

Immaculate conception and intelligent design

By David Hirsch

Many medical negligence practitioners will be familiar with claims arising from failed sterilisation procedures. Most of these claims involve filshie clips – devices that when properly applied crush and occlude a woman's fallopian tubes, thus preventing the sperm from reaching the ovum and so avoiding conception.

Following reports in 2000 of a spate of filshie clip failures in NSW, many women contacted solicitors to investigate possible claims. Once quietly settled out of court, these claims are now being vigorously defended.

In *Hancock v State of Queensland*¹ and *Moore v State of Queensland*,² and in the NSW case of *Sharman v Boshell*,³ the plaintiffs all unsuccessfully sought damages following failed filshie clip sterilisation procedures.

In *Hancock* and *Sharman* the trial judges accepted the defendant doctors' evidence that the procedure was done properly and in accordance with their usual careful practice. In *Moore*, the trial judge accepted that the doctor deviated from his usual practice in the placement of one of the clips, but found that the tube was nevertheless fully occluded.

In *Hancock* the trial judge accepted that the fallopian tube was not fully occluded. But he found that what happened in that case was 'an example of the known but inexplicable failure rate of this particular procedure'.

In *Sharman* the trial judge rejected the evidence of the surgeon who later removed the clips and found one of them to have only partially occluded the fallopian tube. His Honour preferred the evidence of the defendant doctor, who insisted that it was impossible for him to have failed to properly occlude the fallopian tube. Without deciding precisely how it could have happened, the trial judge found that the pregnancy was a result of a rare but inexplicable failure of the procedure.

In *Moore*, the trial judge also accepted that the tube was properly occluded. But his Honour went beyond statistics and tried to understand how the pregnancy could have occurred despite complete occlusion. His Honour accepted the evidence of the defendant's expert that a fistula (a hole in the tube) must have developed which allowed the ovum to escape and somehow locate the sperm to satisfy what the defence expert described as the 'biological imperative' to create life. All of this was done, according to that expert, without leaving any trace of any fistula, which would explain why, despite careful histopathological examination, no evidence of a fistula was found.

Three aspects of these cases cause concern.

First, the trial judges in both *Hancock* and *Sharman* accepted that the defendant doctors' 'invariable practice' precluded the possibility of error. It is worrying that any court would accept evidence from a professional witness that he or she was incapable of making a mistake.

Second, the trial judges in all three cases were persuaded that, because of the recognised failure rate in filshie clip sterilisations, it followed that a proportion of these must occur without negligence. Only an uncritical reading of the statistical literature supports this conclusion. In virtually all cases where filshie clip failures have been investigated, doctor error has been found.

Third, trial judges ought to consider more than bare statistics and be comfortably satisfied with the defendant's explanation of how conception can occur despite proper occlusion of a fallopian tube. This was attempted only in the *Moore* case, where the trial judge accepted – without evidence – that a 'fistula formation' probably occurred.

That defence argued that the ovum is driven to locate and exploit an invisible fistula on the near side of the closed filshie clip, travel around the clip, re-enter through another invisible fistula on the other side, meet up with the sperm, in the fallopian tube and achieve conception. This would be an 'intelligent design' indeed! Both conception and the sterilisation procedure itself were 'immaculate'!

Practitioners acting for plaintiffs in failed sterilisation cases should learn from the examples in these three cases. A critical appreciation of the literature and an insistence upon scientific explanation should lead to findings of liability in most if not all failed sterilisation cases. ■

Notes: 1 *Hancock v State of Queensland* [2002] QSC 27. 2 *Moore v State of Queensland* [2005] QSC 48. 3 *Sharman v Boshell* [2005] NSWCA 476. The plaintiff's appeal was allowed and a new trial was ordered.

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