Australian Government Solicitor the leading lawyers to government

AGS

Express law
fast track information for clients

31 August 2004

Inability to prove alleged psychiatric illness

In this decision Bongiorno J held that although it might be a reasonably foreseeable risk that someone might suffer a psychiatric injury as a result of being told that others who had received similar drug treatments had died of those treatments, this did not happen in this case. Bongiorno J found the plaintiff did not suffer any psychiatric injury in 1993 or subsequently as a result of her obstetrician informing her of the possible risk.

Carol Elizabeth Farrell v CSL Limited and Commonwealth of Australia

Supreme Court of Victoria No. 6285 of 1994, 26 August 2004

In 1994 the plaintiff instituted proceedings against CSL Limited ('CSL') and the Commonwealth of Australia seeking damages for psychiatric injury. As a result of exposure to the risk that she might contract Creutzfeldt-Jakob disease ('CJD') following hormone treatment with human pituitary gonadotropin (or hPG) for infertility from 1976 and 1978, the plaintiff claimed to have suffered psychiatric injury. Although the plaintiff commenced her action for damages against the defendants in 1994, the matter was not listed for hearing until April 2003, before Bongiorno J in the Supreme Court of Victoria.

Background

HPG is derived from pituitary glands harvested from human cadavers and was used for infertility treatment and as a human growth hormone. CSL manufactured the hormone with which the plaintiff was treated and the Commonwealth, through the Department of Health (specifically the Human Pituitary Advisory Committee), supervised the administration of the treatment program.

In June 1993 the plaintiff was informed by the obstetrician who had administered her hPG treatment that she might have received a batch of hPG contaminated with CJD. The plaintiff claimed that as a result of receiving this information she developed a psychiatric reaction which resulted in, *inter alia*, physical brain deterioration, severe stress syndrome and major depression.[1] She claimed that the defendants failed in the duty they owed to her to inform her at the time of treatment of the facts which she says each of them knew or ought to have known regarding the risk of contracting CJD from the hPG treatment she received.

On 13 May 1994 the Department of Health wrote to the plaintiff's general practitioner. They informed him of the specific batch numbers of hPG approved by the Department of Health for use by the plaintiff's obstetrician in the treatment of her infertility. One of those batches had also been administered to one of the women who had in fact contracted and died from CJD as a result of her treatment.

The plaintiff alleged that she received a copy of this letter by way of ordinary post, and that she interpreted the letter as telling her that she had in fact received treatment from an infected batch. The plaintiff claimed that this was the main source of her anxiety.

In July 1994 the plaintiff received her Health Department file from her then solicitors. Although the solicitors advised her that she did not receive treatment from any of the infected batches of hPG, the plaintiff adopted the position that she had in fact received treatment from an infected batch. On 21 July 1994 the plaintiff's obstetrician confirmed to the plaintiff her solicitors' advice that she had not received treatment from an infected batch.

Did the defendant's owe the plaintiff a duty of care?

It was 'beyond argument' that the relationship between the plaintiff and each of the defendants gave rise to a duty of care. CSL owed the plaintiff the duty of care imposed by law on a manufacturer of drugs for human consumption. The Commonwealth, in providing medical treatment for infertile women in the discharge of its 'governmental responsibility', was in a similar situation to a health provider such as a public hospital. Although the exact content of each of those duties was the subject of debate, Bongiorno J held that in the circumstances of this case, the question of whether the plaintiff had established liability for damages could be determined without examining the extent or the specific content of the respective duties. Nor was it necessary to consider whether either or both of the defendants were in breach of their duty of care.

The plaintiff's case failed because of her inability to prove the psychiatric illness she alleged. It also failed on the issues of causation and/or foreseeability. This was largely because the plaintiff's evidence was almost 'totally uncorroborated', and was not accepted by Bongiorno J.

Injury: mid-1993 to mid-1994

The plaintiff's evidence on her injuries suffered between June 1993, when she was first informed of the possibility of receiving a contaminated batch of hPG, and July 1994, when she received her Health Department file, was largely based upon her own testimony, which was not accepted by Bongiorno J. As a result, His Honour found that the plaintiff's case of psychiatric injury during this time was not made out, and consequently that her claims of physical disability also failed.

