ACB *v* Thomson Medical Pte Ltd and others
[2015] SGHC 9

Case Number	: Suit No 467 of 2012 (Summons No 4264 of 2014)
Decision Date	: 15 January 2015
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, Calvin Lim and Nerissa Tan (Rodyk & Davidson LLP) for the defendants.
Parties	: ACB — Thomson Medical Pte Ltd — Thomson Fertility Centre Pte Ltd — Eleanor Quah — Chia Choy May

Tort – Negligence

Contract – Breach

Damages – Measure of damages

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 17 of 2015 was dismissed by the Court of Appeal on 22 March 2017 in so far as the issue of upkeep costs was concerned. However, the Court of Appeal recognised the appellant's right to claim, as general damages, a sum in recompense of the injury which she had suffered to her interest in "genetic affinity". See [2017] SGCA 20.]

15 January 2015 Judgment Reserved.

Choo Han Teck J:

1 The plaintiff is a Singaporean woman of Chinese descent married to a German of Caucasian descent. The first defendant, Thomson Medical Pte Ltd is a private hospital. It was approved by the Ministry of Health to provide the In-Vitro Fertilisation ("IVF") procedure to couples who wish to conceive. IVF involves the removal of eggs from a woman and having them fertilised by sperms in a laboratory. Viable fertilised eggs are then implanted in the woman with the intention of establishing a successful pregnancy. The second defendant, Thomson Fertility Centre Pte Ltd, is a fertility clinic wholly owned by the first defendant and located within the first defendant's premises. The third defendant, Dr Eleanor Quah, is a senior embryologist with the second defendant. The fourth defendant, Dr Chia Choy May was the Chief Embryologist with the second defendant.

2 The plaintiff and her husband wanted to have a family soon after marriage but had difficulty conceiving. In 2006, they sought medical advice from a consultant obstetrician who advised them to try IVF. In 2007, the couple went to the second defendant for IVF treatment that was successful and they had a son.

3 In 2009, the couple went for another IVF at the second defendant as they were keen to have more children. In October 2010 the plaintiff delivered a daughter (named "Baby P" in this action). When the IVF procedure was carried out in respect of Baby P, by mistake the plaintiff's egg was fertilised with the sperm of a third party Indian male ("the donor") instead of the sperm of the

plaintiff's husband. The third defendant was the embryologist who was responsible for (1) the collection and storage of the bottle containing the plaintiff's husband's semen; (2) verifying the details on the bottle containing the semen as being that of the plaintiff's husband; and (3) fertilising the plaintiff's egg with her husband's sperm. The fourth defendant, the Chief Embryologist, was the third defendant's supervisor.

4 The couple later discovered the mistake in the IVF procedure when they found that Baby P's skin tone and hair colour was different from that of the couple and their son and she also had a blood type that did not match those of the couple. On 4 June 2012, the plaintiff sued the defendants in the tort of negligence. The plaintiff also sued the 3rd defendant for breach of contract in the alternative as both of them entered into a contract. The terms of that contract included a promise to fertilise the plaintiff's egg with her husband's sperm.

5 The plaintiff's relief includes a claim for Baby P's upkeep. The expenses for the upkeep include those relating to:

(a) The care of Baby P in Beijing where she would live with the plaintiff, her husband and the son;

(b) Baby P's pre-schooling educational needs in Beijing where she will be cared for;

(c) Schooling in a German International School in Beijing;

(d) Tertiary education in a German college or university;

(e) Necessities including apparels and food until Baby P is financially self-reliant;

(f) Baby P's hobbies and extra-curricular activities until she reached the age of adulthood and is financially self-reliant;

(g) Travel and holiday expenses;

(h) Medical expenses and/or medical insurance; and

(i) Additional maid care to look after Baby P until she starts schooling.

