SUPREME COURT OF QUEENSLAND

CITATION:	*Mollenhauer v Gilroy & Ors* [2004] QSC 377
PARTIES:	**BERNICE KAY MOLLENHAUER** (plaintiff) **v** **DR KEVIN GILROY** (first defendant) **STATE OF QUEENSLAND** (second defendant) **QUEENSLAND SURGICAL PTY LTD** **ACN 058 061 233** (third defendant) **ENDOVASIVE PTY LIMITED** **ACN 061 512 132** (fourth defendant) **FEMCARE LIMITED** (fifth defendant)
FILE NO/S:	SC No 10074 of 2001
DIVISION:	Trial Division
PROCEEDING:	Claim for Professional Medical Negligence
DELIVERED ON:	5 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2001; 2 November 2001
JUDGE:	de Jersey CJ
ORDER:	**Judgment for the defendant against the plaintiff, with costs, including any reserved costs, to be assessed**
CATCHWORDS:	PROFESSIONS AND TRADES – MEDICAL AND RELATED PROFESSIONS – MEDICAL PRACTITIONERS – LIABILITY IN TORT – DUTY TO WARN OF RISKS – where the plaintiff sues the defendant, who is a gynaecologist, for damages for negligence and breach of contract, in relation to her bearing a child subsequently to a tubal ligation carried out upon her by the defendant – whether the defendant warned the plaintiff of a risk of conception *Fazlic v Milingimbi Community Inc* (1980) 32 ALR 437, cited *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1, cited *Manser v Spry* (1994) 181 CLR 428, cited *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657, cited *Rogers v Whittaker* (1992) 175 CLR 479, cited

COUNSEL: J G Crowley QC, with R M Bourke, for the plaintiff
S C Williams QC, with A Luchich, for the respondents

SOLICITORS: Hewlett & Co for the plaintiff
Flower & Hart for the respondents

[1] **de JERSEY CJ:** The plaintiff sues the defendant, who is a gynaecologist, for damages for negligence and breach of contract, in relation to her bearing of a child subsequently to a tubal ligation carried out upon her by the defendant.

[2] At the commencement of the trial, Counsel informed me that the quantum of damages had been agreed at $130,000. Of that sum, $23,000 was agreed as the amount which has been, or will be, paid by the Commonwealth Government for Family Tax Benefits A and B with respect to the rearing of the child. There is an issue, to which I will return, whether the amount of any judgment should be $130,000 or the reduced sum of $107,000.

[3] The plaintiff is a married woman, born on 21 March 1968. She is married to Timothy Mollenhauer, who gave evidence at the trial. The plaintiff had previously been married, for eight years, to a Mr Prove. That relationship ended in 1995/6. It produced two children, Amanda born in 1987, and Imogen born in 1991. A third child was lost through cot death syndrome. Amanda and Imogen live with the plaintiff and her present husband.

[4] During the early stages of her relationship with her present husband, the plaintiff terminated a pregnancy and underwent a tubal ligation. That was carried out at the Greenslopes Clinic. The father was not her present husband. The plaintiff and her present husband discussed that matter, although the decision to terminate was the plaintiff's. She paid for the procedure. She said that at that time, she was not stable emotionally or financially and was not ready to raise a third child. Mr Williams QC, who appeared for the defendant, put to the plaintiff in cross-examination that she then became aware that no method of sterilization could be guaranteed as 100 per cent sure. I accepted her evidence that she could not recall having been given that qualification.

[5] The plaintiff had much earlier, when aged only 16 years, undergone another pregnancy termination. That occurred in 1984.

[6] As the plaintiff's relationship with her present husband developed, and they were contemplating marriage, they determined to have a child together, if they could, so that Timothy would have a biological child of his own. I accepted the evidence of the plaintiff and her husband that they wished, for financial reasons, to have only one child. Timothy was a truck driver, and the plaintiff did not work in employment. Prior to, but in anticipation of, their marriage, the plaintiff and Timothy went through one cycle of the IVF programme, but unsuccessfully. They married in November 1997.