In summary, Bongiorno found that:

> She [the plaintiff] sought no medical or similar treatment during the period under discussion, nor did she satisfy me that her psychiatric or physical capacity was in any way diminished or different from what it had been prior to June 1993. I am not satisfied that her sale of the Bassendean Squash Centre was necessitated by any diminution of her capacity to run it or, for that matter, to play and teach squash. Her histories to those doctors she did see after mid-1994 all refer to any problems she had such as fatigue and the like as arising before 1993 … Her squash playing activities after June 1993 appear to have been unchanged from what they were before. In short, the plaintiff has failed to establish any psychiatric disability which commenced after Dr Giles' conversation with her on 29 June 1993.

Even if the plaintiff had been able to establish some diminution of her psychiatric state over this period, Bongiorno J would not have been satisfied to the requisite standard that any such deterioration was a result of her obstetrician informing her in June 1993 of the possibility of receiving a contaminated batch of hPG.

Injury: post mid-1994

Bongiorno J found that the only difference between the plaintiff's psychiatric health between June 1993 and July 1994 and of that after July 1994 was that in August 1994 the plaintiff claimed to be depressed, was prescribed with anti-depressant medication by her general practitioner and in March 1995 she began seeing a psychiatrist.

Her squash playing continued unabated, with regular trips interstate and to country Western Australia for tournaments, and she remained intent on playing pennant squash. She engaged in a number of business activities during this time, including becoming a director of a finance company, acting director for a number of other companies, engaged in real estate transactions and property development, let real estate and represented herself in a tenancy dispute before a tribunal.

Again, the plaintiff's evidence as to her psychiatric state was essentially uncorroborated and was not accepted by Bongiorno J. Although His Honour found it was possible that the plaintiff suffered from some psychiatric condition intermittently during this period, he found that it was equally possible that her complaints 'have been feigned, either for financial gain or some other more obscure motive.' Thus, the plaintiff was unable to establish any damage flowing from a breach of a duty of care. Even if the plaintiff did suffer some psychiatric condition, His Honour found that it was considerably less severe than the plaintiff submitted.

Furthermore, Bongiorno J held that the plaintiff's unreasonable response to information given to her 'so far overshadowed any breach of duty on the part of one or other or both of the defendants' that it constituted a new intervening act, and as such rendered any such breach of duty no longer a cause of any resulting psychiatric condition.

Finally, Bongiorno J held that although it might be a reasonably foreseeable risk that someone might suffer a psychiatric injury as a result of being told that others who had received similar drug treatments had died of those treatments, that this did not happen in this case. The plaintiff did not suffer any psychiatric injury in 1993 or subsequently as a result of her obstetrician informing her of the possible risk. If she did suffer any injury, it was after mid-1994 and was because of her erroneous belief as to which batches of hPG she was treated with. It would not be reasonably foreseeable by a person in the position of the defendants that their breach of duty in allegedly failing to provide the plaintiff with appropriate information about hPG at the time of treatment would create a risk that she would embrace a false belief as to what happened and that she would suffer a psychiatric injury because of that false belief.

Implications

The decision of Bongiorno J turned on the credibility of the plaintiff's evidence. Given that this case is clearly distinguishable on the facts, it will not have widespread implications for the Department of Health and offers little precedent value.

---

[1] The plaintiff also claimed that the following injuries – sterilisation, severe psychiatric reaction, diagnosed anxiety disorder, sleeplessness, shock, loss of concentration, headaches, dizziness and blackouts, personality changes, suicidal ideation, paranoia, diarrhoea, weight loss, persistent fatigue, intermittent hair loss, intermittent vision loss, forgetfulness, claustrophobia, tremors, abnormal blood chemistry, poor decision making, constant flu-like infections, general poor health, constant fear of death – for self and natural-born son, loss of enjoyment of activities, inability to perform normal household tasks, panic attacks and fasciculation.

For further information please contact:

Susan Pryde
Senior Executive Lawyer
T 03 9242 1426 F 03 9242 1317
M 0418 676 445
susan.pryde@ags.gov.au

Cara O'Shanassy
Lawyer
T 03 9242 1220 F 03 9242 1317
M 0418 676 445
cara o'shannassy@ags.gov.au