

## **SONNY AND ANOTHER v PREMIER, KWAZULU-NATAL, AND ANOTHER 2010**

### **(1) SA 427 (KZP)**

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#### **SUMMARY**

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- The first and second plaintiffs, a husband and wife, instituted action in the High Court in which they claimed, first, their damages flowing from the birth of their child with Down's syndrome and, second, the wife's damages flowing from the performance on her of a sterilisation procedure at the time of delivery without her informed consent.
- Initially a patient at the Clare Estate Clinic , the wife was referred to Addington Hospital where she had two ultrasound scans and subsequently gave birth by Caesarean section.
- After the first scan the wife was sent back to the clinic in order to make an appointment for a follow-up scan two weeks later.
- She returned to the clinic and was given the incorrect advice that there was nothing wrong with the ultrasound report and that everything was in order. (In fact, according to the expert evidence, while inconclusive, the report rang alarm bells for the presence of Down's syndrome.)
- Acting on that advice the wife did not return to Addington Hospital for a rescan.
- Four months later the wife was referred by the clinic to Addington Hospital for a second ultrasound scan.
- Following the scan she was referred to King Edward VIII Hospital where she had a cordocentesis to establish whether the baby had Down's syndrome.
- The cordocentesis revealed that the baby was normal.
- Only after the baby was born was Down's syndrome detected. The wife was 37 years of age when she gave birth.
- Claim one was brought in both contract and delict. The plaintiffs' case was that the medical professionals, charged with the duty of monitoring the wife's pregnancy, breached their obligations in various respects.

- More particularly, they failed, at an early stage of her pregnancy, to perform the various tests that were required to determine whether the foetus was normal or whether it suffered from a genetic abnormality.
- The wife was a high-risk patient. Her age alone proclaimed that her pregnancy ought to have been monitored at a higher level of medical care. Had she been properly advised, she would have elected to terminate the pregnancy.
- In respect of the second claim it was alleged that the plaintiffs signed the consent to sterilisation form prior to the wife's undergoing a Caesarean section only because they believed that there was nothing wrong with the baby.
- After a separation of issues it was determined that the court would first determine the issue of liability. When the trial was part heard, the plaintiffs' claim against the municipality was settled.
- *Held*, in respect of claim one, that the wife was sent back to the clinic by the doctor that had seen her at the hospital after she had her first scan. That event set in motion a chain of events which ultimately led to the unfortunate consequence that the wife gave birth to a Down's syndrome child.
- The wife returned to the clinic and was given advice which was palpably wrong. Any health professional at the clinic applying her mind would have realised, firstly, that the wife had to be rescanned. Furthermore, the wife was a high-risk patient because of her age and she needed to be monitored at a higher level of care. More importantly, the patient herself conveyed that information not only to the nurse that saw her at the hospital, but subsequently when she reported at the clinic for her follow-up monitoring.
- On the facts, the servants of the municipality were grossly negligent.
- *Held*, further, that once the patient was sent out of the hospital's control, as it were, there rested a heavy responsibility on the attending doctor to properly inform and counsel the patient. A reasonable person in the position of a doctor would have foreseen the reasonable possibility of the patient's falling through the cracks and not returning to the hospital and, secondly, given the vagaries of the primary health care facilities, that she might receive the defective and almost bizarre advice from a member of the clinic staff that she did in fact receive. It was incumbent on the doctor to inform the wife in detail of the risks she faced and precisely what the effect was of the inconclusive scan and the absolute necessity of having an urgent rescan.
- *Held*, further, that it went even further. Having regard to the foreseeable consequence of some breakdown of communication or gross misunderstanding that might occur in the clinic

environment, it was at least necessary for the doctor to have given or caused to be given some written instruction to the clinic to make it absolutely clear that the wife was required to return.

- *Held*, further, that, in conclusion, the servant or servants of Addington Hospital were negligent in the respects set out above and, for purposes of any delictual action, there was no contributory negligence on the part of the wife. In any event, no such contributory negligence could be taken into account as far as the plaintiffs' contractual claim was concerned.
- *Held*, further, that that negligence was causatively related to the birth of the child which, but for such negligence, would not have been born.
- *Held*, further, in respect of claim two, that the court was not persuaded on the evidence that the servants of the premier committed any wrongful act, either intentionally or negligently vis-à-vis the wife. In the result, liability on the second claim had not been proved.
- *Held*, accordingly, that the premier was liable to the plaintiffs for any damage the plaintiffs might prove, arising from the birth of the child, and, on the claim relating to the sterilisation of the wife, the premier was absolved from the instance.