[7] The plaintiff asked her general practitioner to refer her to a specialist, with a view to the reversal of the tubal ligation which had been effected in 1996. The general practitioner referred her to the defendant, who carried out the operation in July

1998. The plaintiff fell pregnant to her present husband in October 1998, and the child Gemmah was born by caesarean section on 12 July 1999.

[8] The plaintiff consulted the defendant on 27 May 1999, enquiring about two matters. She said her primary concern was to minimize pain at birth. She had suffered substantially with her previous births. The defendant agreed to do a caesarean section, and in response to the plaintiff's enquiry, said that he would use staples not sutures. The second matter was sterilization. In this area, there was divergence between the evidence of the plaintiff and the evidence of the defendant.

[9] The plaintiff gave evidence that she asked the defendant to have her tubes tied at the birth, and that he agreed, saying that he would bend the tube over and clamp it. The plaintiff's evidence was that she expressed concern about her age, and that she wanted only one more child. The plaintiff said that the defendant was not forthcoming with the information, responding only to her questions. The plaintiff rejected Mr Williams' suggestion, put to her in cross-examination, that the defendant said that he opposed the "cut and tie" method, because recovery took longer, and that he would therefore apply clips. The plaintiff also denied telling the defendant she wanted to have her fallopian tubes removed (which was contrary to para 3(ii)(d) of the plaintiff's amended statement of claim). Her position was that she left the method of "sterilization" to the defendant.

[10] I will come back, a little later, to the defendant's contrary account of that consultation.

[11] On 12 July 1999, Gemmah was born by caesarean section, and at the same time the defendant carried out a tubal ligation by the application of Filshie clips. At the trial, it was accepted that he applied the Filshie clips efficiently. (See also the radiologist's report Ex 3.)

[12] The plaintiff nevertheless fell pregnant again in mid-December 1999. Her fourth child Tytann was born three weeks prematurely, again by caesarean section, on 30 August 1999. After the delivery, which the defendant carried out, the defendant told the plaintiff that he had found something wrong with her right fallopian tube. See the gynaecologist Dr Adam's report Ex 2, referring to the defendant's note as to "the formation of a microscopic fistula".

[13] When the plaintiff discovered she was pregnant with Tytann, she unsurprisingly raised the matter with the defendant, both over the telephone and in person, in late January 2000. I accepted the plaintiff's account of those communications. On 25 January 2000, at the defendant's surgery, the defendant told the plaintiff to the effect that nothing is ever 100 per cent guaranteed. The plaintiff's evidence was that the defendant had at no prior stage warned her that pregnancy could result notwithstanding a tubal ligation.

[14] As pursued at the trial, the plaintiff's case was that the defendant was negligent in essentially two respects: first, in not advising the plaintiff, prior to carrying out the clamping on 12 July 1999, that that method of sterilization was not guaranteed to prevent subsequent conception; and second, in not advising the plaintiff that the residual risk of conception, with a process of sterilization carried out at the time of a caesarean birth, was in those particular circumstances somewhat enhanced.

[15] The evidence before me is clear that no method of so-called "sterilization", even if, as here, carried out efficiently, will necessarily exclude the prospect of subsequent conception – other, that is, than hysterectomy.

[16] The gynaecologist Dr Adam said the failure rate with the Filshie clip procedure is one to three per one thousand procedures, with the failure rate up to three times higher if the procedure is carried out during a caesarean. He said in his evidence what I think is in any event plain, that he would warn a patient that the procedure would not give an absolute guarantee against conception. That is obvious because the patient's wish is to be sterilized, and if that cannot be assured, the patient may reasonably expect to be told that. This plaintiff made plain to the defendant she was anxious to avoid having more children (see, for example, p 14, l 20). See *Rogers v Whittaker* (1992) 175 CLR 479, 490.

