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Health Insights

A wrongful birth case study: *Nouri v Australian Capital Territory [2020] ACTCA 1*

The Australian Capital Territory Court of Appeal (ACT CoA) has recently issued a decision in a wrongful birth case, exploring issues around both breach of duty and causation. Ultimately, the Court decided in favour of the hospital which provided prenatal care to the infant's mother.

The decision is an interesting one, in that although the ACT (which runs the Canberra Hospital) (the **Respondent**) was found to have breached its duty of care to the child's parents, Ms Nouri and Mr Shaor (the **Appellants**), the breach could not be said to have caused the losses associated with the infant's severe birth defects due to a complex matrix of factual circumstances.

For the full details of the case, please click [here]. We have also prepared a condensed chronology of the facts below.

The essence of the breach of duty question was whether or not and at what point during the gestation of fraternal twins, the Appellants ought to have been told that Twin B may have a trachealoesophageal fistula (a **TOF**). In the primary judge's view, 30 weeks and 4 days gestation was the *earliest* date when a duty to inform the Appellants of a possible TOF may have arisen. The Appellants argued that the disclosure ought to have taken place earlier (no doubt because the timing of the disclosure was relevant to their ability to prove that they would have been able to secure a termination of the fetus). However the ACT CoA agreed with the primary judge, stating that even at its highest point, the evidence of one of the experts was simply that it *may* have been a reasonable thing to disclose the suspicion of TOF earlier than 30 weeks, but with the intention of returning to the issue later[1].

The key issue in the case therefore became one of causation and namely whether the Appellants would have or, just as importantly, *could* have obtained a late stage termination of the pregnancy at the point at which the information about Twin B should have been disclosed. In order to succeed, the Appellants had to prove on the balance of probabilities that Ms Nouri could have secured a selective termination of Twin B at 30 weeks and 4 days in the United States of America (USA) (the expert evidence indicated that an ethics committee in Australia would have refused to permit a selective termination in the circumstances.) The primary judge identified a number of different factual obstacles to the success of the Appellants' case.[2]

[1] Ibid, paragraph 60.
[2] Ibid, paragraph 66.

On appeal, the Appellants challenged the causation finding by tackling each individual issue raised by the primary judge. However, the CoA took a broad view of the factual matrix and said that "the ultimate question was a single one: did the appellants discharge their burden of proof by showing, on the balance of probabilities, that Ms Nouri would have terminated the pregnancy?[3]".

> *This question cannot be answered favourably to the appellants by demonstrating in relation to each issue identified by the primary judge that it is more likely than not that it would have been overcome. Rather, what needs to be shown is that taken collectively, it is more likely than not that they all would have been overcome.*[4]

The answer to that question, simply put, was that the particular circumstances faced by the Appellants were too difficult, too costly, and too time sensitive to have been in all likelihood surmounted. After thorough analysis of each individual challenge put by the Appellants, the CoA summarised its conclusions on causation with the following:

> *Notwithstanding the matters put forward by the appellants, there is no error in the conclusion ultimately reached by the primary judge. It is certainly theoretically possible that a person in Ms Nouri's position, with an extraordinary degree of determination, effort and organisation, could have achieved the outcome of a selective termination. However, the absence of a firm diagnosis, the lack of encouragement that she would have received from her treating medical specialists, the need to locate and decide to be treated by a suitable practitioner in the United States, the risks of travel to the United States to both herself and the healthy twin, the logistical hurdles that would need to be overcome in getting to and from the United States, the significant expense that would be involved in such an exercise and the shortness of the time available mean that the balance of probabilities is not in favour of her having achieved that outcome.*[5]

For your information and to assist in digesting the decision, please see below a condensed chronology of the Appellants' care at the Canberra Hospital:

