WRONGFUL BIRTH OR LIFE

AAA v. Registered Trustees (Aga Khan University Hospital, Nairobi)
[2015] eKLR, Civil Case No. 3 of 2013
Kenya, High Court

COURT HOLDING

Medical practitioners providing family planning services owe a duty of care to their clients to provide services in accordance with the professional standards expected of them.

Damages were awarded for pain, suffering, and loss of amenities, and for the cost of raising and educating the child until she turned 18. Damages for the costs of antenatal care and delivery services were rejected as the claim was not particularised and proven by the Plaintiff.

Summary of Facts

The Plaintiff consulted the family planning clinic of Aga Khan University Hospital (the "Defendant") for an appropriate contraceptive to prevent her from having any more children. She was advised to choose the method of *implanon*, an implant that would prevent conception for three years from the date of insertion. She decided to choose this method and the procedure was done the same day. About a year later, her menses failed and she was confirmed pregnant. Further tests at the Defendant's clinic revealed that there was no *implanon* implanted in her arm. The Plaintiff claimed that it was the failure to implant the *implanon* that led to her subsequent pregnancy and the birth of her baby. The Plaintiff further claimed that both of these events were the result of the Defendant's negligence. She therefore sought damages for having suffered emotional pain, distress, psychological damage, physical incapacity, and financial hardship, including the cost of bringing up the child from the date of her birth until the child turned 18 years old. No defence was entered and an interlocutory judgment was entered on 14 May, 2014.

Issue

Since an interlocutory judgment had already been entered as unopposed by the Defendant, the issue before the Court was what damages should be awarded to the Plaintiff.

Court's Analysis

The Court noted that this was a unique case in the jurisdiction, and that there was little precedent to rely upon. The Court distinguished the Kenyan case of *ERO v. Board of Trustees Family Planning Association of Kenya, Nairobi HCC No 788 of 2000* on its facts, as the evidence in that case showed that conception had occurred prior to the sterilization. The Court therefore relied upon comparable court decisions from other jurisdictions to make its determination. The Court reviewed the decisions of English Courts in *Emeh v. Kensington and Chelsea and Westminster Area Health Authority* (1985) *2 WLR 215; (1984) 2 ALL ER 513* (*Emeh case*) and *Thake & Another v. Maurice* (1986) *1 ALL ER 497 (CA)* in recognition of the history of such litigation in England. The Court noted that the approach

previously taken by courts in such cases had been that the claimant would be compensated only for pain, suffering, loss of amenities, and loss of consortium. Courts historically would award damages for the upbringing of the child only if the child was born with congenital abnormalities. For a healthy baby, public policy dictated that the joy derived by parents in bringing up a child cancelled out the compensation that could otherwise be awarded.

The Court noted, however, that courts had since moved away from this policy and started awarding compensation for the cost of raising an unexpected child until the age of majority. The Court referred to the *Emeh case* cited above, which held that "the compensatable loss suffered by the Plaintiff as a result of the negligence in performing that operation extended to any reasonably foreseeable financial loss directly caused by her pregnancy" [55] and that there was no rule of public policy preventing the plaintiff from recovering in full the financial damage sustained; therefore, the plaintiff in *Emeh* was entitled to damages for "loss of future earnings, maintenance of the child up to trial, maintenance of the child in the future, Plaintiff's pain and suffering up to the time of trial, and future loss of amenity and pain and suffering, including the extra care that the child would require. . . ."[56] Mitigating factors which could reduce an award would include "the value of the child's aid, comfort and society to the parents."[57]

The Court also referred to a decision of an American court in *Sherlock v. Stillwater Clinic* ((1977) 260 NW 2D 169), where the Supreme Court of Minnesota addressed the "troublesome" issue of allowing recovery of damages for rearing a normal, healthy child. That Court had said that the costs of raising a child resulting from wrongful conception and birth are a direct financial injury to parents and that it would be short-sighted in today's society to say that the long term and enduring benefits of parenthood exceeded these costs. Further, leaving aside moral and ethical considerations, public policy should not deny the parents' recovery of damages. It also said that family planning is an integral part of modern marital relationships and that public policy had changed in line with statutes promoting family planning.

The High Court of Kenya held that medical practitioners owed a duty of care to clients to provide family planning services according to the professional standards expected of them. The Defendant was vicariously liable for the negligence of its medical staff. The Court held that damages were awardable (where appropriate) for each of the following claims:

1. pain and suffering, including psychological damage, mental distress and anguish;
2. costs of antenatal care and delivery services; and
3. expenses/costs related to care and upbringing of the child (medical, shelter, food, education, clothing, entertainment, etc.) from birth until the age of 18 years.

