ACB *v* Thomson Medical Pte Ltd and others
[2014] SGHC 36

Case Number : Suit No 467 of 2012 (Registrar's Appeal No 327 of 2013)

Decision Date : 25 February 2014

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : N Sreenivasan SC and Palaniappan Sundararaj (Straits Law Practice LLC) for the plaintiff; Lok Vi Ming SC, Audrey Chiang Ju Hua and Calvin Lim (Rodyk & Davidson LLP) for the defendants.

Parties : ACB — Thomson Medical Pte Ltd and others

Tort – Negligence – Remedies

Contract – Remedies – Remoteness of damage

Contract – Breach

25 February 2014 Judgment Reserved.

Choo Han Teck J:

1 The plaintiff is a Chinese woman married to a German of Caucasian descent. They have a son conceived in 2006 through an assisted fertilisation procedure commonly known as In-Vitro Fertilisation or "IVF" for short. In October 2010 the plaintiff delivered a daughter (named "Baby P" in this action) also conceived through IVF. When the IVF procedure was carried out in respect of Baby P, a mistake was made and the plaintiff's egg was fertilised with the sperm of a third party male ("the Donor") instead of the sperm of the plaintiff's husband. The plaintiff sued the defendants in the tort of negligence and breach of contract.

2 The first defendant is the company that owned the second defendant, which was the medical centre in which the IVF procedure was carried out on the plaintiff. The third defendant was the embryologist who was responsible for the collection and storage of the bottle containing the plaintiff's husband's sperms. The fourth defendant was the Chief Embryologist at the third defendant. The parties applied to have a question of law to be determined. The question raised two items of claim. The first (referred to in the proceedings here and below as "the Upkeep Claim") was the issue of whether the plaintiff was entitled to the expenses incurred that may reasonably be incurred in bringing up Baby P. The second ("the Provisional Damages claim") concerned the claim for provisional damages, by which the plaintiff sought to make the defendants liable to pay for damages (until Baby P reaches 35 years of age) arising from any genetic condition or disease that might be attributable to the genes of the unknown male sperm donor. The defendants applied to strike out these two claims from the action. The learned Assistant Registrar David Lee ("AR Lee") agreed with the defendants' counsel's submission that these claims were contrary to public policy, and thus ruled against the plaintiff in both issues in the question of law. These portions of the claims were struck out from the action. The plaintiff appealed only against the order regarding the Upkeep Claim in this appeal before me.

3 Mr Sreenivasan, counsel for the plaintiff, submitted that the Upkeep claim should be allowed,

whether in contract or tort. He argued the Upkeep claim should be allowed in tort on the grounds of public policy and that it involved reasonably foreseeable damage. He submitted that AR Lee's decision was based on *McFarlane v Tayside Health Board* [2000] 2 AC 59 ("*McFarlane*"). He argued that that case was not an appropriate precedent. He argued that *Cattanach v Melchior* [2003] 215 CLR 1 ("*Cattanach*"), from the High Court of Australia, ought to be followed instead. Mr Sreenivasan also submitted that the court below was wrong to find that the Upkeep claim was too remote in the plaintiff's alternative cause of action under breach of contract. He argued that the damages were not remote.

4 Mr Sreenivasan's arguments were based on the fact that the mistake was not discovered until after Baby P was born. He submitted that, had the mistake been discovered sufficiently early, the plaintiff could have terminated the pregnancy, but once that opportunity had passed, the defendants must contemplate that someone would have been obliged to bring up the baby. Although counsel accepted that the law obliges the parents to bring up the child, he referred to s 70(1) of the Women's Charter (Cap 353, 2009 Rev Ed) as a basis for imposing financial obligations on the defendants. I should deal with this point first as it is not relevant. Section 70(1) allows persons who have accepted a child into their family to seek a court order compelling the child's father or mother to pay for the child's upkeep. The person who might be liable under s 70(1) in this case can only have been the Donor, but I doubt that the Donor would have been ordered by any court to pay for Baby P's upkeep, given the circumstances of this case.

5 The contest of legal authorities in the court below and on appeal before me was the differing views between *McFarlane* and *Cattanach*. *McFarlane* was a four-to-one decision from the House of Lords. *Cattanach* was a four-to-three decision in the High Court of Australia. Both cases concerned claims for the expenses of bringing up a child conceived after the mother was negligently advised that the sterilisation procedure was complete and no contraception was required. These were referred to as "unwanted birth cases". The majority in *McFarlane* was not in favour of allowing such claims, whereas the majority in *Cattanach* formed the opposite view.

