from a doctor's negligence. The High Court held in *Harriton* that wrongful life cases are unable to be compensated. A wrongful birth case, however, is where the parents commence proceedings claiming the cost of rearing the child, whether healthy or disabled. The High Court in *Cattanach v Melchior* (2003) 215 CLR 1 allowed an amount for this category of case. Given the circumstances surrounding this case, Justice

Bennett determined this to be a wrongful birth case, which is compensable.

General damages were allowed for the foreseeable consequences of the transfer of two embryos which included a multiple pregnancy, the carrying of the extra foetus and the exacerbation of the symptoms of pregnancy. Ms G also experienced depression and had complications during birth, something which is found more commonly with the birth of twins. For the additional emotional stress and pain from the second birth, Ms was awarded \$55,000 for general damages.

Loss flowing from expenses in raising the child were calculated on a "moderate but adequate" living standard. An allowance was made for housing, additional energy costs, clothing, household goods and services and childcare. The cost of three years' tertiary education was not awarded however, private schooling was. The amount decided as being appropriate for raising a child until the age of 18 was \$234,600. An allowance was also made for economic loss and out of pocket expenses.

What the judgment will mean for future cases

The court's decision has broadened the scope for parents claiming wrongful birth of a child to include situations where the parents actually wanted a child. Previously, as in *Cattanach*, the parents in that case undertook a procedure to prevent them having future children. The procedure was unsuccessful and a child was born. It is clear that in Australia, and many other jurisdictions, the courts are still grappling with the concept that the birth of a child is compensable, putting doubt on the sanctity of life argument. It will be interesting to see what further circumstances arise in the future which may challenge the distinction between the two claims and how the courts determine damages in such cases.

**Gavin Creighton
Partner**

T: 02 8281 4423
E: gwc@cbp.com.au

**Debbie Kaminskas
Solicitor**

T: 02 8281 4443
E: dlk@cbp.com.au