

WRONGFUL BIRTH CLAIM: BREACH OF DUTY OF CARE FOUND, BUT JUDGMENT FOR THE DEFENDANT

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A suit for wrongful birth was brought by the parents of a severely disabled child against the Canberra Hospital. The child, Saba Nouri, was born on 3 November 2011 suffering from trachea-oesophageal fistula (a TOF) which is an abnormal connection between the oesophagus and the trachea. The child's disabilities are so severe that she requires ongoing 24 hour care. It was alleged by the parents of the child that had her disability been known to them in utero they would have elected to terminate the pregnancy.

IN ISSUE

- Whether the hospital's failure to provide information on the child's condition was a breach of duty of care.
- The court was also required to consider the central issue of causation, which related to whether or not the plaintiffs would have or could have secured a termination at the late stage of the pregnancy when the information regarding the disability should have been supplied.

The Background

The first plaintiff became pregnant on or about 20 February 2011. The pregnancy was unplanned. The first plaintiff and her husband, the second plaintiff, resolved to proceed with the pregnancy, but on their case, only if the child did not suffer from disabilities. On 8 July 2011 the first plaintiff underwent an ultrasound in a private clinic in Canberra, which confirmed that she was pregnant with twins and that in the case of the female twin, some abnormalities were detected in relation to the foetal heart. Over the course of the next few months a number of investigations were undertaken concentrating on the perceived problem with the female foetus' heart.

A range of ultrasounds and other investigations were carried out over the course of August and September 2011, and at no time was any mention made of the possibility of the female child having a small stomach or a possible TOF.

It was not until the twins were born that the female twin was diagnosed as suffering from TOF. It was not until that time that the ramifications of this disability were explained to the plaintiffs.

THE DECISION AT TRIAL

Justice Elkaim entered judgment for the defendant with an order for the plaintiffs to pay the defendant's costs. His Honour's specific findings were that the defendant had breached its duty of care in failing to provide the relevant information but that the plaintiffs had failed to prove that their alleged losses were caused by this breach. Justice Elkaim went on to notionally assess damages in the case (had the plaintiffs

succeeded) at \$1,813,807.

The central basis of the decision was that the plaintiffs had failed on the issue of causation. The plaintiffs did not establish on the balance of probabilities that they could have, or would have, obtained a termination when the information was supplied at a late stage of the pregnancy.

In a discussion on the issue of damages, Justice Elkaim found that despite the moral obligation that the plaintiffs may feel to continue to look after their disabled daughter for the remainder of her life, they would not be entitled to damages after the child had turned 18 years of age.

IMPLICATIONS

The significance of this decision is that even when breach of duty of care had been found, and the medical evidence taken as a whole was supportive of the plaintiffs' contention that they had not been adequately informed, the requirement for causation is a rigorous one. As the plaintiffs' parents were unable to prove on the balance of probabilities that, had they been given an early diagnosis of TOF, they would have elected to proceed to a termination at that time (rather than with the benefit of hindsight), their claim failed.

[Nouri v Australian Capital Territory \[2018\] ACTSC 275](#)

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