

## *Patients' Right to Plan their Reproductive Future*

### *Waller v James [2015] NSWCA 232*

#### Key Points

- The parents' right to plan their family is an interest capable of the law's protection and medical practitioners have a duty of care to protect that right; and
- A plaintiff may satisfy the "but for" test of causation, but if legal causation is not satisfied, his or her claim will fail.

#### Background

Keeden Waller was conceived through in vitro fertilisation (**IVF**) to parents Deborah and Lawrence Waller, the appellants. Keeden was born with the anti-thrombin deficiency (**ATD**) gene which he inherited from his father. Whilst Mr and Mrs Waller were aware that Mr Waller suffered from ATD, they were unaware that it could be genetically inherited. Coincidentally, four days after his birth, Keeden suffered a cerebral sinovenous thrombosis (**CSVT**) (a type of stroke). The CSVT left Keeden severely disabled.

Mr and Mrs Waller commenced legal proceedings against the doctor who coordinated the IVF, Dr Christopher James, alleging that:

- Dr James ought to have informed them of the hereditary aspects of ATD (breach of duty); and
- If Dr James had informed them as such, they would not have undergone the IVF procedure at that time and would have waited until Dr James was able to ensure that only embryos not affected by the ATD gene were available. As a result, they would have avoided having a baby who suffered from a CSVT (causation).

The trial judge found that Dr James had breached his duty of care. However, since the ATD did not cause Keeden's CSVT, it could not be said that Dr James' breach caused the loss and damage suffered by Mr and Mrs Waller.

Mr and Mrs Waller appealed arguing that Dr James' breach of duty caused them to be deprived of their 'right to plan their family and reproductive future'.<sup>1</sup> As a result, they suffered loss and damage including the cost of raising Keeden.

One major issue before the appellate court was whether Mr and Mrs Waller's deprivation of "the right to plan their family" actually constituted an interest capable of the law's protection. In support of their submissions, Mr and Mrs Waller cited the High Court case of *Cattanach v Melchior*.<sup>2</sup> *Cattanach v Melchior* concerned a wrongful birth following a failed sterilisation procedure in which the High Court found that the relevant harm or damage caused by the medical practitioner's breach of duty was "the burden of the legal and moral responsibilities which arise by reason of the birth of the child."<sup>3</sup> By this reasoning, Mr and Mrs Waller's 'right' was entitled to the law's protection. Heydon J

<sup>1</sup> *Waller v James* [2015] NSWCA 232 at [6]

<sup>2</sup> [2003] HCA 38

<sup>3</sup> *Cattanach v Melchior* [2003] HCA 38 at [68]

dissented pointing out that children are also a benefit to their parents (not merely a financial burden) and the majority's approach ignores this simple fact.<sup>4</sup>

A second issue was the scope and content of Dr James' duty of care. Dr James admitted that he owed Mr and Mrs Waller a duty of care pursuant to the principles outlined in *Rogers v Whitaker*.<sup>5</sup> That duty encompasses the requirement of a medical practitioner to warn their patient of material risks and to provide necessary information so that the patient can make an informed decision as to the proposed treatment.<sup>6</sup> Whilst Dr James had provided Mr and Mrs Waller a post-it note with the contact details of a genetic counsellor, he failed to advise them of the importance of obtaining genetic counseling and he failed to follow up with them to ensure that they had made an appointment with the genetic counsellor. The appellate court found that Dr James' duty of care extended to ensuring he attended to these two things as well as ensuring he did not interfere with a patient's right to plan their family.

As to breach, the appellate court found that Dr James had breached his duty of care to Mr and Mrs Waller. The only contested matter as to breach related to the issue of the post-it note and whether that constituted an adequate referral. The appellate court held that, whilst some of the expert evidence indicated that the usual form of referral was in writing or by phone, the purpose of the post-it note was to give Mr and Mrs Waller the genetic counsellor's contact details and that purpose was achieved. The referral by way of post-it note did not constitute a breach of duty of care.

Mr and Mrs Waller succeeded in establishing the "but for" test. That is, had Dr James explained to Mr and Mrs Waller the importance of obtaining genetic counselling, Mr and Mrs Waller would have attended a consultation with the genetic counsellor, and, then properly informed, they would have decided against proceeding with IVF at that time. Resultantly, they would not have had a child who suffered from CSVT. However, Mr and Mrs Waller failed to establish legal causation. When attributing legal liability, the relevant consideration is whether the risk of the injury is unacceptable to the patient. In the present case, having a child with ATD was an unacceptable risk to Mr and Mrs Waller. However, they were willing to accept the general risks of pregnancy which included a small risk of CSVT or some other form of abnormality. Having been well established that Keeden's ATD was not causally related to his CSVT, and that it was his CSVT that caused his severe disabilities, the appellate court found that Mr and Mrs Waller failed to prove legal causation.

The appeal was dismissed.

## The Law

Two High Court decisions were considered here, those being *Cattanach v Melchior*<sup>7</sup> and *Rogers v Whitaker*.<sup>8</sup>

## Lessons Learnt

This case establishes that the parents' right to plan their family is an interest capable of the law's protection and medical practitioners have a duty of care to protect that right. Medical practitioners practicing in the area of fertility should be particularly aware of this case. The case also serves as a reminder to practitioners to keep detailed clinical notes, explain to patients the reasons for any referrals, and follow up with patients to ensure they have attended to the referral. Whilst Dr James

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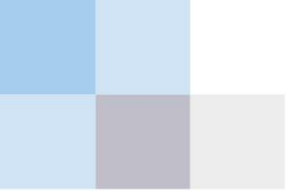
<sup>4</sup> See [347] for a detailed discussion

<sup>5</sup> [1992] HCA 58

<sup>6</sup> These duties were discussed in *Rogers v Whitaker* [1992] HCA 58 at 483 and 490, and in *F v R* (1983) 33 SASR 189 at 192

<sup>7</sup> [2003] HCA 38

<sup>8</sup> [1992] HCA 58



was found to have breached his duty of care to Mr and Mrs Waller, he avoided liability on the issue of causation. Despite going to great lengths, Mr and Mrs Waller simply could not prove that Dr James' breach caused the loss and damage which they were suffering as a result of Keeden's disabilities.

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