6 On 16 July 2012, the defendants filed their defence. On 8 October 2012, the defendants filed Summons No 5179 of 2012 ("SUM 5179/2012") to have a question of law determined. The first was the issue of whether the plaintiff is entitled to the upkeep claim. The second concerned the claim for provisional damages, by which the plaintiff sought to make the defendants liable 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 donor. The defendants applied to strike out these two claims from the action. The learned Assistant Registrar David Lee ("AR Lee") agreed with the defendant's 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. Those portions of the claims were then struck out from the action. The plaintiff appealed only against the order regarding the upkeep claim. I heard the appeal on 20 January 2014 and allowed it on 25 February 2014 (see: [2014] SGHC 36). I held that it is inappropriate that an application to strike out was brought in a case such as this as the claim on reasonableness of damages was challenged on law and that the issue of damages should not be heard in isolation because both the liability and damages aspects of the case are connected. The matter 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 before AR Lee (at: [13]). On 8 July 2014, the plaintiff amended her Statement of Claim to delete the claim for provisional damages. On 14 August 2014, an interlocutory judgment was entered against the defendants by consent with damages to be assessed and costs and interest reserved to a Judge or Registrar.

7 The defendants then took out Summons No 4264 of 2014 ("SUM 4246/2014") under O 33 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) on 28 August 2014 to have tried as a preliminary issue in the action before the trial for assessment of damages the question of whether the plaintiff is entitled to the upkeep claim as a matter of law. Order 33 r 2 of the Rules of Court reads:

> **Time, etc., of trial of questions or issues (O. 33, r. 2)**
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> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

I heard SUM 4246/2014 on 13 October 2014 and reserved judgment.

8 Mr N Sreenivasan, SC, counsel for the plaintiff, says the application raises two issues. The first being whether the question postulated by the defendants ought to be determined as a preliminary issue, and second, whether the plaintiff is entitled in law to claim damages for Baby P's upkeep. In respect of the first issue, Mr Sreenivasan says he was prepared to "leave the same" to me and will proceed to submit on the second. He stopped short of saying that he concedes the first issue and did not make any submissions on whether the first issue should be decided in his client's favour.

9 Mr Lok Vi Ming, SC, counsel for the defendants, submits that application should be determined as a preliminary issue for the following reasons:

> (a) First, the determination of the question of law will lead to substantial savings in both time and costs. This is because if the question is answered in the negative, the parties need not adduce further evidence on the upkeep claim. Mr Lok says that foreign expert witnesses are needed as the expenses for Baby P's upkeep include those that have to be incurred in Beijing and Germany;
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> (b) Second, the question of law can be determined independently of the evidence that will be adduced in the assessment of damages trial. The question of whether the upkeep claim is permitted is a purely a question of law that can be determined based on applicable legal principles and/or public policy;
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> (c) Third, there are precedents where the courts have tried issues of upkeep as a preliminary issue or on a summary basis. In this regard, Mr Lok relies on the following six authorities where the court has done so: (1) *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 ("*Rees*"); (2) *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] 3 WLR 376 ("*Parkinson*"); (3) *A (A Minor) v A Health & Social Services Trust* [2010] NIQB 108; (4) *Rouse v Wesley* (1992) 196 Mich App 624; (5) *Chaffee v Seslar* (2003) 786 N E 2d 705; and (6) *Boone v Mullendore* (1982) 416 So 2d 718.

I accept that the question postulated by the defendants ought to be determined as a preliminary issue for the same reasons given by Mr Lok.

10 I now deal with the second issue of whether the plaintiff is entitled in law to claim damages for Baby P's upkeep. Mr Sreenivasan submits that the upkeep claim should be allowed, whether in contract or in tort for the following reasons:

(a) First, the upkeep claim should be allowed in tort on the grounds of public policy and that it involved reasonably foreseeable damage. Mr Sreenivasan pointed out that the Termination of Pregnancy Act (Cap 324, 1985 Rev Ed) ("TPA") gives the right to any female to decide for herself whether to terminate a pregnancy. The TPA remains the law of the land and to a "major extent marks out the public perception towards abortion". Had the plaintiff been told about the mix-up early, she would have been able to terminate the pregnancy, but once that opportunity passed, the defendants must contemplate that someone would have been obliged to bring up the baby;

(b) Second, the decision of the majority in the High Court of Australia decision (on appeal from the Supreme Court of Queensland) in *Cattanach v Melchior* [2003] 215 CLR 1 ("*Cattanach*") ought to be followed. That case concerned a claim 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. The majority (four-to-three) allowed the claim;

