

Duty of care in IVF goes beyond ensuring a successful pregnancy

*G and M v Armellin*¹

By Thena Kyprianou

On 9 December 2009, the High Court refused leave to the defendant to appeal from the unanimous verdict of the ACT Court of Appeal, which had awarded the first plaintiff (G) damages of \$80,990.59 and both plaintiffs the sum of \$236,495.70. G was awarded damages for psychological injury arising from an unwanted twin pregnancy, which was the result of invitro fertilisation (IVF) treatment. The award of damages to both plaintiffs related to the cost of raising the second child.

THE FACTS

G gave birth to twins following IVF treatment in November 2003. The twins were born as a result of the fertilisation of two separate embryos.

The plaintiffs consulted Dr Armellin,

seeking help for G to become pregnant. G told Dr Armellin that she did not want a multiple pregnancy. Dr Armellin gave the plaintiffs advice that the chances of success of becoming pregnant diminished unless more than one embryo was transferred. He also advised them that there was a risk of multiple pregnancy even if only one embryo was transferred. The plaintiffs accepted that risk but understood it to be very low (0.1 per cent). The plaintiffs were referred by Dr Armellin to the Canberra Fertility Centre (the Centre). The Centre managed certain aspects of the procedure, such as counselling, obtaining consent forms and harvesting eggs. As part of that process, the plaintiffs filled out a form at the Centre nominating the number of embryos they wanted transferred. G gave evidence that she was unsure of what number to put on the form when

she was asked to complete it. She was advised by a nurse to put 'up to 2' and then let them know, any time up to the time of the procedure, as to how many embryos were to be transferred. The plaintiffs proposed to make that decision once they were given information about the quality of the embryos. The transfer of two healthy embryos increases the probability of a twin pregnancy by up to 25 per cent.

The day before the transfer, G was informed by the Centre that there were four healthy embryos. No discussion took place about how many embryos she wanted transferred.

On the day of the transfer, the plaintiffs attended the Centre but had no discussion with any person about how many embryos they wanted transferred until they saw the defendant immediately prior to the procedure. G informed Dr Armellin that she wanted only one embryo transferred. Dr Armellin completed an operation record to the effect that 'one embryo was to be transferred'. Dr Armellin had assumed that G had communicated her decision to have only one embryo transferred to someone else in the Centre as well, and that the embryologist who prepared the embryo for transfer had been informed. This assumption was incorrect. The plaintiffs did not know that they had to tell anyone other than Dr Armellin of their decision.

Unbeknown to the plaintiffs, the usual procedure was that the Centre asked the patient prior to the time of the procedure how many embryos she wanted transferred and then Dr Armellin and the embryologist had a three-way conversation

with the patient at the time of the procedure confirming that number. The three-way conversation could not occur on this occasion because G decided to have the procedure under sedation. Dr Armellin therefore had a conversation with G alone and then had a conversation with the embryologist after G was taken into theatre and while she was sedated. Dr Armellin did not tell the embryologist what G had told him about the number of embryos she wanted transferred.

FINDINGS OF THE PRIMARY JUDGE

The primary judge accepted that the doctor owed a duty of care to the plaintiffs that was 'a duty to exercise reasonable care and skill in the provision of professional advice and treatment'. However, the primary judge went on to find that Dr Armellin was entitled to rely on 'the system', which required the embryologist to provide the number of embryos nominated and confirmed by the patient. The primary judge considered that Dr Armellin did not control the transmission of G's instructions to the embryologist and he was therefore not negligent.

THE DECISION OF THE COURT OF APPEAL

The judges of the Court of Appeal unanimously disagreed with the primary judge and found that G was Dr Armellin's patient and he was

the professional responsible for the procedure. G was not told that it was her responsibility to inform staff at the Centre, other than Dr Armellin, of her decision and if there was a system in place, its existence was not brought to the attention of the plaintiffs.

The Court found that, although the default position was that two embryos would be implanted, the plaintiffs had the right to decide how many embryos they wished to nominate. In those circumstances, Dr Armellin could not simply say that it was not his concern when he was in charge of the procedure. Doing so put him in breach of his duty of care to the plaintiffs.

The Court distinguished *Elliott v Bickerstaff* [1999] 48 NSWLR 214, as the doctor in this case took on a personal responsibility for receiving and implementing instructions from the plaintiff.

Counsel for the doctor submitted that his client's duty of care extended only to doing all that was reasonable to ensure that the therapeutic outcome she had consulted him for was achieved – that is, getting pregnant. The Court of Appeal found that the doctor's duty extended further, and included doing all that was reasonable to ensure that the procedure occurred according to G's wishes.

THE APPEAL TO THE HIGH COURT

The doctor sought leave to appeal to the High Court on the basis that he

had not breached the duty of care that he owed to the plaintiffs, as it was the Centre and not him that owed the duty to the plaintiffs to follow their instructions. Leave was refused.

Though the validity of the decision in *Cattanach v Melchior* (2003) 215 CLR 1 was raised by the doctor at first instance, this issue was not raised in the leave application. This is despite the fact that the primary judge introduced her judgment by stating:

'It is important to say at the outset that I am not free to form my own view as to the ability of a parent to sue for what has been called "wrongful birth of a child" ... The High Court determined this right in *Cattanach and Melchior* by a majority of four to three. Personally, I am persuaded by the reasoning in the minority. I am, however, bound by the decision of the majority.'

Ultimately, *G and M v Armellin* added little to the debate about wrongful birth cases. The case was decided purely on the extent of a doctor's duty of care to his patients. ■

Note: 1 [2009] ACTCA 6 (1 May 2009).

Thena Kyprianou is General Counsel with a practice in professional conduct and negligence at Maurice Blackburn Canberra. **PHONE** (02) 6120 5004 **EMAIL** TKyprianou@mauriceblackburn.com.au