> **9 July 2011** – Ms Nouri had an ultrasound performed at 19 weeks and 5 days. She was informed that she was pregnant with non-identical twins and that due to an anomaly in one of the twin's umbilical cords (Twin B), that twin may have a heart problem. She was referred to the Fetal Medicine Unit (**FMU**) at Canberra Hospital.
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> **15 July 2011** –Ms Nouri attended an appointment at the FMU and had another ultrasound. She was told that Twin B's single umbilical artery was associated with a chromosomal abnormality and it was recommended she have an amniocentesis test to identify chromosomal abnormalities and fetal infections.
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> **25 July 2011** –Ms Nouri attended the FMU and saw Dr Robertson who confirmed the amniocentesis test was negative. Another ultrasound was performed, but there was no suggestion of any abnormality other than a cardiac abnormality. Dr Robertson said she would organise a cardiac test

[3] Ibid.
[4] Ibid.
[5] Ibid, paragraph 103.

in Sydney. At this appointment there was a discussion about termination of the fetus in the context of a heart abnormality.

2 August 2011 – The Appellants saw a paediatric cardiologist at Sydney Children's Hospital (**SCH**) who carried out an ultrasound. He said the only problem with Twin B was a "variable normality" which was of no significance.

8 August 2011 – The Appellants attended the FMU. Dr Robertson confirmed the cardiologist's opinion and carried out another ultrasound.

22 August 2011 – The Appellants had another ultrasound at the FMU and were told there was no change. All was well.

5 September 2011 – The Appellants attended the FMU because Ms Nouri had pain on her right side. An ultrasound revealed excess fluid around Twin B and Dr Robertson suggested removal of the excess fluid (called an amnioreduction). She also told them that she was not content with the SCH cardiologist's opinion and wanted to arrange a referral to another cardiologist at Westmead Hospital.

6 September 2011 – Gestation was 28 weeks and 2 days. At a High-Risk Meeting at the FMU, there was a discussion about Ms Nouri's pregnancy. In particular, there was discussion about the increased amniotic fluid together with the possibility of a trachealoesophageal fistula (TOF). Dr Robertson did not discuss the meeting with the Appellants.

12 September 2011 - The Appellants attended the FMU where a further ultrasound was conducted and Ms Nouri was given steroid injections.

15 September 2011 – The amnioreduction was carried out and helped to relieve pain in Ms Nouri's side. Mr Shaor enquired about the referral to another cardiologist as had been suggested by Dr Robertson and was told "that it was in train".

22 September 2011 – Gestational age was 30 weeks and 4 days. The Appellants had another ultrasound. They asked again about the referral and were told it was being arranged. There was no mention made of Twin B having a small stomach or possible TOF. There was also no mention of a referral to a geneticist or of the High-Risk Meeting that had taken place on 6 September 2011.

5 October 2011 – The Appellants had another ultrasound and asked about the referral. Dr Robertson said she was still organising it.

15 October 2011 – Ms Nouri experienced pain in her right side again and was admitted to the maternity ward. She was discharged the following day**.**

18 October 2011 – Another amnioreduction was attempted on Ms Nouri but she found it too painful and the procedure was stopped. The Appellants again asked about the referral to Westmead Hospital, to which they received the same response that the appointment was being arranged.

26 October 2011 – Dr Robertson told the Appellants there was no longer a need for an appointment with another cardiologist and everything was fine. After some discussion it was agreed

that a caesarean birth would occur. At this point the Appellants were expecting the birth of normal twins and had not been told of any possible abnormality other than the cardiac issue.

2 & 3 November 2011 – On 2 November an ultrasound was performed and the twins were delivered by caesarean on 3 November. Twin B was taken to the Neonatal Intensive Care Unit and then to an operating theatre. Later that day Mr Shaor was told that Twin B had a TOF and was asked whether he had been told this was likely. Mr Shaor said that he had not been told.

Twin B's disabilities were severe, and categorised as "VACTERL association" which refers to vertebral anomalies, anal atresia, cardiac defects, TOF, renal abnormalities and limb defects. She now requires 24 hour care.

Meridian Lawyers regularly assists health practitioners to respond to patient complaints and allegations of professional negligence. This article was written by Principal Kellie Dell'Oro and Associate Anna Martin. Please contact us if you have any questions or would like more information.

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