(c) Third, the decision of the majority (four-to-one) in the House of Lords in *McFarlene v Tayside Health Board* [2000] 2 AC 59 ("*McFarlene*") that formed the opposite view from the majority in *Cattanach* ought not to be followed. *McFarlene* also concerned a claim for upkeep of a child conceived after the mother was negligently advised that the sterilisation procedure was complete and no contraception was required. *McFarlene* was not an appropriate precedent to follow for these reasons:

(i) The court in *McFarlene* was constrained by its characterisation of the claim as one for pure economic loss. The court therefore could not circumvent the "general reluctance" in England in allowing claims for pure economic loss only under very exceptional circumstances. However, our Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 ("*Spandeck*") has made it clear that Singapore's position is different from that in England in that the Singapore courts are prepared to allow claims for pure economic loss;

(ii) Having made clear that it was not basing its decision on public policy reasons, the majority decision in *McFarlene* cannot then be relied on to support any public policy reasons against the upkeep claim obliquely; and

(iii) *McFarlene* cannot be rationalised as upkeep claims are now allowed for cases involving disabled children conceived due to failed sterilisation. In this regard, Mr Sreenivasan relies on *Parkinson* and *Rees.* He further submits that:

> The argument that sanctity of life would be defiled by allowing a monetary claim for the upkeep of a child if valid, we submit, should apply equally without disparity to both healthy and disabled children in failed sterili[s]ation cases. The life of a disabled child is as precious as that of a healthy child. Hence, it would be odd to allow claims in respect of disabled children for upkeep but deny such a claim in respect of healthy children by citing … the "sanctity of life" argument as was done in [the] *McFarlene* case.

(d) Fourth, not allowing the upkeep claim would deprive the plaintiff of a remedy and it is reprehensible to provide immunity to the defendants; and

(e) Fifth, the upkeep claim was not remote in the plaintiff's alternative cause of action under breach of contract as the upkeep claim would have been within the 3rd defendant's contemplation at the time when they entered into the contract.

11 Mr Lok submits that the upkeep claim should be denied for the following reasons:

(a) First, *McFarlene* is an appropriate precedent. It rightly underscored the unease in allowing upkeep claims for a healthy child. Allowing damages compensating for the "wrong" or "injury" in the birth of a healthy child is "morally repugnant and against public policy" as the birth of a healthy child is a blessing and not a liability;

(b) Second, *Cattanach* should not be followed for two reasons:

(i) It was overturned by legislation. Within 4 months of the delivery of the decision in *Cattanach*, Queensland's Parliament included ss 49A and 49B in the Civil Liability Act 2003 to provide that "a court cannot award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child" in cases of failed sterilisation procedures, failed contraceptive procedures or contraceptive advice. Mr Lok submits that:

> It would appear from the above that the holding in *Cattanach* was so repugnant to the societal psyche and so clearly against public policy considerations that the legislature had to act swiftly to reverse the holding by the amendments to the Queensland Civil Liability Act.

(ii) *Cattanach* had not been "well-received" by the courts in England (*Rees*), Ireland (*Byrne v Ryan* [2009] 4 IR 542) and Canada (see the decision of the Supreme Court of British Columbia in *Bevilacqua v Altenkirk* [2004] BCSC 945). Even in Australia itself, the courts have not "wholeheartedly embraced" the majority's ruling in *Cattanach*. For example, the Supreme Court of the Australian Capital Territory in *G and M v Sydney Robert Armellin* [2008] ACTSC 68 agreed with the reasoning of the minority in *Cattanach* but it was bound and had no choice but to follow the majority's ruling. The Supreme Court of New South Wales in *Waller v James* [2013] NSWSC 497 sought to confine the application of *Cattanach* to cases where the parents did not want a child at all; and

(c) Third, the upkeep claim is too remote in the plaintiff's alternative cause of action under breach of contract. Mr Lok submits that remoteness is also concerned with the wider policy considerations of placing limits on contractual liabilities. Hence, damages can be refused on policy grounds, even if they are foreseeable.