[17] Dr Adam said that in view of the failure rate of Filshie clips at the time of caesarean, the cut-and-tie method would have been preferable. It is not necessary to my mind to deal with that. The determinative issue is an alleged failure to warn of residual risks: if the warning had been given, the plaintiff would on her case have taken supplementary measures, an aspect to which I will return. But as Dr Adam agreed anyway, whether or not Filshie clips, or the cut-and-tie method, or any other, is adopted, is a matter of professional judgment for the doctor. Dr Adam's concern was the need to warn a patient that methods like these are not necessarily foolproof, where the patient's primary interest, known to the doctor, is to avoid further pregnancy.

[18] Another gynaecologist, Dr Keeping, supported Dr Adam's view that there was "no clearly right or wrong method to choose" (Ex 4). He put the risk of failure at one to nine per one thousand procedures, with a "slightly higher" failure rate at caesarean (Ex 4). There was therefore no appreciable difference between those specialist doctors. Further, there was no negligence in the defendant's selection of method.

[19] As the case developed, the critical question of fact was whether the defendant warned the plaintiff of a risk of conception notwithstanding. I will come back to that question, but there are two other matters which I should first conveniently dispose of.

[20] I am satisfied that if warned of a risk, however small, the plaintiff would probably have proceeded with a tubal ligation, but would also have taken additional measures to ensure that the risk was nullified. They included her husband's undergoing a vasectomy (which the husband later undertook in May 2000). I accepted her husband Timothy's evidence that had he been aware that a sterilization could fail, he would have had a vasectomy. The other measures available were the plaintiff's taking the contraceptive "pill", and the use of condoms.

[21] I consider it likely that the plaintiff, if aware of any risk of conception notwithstanding the tubal ligation, would have taken steps of that character (or her husband would), to eliminate the risk of pregnancy which was in fact fulfilled. I accepted the evidence of the plaintiff and her husband that they were very concerned, for financial reasons, to have only one additional child. Their financial resources were limited. The plaintiff's own past history of terminations, and the

sterilization with its reversal, would suggest a particular awareness of the need to avoid future problems, and I think it likely that she was astute to taking all reasonable steps to avoid producing any child after Gemmah.

[22] The plaintiff and her husband gave evidence that they did not contemplate terminating the plaintiff's pregnancy with Tytann. It may be felt that that does not sit comfortably with the content of the previous paragraph of these reasons. The plaintiff's explanation for wanting to "keep" Tytann, as she put it (rather than wanting to conceive him in the first place), was that although their finances were poor, and although she had terminated earlier pregnancies, she was bearing Tytann while happily married, with three children in a stable domestic situation such as she had not previously experienced. I found the plaintiff's evidence about that issue candid and convincing, as I found the evidence on the same point of her husband. In a matter of fact way, her husband said that they wanted to keep Tyttan, although there was nothing much they could do. Although the birth was not planned, it "was mine", as he put it. I appreciate of course the potential significance of the plaintiff's having previously undergone abortions, but having listened to her evidence and that of her husband, I am convinced they wished to keep Tyttan. They certainly did not resolve to keep him just in order to secure financial damages against the defendant, or his insurance company. (I also consider the plaintiff did not act unreasonably, with respect to mitigation, in not terminating the pregnancy: *Fazlic v Milingimbi Community Inc* (1980) 32 ALR 437, or that she made an "election" which broke the chain of causation.)

[23] I return now to the question of what transpired at the consultation on 27 May 1999. I have just expressed views favourable to the plaintiff's credibility, and that of her husband, in relation to the issues whether, if warned of the risks, the plaintiff would have taken (with her husband) additional protective measures which would have avoided any risk of pregnancy; and as to their claim not seriously to have contemplated terminating the pregnancy with Tytann. I have dealt with those issues to this point for reasons of convenience. Because I have accepted the plaintiff on those issues, does not mean I must necessarily have accepted her evidence as to the content of the meeting of 27 May 1999. The question is as to the reliability of that evidence. I summarized the plaintiff's evidence in para [9] above.

[24] The defendant's evidence was that the plaintiff asked him to remove the whole of her fallopian tubes, which he regarded as an unusual request. He said he told the plaintiff that that operation provided no guarantee of infertility, and that he recommended the use of Filshie clips. (He said in his evidence that he had in mind the possibility of a yet further subsequent request to reverse the process.)