In assessing damages, the Court did not award any damages for the costs related to antenatal care and delivery, because the Plaintiff had failed to particularise and prove these "special damages" which had to be specifically raised by the Plaintiff. The Court therefore awarded general damages under the first and third claims above. However, in determining the amount of damages for pain, suffering, and loss of amenities, the Court distinguished awards made in England by taking into account the comparable standard and costs of living in the Republic of Kenya. The Court also noted

that the Plaintiff had not testified to having experienced any "particular undue pain or difficulty, pre-natal, natal, or ante-natal."[58]

In determining the amount of damages under the third claim the Court balanced the claimed damages with the joy and society that the parents will have in bringing up their child. The Court also noted that the new child was a girl, while the two previous children were boys. It also took account of the fact that the parents had failed to provide evidence substantiating the quantum of the damages claimed. It accordingly reduced the damages awarded under that claim, against the Plaintiff's claim.

Conclusion

The Court awarded general damages, but special damages were denied.

Significance

The cause of action in this case was negligence. However, access to contraceptives can also be discussed in terms of human rights. The right to contraceptive information and services is grounded in internationally recognised human rights, and this was especially brought to the fore at the 1994 International Conference on Population and Development (ICPD). The ICPD Programme of Action, which was a consensus document adopted by 179 countries at this conference, articulated the relationship between population and development in terms of human rights, and especially through the concept of sexual and reproductive health rights. The ICPD Programme of Action defined reproductive rights as rights already recognised in various national laws and policies, international human rights documents, and other consensus documents. Reproductive rights rested on the "recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health."[59] In the African context, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is an important human rights document as it specifically recognises reproductive rights and the right to sexual health. Article 14 of the Maputo Protocol states that:

> *1. Parties shall ensure that women's right to health, including sexual and reproductive health, is respected and promoted, including:*
>
> *(a) the right to control fertility;*
>
> *(b) the right to decide whether to have children, the number of children and the spacing of children; [and]*
>
> *(c) the right to choose any method of contraception.*

Article 14 (2) of the Maputo Protocol stipulates the measures which states are required to undertake to realise these rights, including to: "provide adequate, affordable, and accessible health services, including information, education, and communication programs to women, especially those in rural areas…."[60]

The African Commission on Human and Peoples' Rights (African Commission) issued an interpretive document, General Comment No 2 on Article 14(1)(a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Maputo Protocol, to interpret Article 14's provisions and guide implementation by states. In the General Comment, the African Commission reminded states parties to "ensure availability, accessibility and acceptability of procedures, technologies and comprehensive and good quality services, using technologies based on clinical findings."[61] This includes contraceptive services.

Indeed, the Constitution of Kenya, 2010, contains various provisions that are aimed at promoting sexual and reproductive health, including Article 43(1)(a) that specifically articulates the right to health, including reproductive health care. Family planning and access to contraceptives is a key priority area, according to the National Reproductive Health Policy of 2007.

Although a great deal more could be said about the human right to access contraceptives, in the current case the apparent scenario is that the health providers did provide the information and education that enabled the Plaintiff to exercise the right to choose her contraceptive method. When she made her choice, the health providers negligently failed to implant the chosen contraceptive, resulting in the Plaintiff conceiving and eventually delivering a child.

There are two reports that have been published which examine the human rights implications of the barriers to accessing family planning in Kenya. The first is a report published in 2007 by the Center for Reproductive Rights and Federation of Women-Lawyers - Kenya, entitled, *Failure to Deliver: Violations of Women's Human Rights in Kenyan Health Facilities*.[62] This report indicated, amongst other things, that there were numerous barriers to accessing contraception and family planning, including the cost, supply shortages, and abusive treatment that prevented women from seeking services at public facilities.

The other report was published in 2012 by the Kenya National Commission on Human Rights, entitled, *Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality?*[63] This report also indicated there were barriers to accessing family planning related to socio-cultural barriers, commodity insecurity and prohibitive costs. Neither of these reports address the quality of the family planning services that are available.

E.R.O. v. Board of Trustees, Family Planning Association of Kenya
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COURT HOLDING

The Family Planning Association of Kenya ("FPAK") was not liable for breach of duty of care to the Plaintiff, who gave birth to a child 9-10 months after having a permanent family planning procedure performed at a FPAK clinic. The Plaintiff was already pregnant at the time of the procedure, and the pregnancy was not therefore a result of the Defendant's negligence.