12 Although both counsel accepted that the law obliges the parent to bring up the child, Mr Sreenivasan referred to s 70(1) of the Women's Charter (Cap 353, 2009 Rev Ed) ("WC") as a basis for imposing financial obligations on the defendants. Section 70(1) of the WC reads:

> **Duty to maintain child accepted as member of family**
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> **70.**—(1) Where a person has accepted a child who is not his child as a member of his family, it shall be his duty to maintain that child while he remains a child, so far as the father or the mother of the child fails to do so, and the court may make such orders as may be necessary to ensure the welfare of the child.

I should deal with this point first as it is not relevant. Section 70(1) of the WC 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) of the WC in this case can only have been the donor, but I doubt that he would have been ordered by any court to pay for Baby P's upkeep, given the circumstances of this case.

13 For the reasons that follow, I reject the arguments made by Mr Sreenivasan and hold that the plaintiff is not entitled in law to claim damages for Baby P's upkeep.

14 First, I am not convinced by Mr Sreenivasan's submission that the defendants should bear the entire cost of maintaining a healthy child simply because she missed the opportunity to abort Baby P. I think that this submission is a mere afterthought as the plaintiff did not even plead her missed opportunity to abort Baby P. She did not depose in any of the affidavits filed by her that had she been informed about the mix-up earlier, she would have aborted Baby P. Even if this submission was genuine and not a mere afterthought, I am of the view that it has no merits. I am not aware of any authority that supports Mr Sreenivasan's submission. I agree entirely with Lord Clyde in *McFarlene* at 105, that it would be "going beyond what should constitute a reasonable restitution for the wrong done" to allow the plaintiff's claim for the lost opportunity to an abortion.

15 Second, the plaintiff had wanted a second child all along. The contest of legal authorities before me was the differing views between *McFarlene* and *Cattanach*. As mentioned (see above: [10(b)] and [10(c)]), both cases concerned claims by parent(s) 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 are referred to as "wrongful birth", "unwanted birth" or "unwanted pregnancy" cases (see *eg*: John L Powell QC & Roger Steward QC, *Jackson & Powell on Professional Liability* (7th Ed, Sweet & Maxwell) at paras 13-095–13-100; and Margaret Fordham, "Blessing or Burden? Recent Developments in Actions for Wrongful Conception and Wrongful Birth in the U.K. and Australia" [2004] Sing J L S 462). But there is a crucial difference between those cases and the present application before me: 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. 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.

16 In passing, I note that the issue of whether an upkeep claim will be allowed for wrongful birth cases is a contentious one as there is a divergence of views expressed. It may be the case that legislative intervention is required. I express no definite view on this matter as it is not one that I need to resolve for the present application, but there are cogent policy considerations against finding liability for upkeep. Lord Millett in *McFarlene* opined that "[t]here is something distasteful, if not morally offensive, in treating the birth of a normal, healthy child as a matter for compensation" (at 111). Similarly, Hale LJ (as she then was) in *Parkinson* at [87] opined that:

> No one wants a situation in which a parent who thoroughly dislikes her child and the predicament in which she has been placed, but does her duty, is at an advantage compared with the parent who falls in love with her child at birth (as most do) and willingly reconcile herself to her fate. No one wants a situation in which the parent who disparages her child is at an advantage compared with one who sees the best in him.

I agree entirely with the views expressed by Hale LJ, and think that they apply with equal force in the present case. As I had mentioned previously in this same case, no parent would want her child to grow up thinking that she (the child) is a mistake. Were the plaintiff to succeed in her upkeep claim, whether in tort or in contract every cent spent 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. A parent is obliged to maintain his infant child. It does not matter whether the child is his or her natural child, or an adopted child. When a parent has accepted his role in respect of that child, the obligation is his (and his spouse's). He cannot be a parent and have someone else pay to bring up the child.

17 I therefore hold that the plaintiff is not entitled in law to claim damages for Baby P's upkeep in both contract and in tort. The tortfeasors are bound to compensate the plaintiff under the established heads of claim such as pain and suffering, but those other claims are not in issue before me because the counsel for the parties believe that they are saving time and costs by proceeding with this head of claim first. I will hear the question of costs when the other claims are resolved.