[25] As to warning of any risk, the defendant could not recall his conversation with the plaintiff, but said that his "habit", as at 1999, was to warn of a risk of failure, of the order of one per 500 procedures. The defendant considered that rate an accurate representation of the risk of failure following his application of Filshie clips at caesarean. As to the difference between the rates expressed by the defendant, and on the other hand, by Drs Adam and Keeping, the difference in my view lacks significance. That is because on my assessment, the precise rate would not have mattered to the plaintiff. What was important to her was the prospect of any risk of failure, even if very small.

[26] The defendant's notes in relation to the plaintiff (Ex 5) record a warning expressed as to risk: "told failure 1/500". That entry appears below an entry relating to the plaintiff's being seen by the defendant on 7 July 1999 concerning a fall. But it is in a different pen. It is however in the defendant's handwriting. The defendant could not recall when that was recorded, but said that his purpose was probably to record what he believed had earlier happened, at the time the plaintiff, on his account, raised the issue of the removal of the entire fallopian tubes. That would probably, I consider, have related to the consultation on 27 May 1999 (although the plaintiff denied raising that particular matter then). The defendant particularly recalls the request made for the removal of the entire tubes because it was so unusual. He gave evidence of a specific recollection of saying to the plaintiff that such an operation would not guarantee infertility, or to that effect. The request of course reflects the plaintiff's pleading, which in her oral evidence she disavowed. If that exchange did occur, it shows the defendant adverting, with the plaintiff, to the intended goal of the procedure, and thereby the question of the risk of failure.

[27] It is not particularly easy to resolve this factual issue. On the one hand, I consider the plaintiff to be an honest witness, though there was an erratic aspect to her evidence which left me generally uncertain about its reliability. Importantly, her focus at the meeting on 27 May 1999 was, as she agreed, on the caesarean rather than the tubal ligation.

[28] On the other hand, the defendant likewise presented as an honest witness. Certainly his professional reputation is being questioned, but by way of background at least, it seems unlikely that an experienced medical specialist, asked for a sterilization, would not, recognizing the objective of the patient, warn of a well established, if small, risk of failure – even though he be a busy practitioner with many patients.

[29] A number of circumstances combine, on my assessment, to provide the basis for the reasonable inference that the defendant did give an appropriate warning of a risk of failure at the consultation on 27 May. They are that the defendant was in the habit of giving that warning, the entry in his patient notes (albeit inserted later), and his particular memory of the 27th May meeting because of the plaintiff's unusual request for the removal of the tubes in their entirety, drawing the response, which he could directly recall, as to risk.

[30] I found the defendant very candid in his evidence. He was forthcoming. There was no suggestion of overstatement or reconstruction. I found him an honest and reliable witness, and in relation to reliability, I preferred his evidence to that of the plaintiff where there was conflict.

[31] My approach to the resolution of the case is strengthened, if a little unusually, by the directness of the defendant's acknowledgements that he could not remember giving the warning, and that the entry in his notes was made subsequently. (There is no basis for any suspicion it was made dishonestly.) I consider the likely explanation for the plaintiff's not recalling such a warning was her concentration at the meeting, not on sterilization, but on the caesarean.

[32] The warning given was, I consider, sufficient. It was not necessary for any enhanced risk because of the caesarean to be mentioned. (As to the degree of that enhancement, I accepted the evidence of Dr Keeping.)

[33] It follows that judgment will be entered for the defendant.

[34] Reverting to the question whether the amount of any judgment would have been $130,000 or $107,000, I record that I would have entered judgment for the lesser amount, on the basis that the plaintiff could not recover more than her actual loss: see *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657, 664; *Manser v Spry* (1994) 181 CLR 428, 436 and *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1, 18. In response to two points made by Mr Crowley QC, for the plaintiff, I would not think the plaintiff's being a taxpayer, or the prospect of legislative change, exclude that conclusion. There is however no need for me to provide any further analysis of this issue.

[35] There will be judgment for the defendant against the plaintiff, with costs, including any reserved costs, to be assessed.