the police would be summoned', Atlis's injury would not have occurred. However, notwithstanding this, no breach was found. As the men had been badly behaved only for some minutes, Youngman had to make an immediate judgement in circumstances not admitting of an obvious answer. Hence Ipp JA[8] concluded that while

> '... *Youngman may have made an error of judgement in not telling the men to go and that he would call the police immediately ... I do not think that that amounted to negligence. In my view, a finding to that effect would be an impermissible finding of negligence by hindsight.*'

While reaching similar findings to the majority in relation to duty of care and causation, Mason P (dissenting)[9] would have disallowed the appeal on the basis of breach in failing to take steps to remove the men from the premises. Given Youngman's capacity to require the men to leave, and to support this request by summoning the police, his Honour opined that such action would have been likely to prevent patrons from taking their own action; and either influence the two men to depart or act non-violently.

CONCLUSION

This decision confirms that negligence requires a failure to conform to a 'legal obligation'. Not every mistake by a defendant will sound in liability. The central criterion remains reasonableness.[10] ■

Notes: **1** *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 263-4. **2** *Ibid,* 292 (Hayne, J). **3** See, for example, *Cole v South Tweed Heads Rugby League Football Club Limited* (2004) 207 ALR 52, 60, 72. **4** See, for example, *Chordas v Bryant* (1989) 91 ALR 149; *Crown Limited v Hudson* [2002] VSCA 28 where a duty of care to protect entrants from the criminal conduct of others has previously been found. **5** *Ibid* [12] (Beazley JA), [33-40] (Ipp JA). **6** *Ibid* [41-65] (Ipp JA). **7** *Ibid* [31], [46], [51] referring to statements made by Phegan DCJ, DC 2428/02. **8** *Ibid* [65] (Beazley JA concurring). **9** *Ibid* [2-10]. **10** See, for example, *ibid* [40], [62]; *Tame v New South Wales* (2002) 211 CLR 317, 330 (Gleeson CJ).

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General damages for 'wrongful birth'

Brown V Dr Thoo (Unreported)

By Anna Walsh

The case of *Brown v Dr Thoo* was recently decided in the NSW District Court by Sorby DCJ. This was a 'wrongful birth' medical negligence case arising from the negligent administration by the defendant of the contraceptive device 'Implanon' into the plaintiff, leading to the birth of the plaintiff's fifth child.

The plaintiff was successful. The case was novel because it was the first time that the court had been asked to decide the appropriate method of calculating the cost of raising a child to age 18 years. The court was also required to fix non-economic loss for pregnancy and childbirth as a percentage of a most extreme case, pursuant to Part 2 Division 3 of the *Civil Liability Act* 2002.

Unfortunately, damages for the costs of raising a child born as a result of negligence are no longer allowable in NSW under ss70 and 71 of the *Civil Liability Amendment Act* 2003.

THE FACTS

Following the birth of the plaintiff's fourth child in late 2001, the plaintiff decided to have the long-acting contraceptive device, Implanon, implanted into her arm. The plaintiff obtained the appropriate prescription from her obstetrician and made an appointment with her GP for insertion.

The defendant purported to insert the rod, palpated the plaintiff's arm and assured her that everything was all right. She returned to see him two days later and he again advised her that all was well. About a week later, the plaintiff became concerned that she could not feel the rod in her arm. She telephoned her obstetrician. After that discussion, she said she felt at ease.

About seven months later, the plaintiff fell pregnant and was obviously shocked by this discovery. She was also worried that the health of her unborn child might be adversely affected by the hormone from the rod that she assumed was in her arm. Her obstetrician performed an ultrasound, which confirmed that the rod was not present.

LIABILITY

The defendant did not give evidence, so the plaintiff's evidence relating to the purported insertion of the rod went unchallenged. The combined evidence of three experts was to the effect that it would be extremely unlikely for a prudent medical practitioner, who followed the instructions on the box and who had the appropriate training, to fail to insert the rod.

The defendant did not rely on any expert reports to counter this evidence, nor did he offer an explanation as to how the rod might have fallen out of the plaintiff's arm between the date of insertion and the date of the ultrasound. The court found the defendant guilty of negligence.

CONTRIBUTORY NEGLIGENCE

The court found that the telephone call made by the plaintiff to her obstetrician did not break the causal chain. The relationship between the plaintiff and the defendant was grossly unequal, and after she had been reassured by the defendant on two separate occasions that the rod was in situ, she was not obliged to do more. There was no finding of contributory negligence on the part of the plaintiff.

DAMAGES

In relation to general damages, the plaintiff's evidence was that she was stretched financially prior to her fifth pregnancy. The pregnancy was uncomplicated, apart from a post-partum infection that required hospitalisation for a few days. Following the birth, the plaintiff had felt depressed and experienced difficulty in coping. There was no expert evidence as to the depression.

The court found that the stress of the extra, unplanned child would continue for the rest of her life, to varying degrees. The plaintiff's non-economic loss was assessed to be 26% of a most extreme case, and she was awarded $31,000.

Since the High Court Case of *Cattanach v Melchior*[1] did not provide any guidance as to how the costs of raising a child should be calculated, the plaintiff submitted that a statistical model based on a normative approach be adopted.

This statistical model required information to be supplied by the plaintiff as to the number of siblings, the number of bedrooms in the house, the earnings of both parents, the type of school that the plaintiff's other children attended, where the family normally took holidays, the type of motor vehicle and the number of seats in the vehicle. The model comprised 14 components contributing to the costs of raising the child, including food, clothing, housing, utilities, transport, childcare and education.

The defendant argued that the actual expenditure by the plaintiff on her child to date should be used to project future costs. Alternatively, the defendant argued that if the normative approach were to be accepted, the plaintiff's figures for housing, transport and childcare were excessive.

The court preferred the plaintiff's normative approach, as it allowed a fairer evaluation of the costs to the plaintiff of maintaining the standard of living that existed prior to the birth of the fifth child. However, the court used the defendant's lower figures for housing, transport and childcare.

DISCOUNT FOR FUTURE LOSS AND CONTINGENCIES

Although ss12 and 13 of the *Civil Liability Act* relate to a 5% discount for future economic loss, the court accepted that the costs of raising the child were *a kind* of economic loss and thus attracted the discount. Damages were again discounted by 5% for the vicissitudes of life.

The final figure for the costs of raising the child to age 18 years was $101,612, a very modest figure only slightly lower than that awarded to the respondents in *Cattanach v Melchior*.[2] ■

Notes: **1** (2003) 199 ALR 131. **2** Supra.

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