

purchaser that its valuation was much lower.

The appeal against the refusal to grant injunctions preventing the marketers from making further predictions about future values also failed, on the grounds that the court found no error in the exercise of the judge's discretion to refuse the injunctions at first instance. ■

Note: 1 *Spencer v the Commonwealth* (1907) 5 CLR 418.

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Filshie Clip Failure

Gentile & Gentile v Ferri [2004] WADC 144

By Bill Madden

BACKGROUND

This medical negligence claim came before Judge Macknay in the District Court of Western Australia in late November 2003, with judgment delivered on 26 July 2004.

The plaintiffs, Mr and Mrs Gentile, brought an action against Dr Ferri, an obstetrician, arising from the performance of a laparoscopic sterilisation by application of filshie clips in May 1997.

Despite that procedure, Mrs Gentile subsequently conceived and gave birth to a son, Anthony.

The judgment is of interest for its consideration of the medical issues in these not uncommon claims, and its consideration of a 'voluntary services' claim by the parents.

MEDICAL ISSUES

Investigations after Anthony's birth disclosed that the clip applied to the right fallopian tube had dislodged and was resting lower in the abdomen in an open position.

The plaintiffs argued that the clip could not have dislodged unless it had been incorrectly applied and/or inadequately inspected after being placed.

Pathology testing showed a lack of scarring of the right fallopian tube which, it was said, demonstrated that the clip had either never been properly applied or had fallen off quite early after application.

The court observed:¹

'If one then compares the three competing inferences, non-closure is unlikely and mechanical failure as a likelihood is also not supported, but there is support for a lammes closure and subsequent failure...'

The court went on to hold² that the defendant did not observe incomplete closure of the clip in circumstances where it was observable. There was an implication thereafter³ that the defendant placed undue reliance upon 'feel' as opposed to the need for a careful visual inspection of the clip and tube, especially so as to observe the latch under the catch.

Interestingly, a videotape of the procedure was available which enabled at least one of the experts to comment that the defendant's inspection following application was only cursory and, by itself, inadequate.

The defendant, by his own admission, was unaware of the need to examine the clip and tube at right angles where possible.

LEGAL ISSUES

The court applied the High Court decision in *Cattanach v Melchior*.⁴

The plaintiffs were allowed modest compensation for general damages (\$20,000), past and future costs associated with rearing the child (approximately \$77,000) and special damages (approximately \$8,000).

However, the plaintiffs also made a claim for voluntary services, being a claim based on the commercial costs of paying someone to discharge the parents' duty of bringing up the child.

That claim failed:⁵

'Whatever the position might be in a case where a claim of this kind was made on some other basis, with evidence to support that, I am of the view that the plaintiff's claim here for the notional value of voluntary services provided or to be provided to Anthony does not as put, accord with existing legal rules, is contrary to what was said in Cattanach, and ought not be allowed.' ■

Notes: 1 Para 142. 2 Para 144. 3 Para 146. 4 (2003) 77 ALJR 1312. 5 Para 181.

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