6 The crucial difference between those cases and the present appeal before me is that in the present case, Baby P was not an unwanted birth in the sense that the plaintiff mother did not want to have a baby at all. The plaintiff just wanted a baby conceived with her husband's sperm. This is an important distinction for the reasons that follow.

7 The House of Lords gave various reasons for disallowing the claim for upkeep. Lord Steyn expressed the majority view when he held in *McFarlane* at 83:

> Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor.

None of the Law Lords who referred to distributive justice explained which idea or principle from that vast ocean of philosophy they had found relevant. Distributive justice is a philosophical subject that leaves philosophers with much to say about one another's vision of what constitutes distributive justice. Distributive justice is also primarily concerned with the distribution of wealth across society. Volumes have been written about the egalitarian nature of distributive justice as well as implications of liberty. Resort to distributive justice is, therefore, generally not appropriate when one is discussing the specific entitlements of an individual in law. Hence, Kirby J, in *Cattanach*, might hence have been perplexed by the references to this subject in *McFarlane*. He thought that the Law Lords called distributive justice in aid because the defendant there was the national health authority. We may not know for certain, but in my view, any discussion of distributive justice in this case would not be

appropriate because there is no direct principle in distributive justice that might be appropriate in the present case.

8 Kirby J distinguished *McFarlane*, in *Cattanach* at [178], as follows:

> One writer has argued that the House of Lords decision in *McFarlane* reflects a particular factual context in the United Kingdom whereby most patients in this class of case bring their claim, in effect, against the local authority representing the National Health Service, not, as in Australia, against individual physician or surgeon or healthcare facility legally responsible for the legal wrong. Concern to protect the viability of the National Health Service at a time multiple demands upon it might indeed help to explain the evocation in the House of Lords in *McFarlane* of the notion of "distributive justice". But such a consideration has no part to plain the identification of an applicable Australia public policy.

The factual background in the case before me is similar to *Cattanach* in that we are not here concerned with a public health authority. In any event, the House of Lords in *McFarlane* was not inclined to rely on public policy to found liability either. The majority Law Lords thought of public policy as "quicksand" and emphatically avoided it as a basis for their decision in that case. If public policy is a quicksand, philosophies of distributive justice are sinkholes. Nonetheless, in spite of such noble protests, courts have to adjudicate, from time to time, difficult cases in which they have little else apart from policy considerations to rely on. Hence, the Court of Appeal recognises that policy considerations can be relevant (see *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [83]–[85]).

9 Sometimes, a court applies the convenient label of public policy without articulating what the policy was; conversely, it may, at other times, avoid public policy considerations altogether. But it is probably true that in many cases, such as unwanted birth cases involving matters of rights and legal standing, legislative intervention is required. Courts in the UK and Australia have refused to allow claims by children for their upkeep in wrongful birth cases. The reasoning behind this refusal is articulated by Lord Steyn in, *McFarlane* at 83, who cited with approval the following quote from The Law of Torts in Australia:

> [I]t might seem somewhat inconsistent to allow a claim by the parents while that of the child, whether healthy or disabled, is rejected. Surely the parents' claim is equally repugnant to ideas of the sanctity and value of human life and rests, like that of the child, on a comparison between a situation where a human being exists and one where it does not.

10 The majority in *McFarlane*, ultimately, distilled the rationale to the narrower basis that the law of torts does not permit a claim for purely economic loss. Purely economic loss, I should explain, is to be contrasted with consequential economic loss. The costs of hospitalisation and medical fees incurred in the delivery of an unwanted baby are consequential economic loss and can be recovered. The majority in *McFarlane* was of the view that the benefits and joy of bringing up the child in an unwanted birth case cannot be properly measured in order to set off against the expenses of bringing up the child. In the present case before me, the plaintiff was prepared to expend money to bring up a child. That obligation remains, not only with her, but also with her husband even though he might not be the biological father, as the decision to keep Baby P must have been a joint decision. The husband, however, is not a party in this action.

11 Lord Steyn held in *McFarlane*, at 79, that with *Murphy v Brentwood District Council* [1991] 1 AC 398 ("*Murphy*"), the common law had sounded a full retreat from *Anns v Merton London Borough Council* [1978] AC 728, the case that allowed claims for purely economic loss to sneak into the law of

torts. The Court of Appeal in Singapore declined to accept *Murphy* as an absolute rule restricting claims for purely economic loss to cases of negligent misstatements in the vein of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*") (see *Spandeck* at [68]–[72]). The emphasis in *Spandeck*, so far as purely economic loss is concerned, was on how the loss occurred and not what kind of loss it was. The claim in *Spandeck* itself was dismissed at first instance and on appeal. Outside of *Hedley Byrne*, the courts have been reluctant to award damages for purely economic loss. The Court of Appeal in *Spandeck* noted, at [69], that damages for purely economic loss have so far been awarded in cases where the loss was related to the economic value of land. The reason may be that in such cases, the loss was not only purely economic, it was also the only loss arising from the breach of duty.

12 The *Spandeck* redacted test for duty in the tort of negligence seems to be a restoration of the Atkinian test based on the "neighbour" principle in *M'alister (Or Donoghue) (Pauper) v Stevenson* [1932] AC 562, with the added flavour of judiciously determined considerations of policy. On the basis of the proximity between the plaintiff and the defendants, there is little doubt that duty will readily be established. The issue is the extent of compensation by way of damages that flows from a breach of that duty. In the present case, Baby P was not a loss arising from the breach of duty. Furthermore, it cannot be said that the plaintiff and her husband were not contemplating having to expend money to bring up a child. On the contrary, the reason they engaged the defendants was so that they could have a child. This case cannot be compared to the cases where purely economic was deemed recoverable in damages. I am of the view that the Upkeep Claim in tort in this case is one for purely economic loss which, even if liability in negligence was established, cannot be recovered. However, that does not mean that this appeal has to be dismissed.

13 This appeal arose from an application to strike out the part of the plaintiff's claim relating to the upkeep of the child. It is inappropriate that an application to strike out was brought in a case such as this. The facts did not seem to be very much disputed, but the claims as to reasonableness of damages were challenged on law. If the issue were strictly on damages, then the dispute should be addressed during the assessment of damages after liability has been determined. In a case such as this, the issue of damages should not be heard in isolation because both the liability and damages aspects of the case are connected. This was not heard as a preliminary point of law in respect of liability and quantum although counsel for both sides appeared to have proceeded as such in their submissions before me as well as in the court below. Had Mr Sreenivasan submitted that this issue ought to be heard by the trial judge, I would have allowed the plaintiff's appeal and set aside the order striking out the claim, but he seemed as keen as the defendants' counsel, Mr Lok, to dispose of this appeal as if the issue in dispute was an independent one. Counsel should also bear in mind that the plaintiff's claim is founded in both contract and tort on the same facts. They must be tried together. Hence, this issue (the validity of the Upkeep Claim) may also not be appropriate to be tried as a preliminary issue. Both counsel appear to treat the liability for the Upkeep Claim as an issue in liability but it is really an issue in damages.

14 However, since counsel on both sides, by mutual consent, argued on the correctness in law of awarding an Upkeep Claim, I am giving my reasons for not accepting Mr Sreenivasan's submissions as to the validity of the Upkeep Claim. Although I am of the view that the Upkeep Claim is not recoverable as damages in tort, I am setting aside the order below and direct that the claim proceed to trial. Further, the plaintiff is also making the Upkeep Claim in contract (although not in the court below). How does the court assess damages in a contract claim before liability has been determined?

15 Damages in contract will generally not be recoverable unless the loss and damage flow from the breach. It is understandable that the plaintiff and her husband would be aggrieved by the defendants' error, and they might be entitled to general damages for that distress. However, whether the

defendants were negligent or not and whether they were in breach of contract or not, the plaintiff and her husband would have to expend money to bring up the child conceived through IVF. Expenses for the upkeep of the child, whether it was Baby P or another, cannot be considered damage or loss arising from the defendants' conduct. While I am thus also doubtful of the plaintiff's chances of success in the contract claim on account of remoteness, I am of the view that the matter must be heard at trial so that all the loose ends in fact and law may be heard and adjudicated. The trial judge is at liberty to form his own views on the Upkeep Claim. I have only expressed mine by reason of the peculiar situation arising from the defendants' application to strike out the claim at this stage. For the reasons above, the order striking out the relevant portion of the claim is therefore set aside. The costs of the striking out application and the appeal shall be reserved to the trial judge.

16 What I now say may not be a principle in law, but I believe that it is a treasured value in humanity, and that is that no parent would want her child to grow up thinking that she (the child) was a mistake. Were the plaintiff to succeed in the Upkeep Claim, whether in tort or in contract, every cent expended in the upbringing of Baby P will remind her that it was money from a compensation for a mistake. Baby P should not ever have to grow up thinking that her very existence was a mistake. If there is any reason for not pursuing or granting the Upkeep Claim, the emotional wellbeing of Baby P is reason enough.