

# MEDIA SUMMARIES

## ACB v Thomson Medical Pte Ltd and Others

### **SUPREME COURT OF SINGAPORE**

**22 March 2017**

#### **Media Summary**

**Civil Appeal No 17 of 2015**

***ACB v Thomson Medical Pte Ltd and Others* [2017] SGCA 20**

#### **Background to the appeal**

1 The Appellant and her husband desired to have a child and were advised to attempt in-vitro fertilisation (“IVF”). The Appellant underwent IVF treatment at the fertility clinic operated by the second Respondent and delivered a daughter (“Baby P”) that same year. The second Respondent is wholly owned by the first Respondent, which also manages and controls the private hospital within which the second Respondent’s clinic is located. The third and fourth Respondents were, respectively, a senior embryologist and the chief embryologist employed by the second Respondent at the material time.

2 After the birth of Baby P, it was discovered that a mistake had been made. The Appellant’s ovum had been fertilised using sperm from an unknown third party instead of sperm from the Appellant’s husband. The Appellant sued the Respondents in both tort and contract and sought damages for, among other things, the expenses

she would incur in raising Baby P (“upkeep costs”). The Respondents conceded liability but argued that the Appellant should not be allowed to recover upkeep costs. The Respondents then applied for the issue of whether the Appellant was entitled to claim upkeep costs determined as a preliminary issue. The High Court ruled in favour of the Respondents and held that the Appellant was not entitled to bring a claim for upkeep costs. The Appellant appealed to the Court of Appeal against the High Court’s decision.

3 The principal issue in this appeal is whether the expenses which arise in relation to the unplanned birth of a healthy child who was born as a result of the negligence of a medical professional is a compensable head of damage. Further submissions which were filed at the direction of the Court of Appeal address the further issues of (a) whether the Appellant can claim damages to compensate her for the loss of autonomy which she has suffered and (b) whether the Court is entitled to make an award of punitive damages in this case. Associate Professor Goh Yihan from Singapore Management University School of Law was appointed to assist the court as *amicus curiae*.

## **Judgment**

4 The Court of Appeal unanimously dismisses the appeal and upholds the decision of the High Court on the issue of upkeep costs. It holds that the recognition of a claim for upkeep costs would be against public policy as it requires the Court to regard, as actionable damage, the incidents of a relationship (the parent-child relationship) which is regarded as socially foundational and incapable of estimation as loss. Such recognition would also be inconsistent with, and deleterious to, the health of the institution of parenthood and would be against the public interest.

5 However, the Court finds that the Appellant has suffered a loss of “genetic affinity” – this is an expression which the Court uses to refer to ties which arise partly a result of genetic relatedness and partly a result of the social significance which such relatedness carries. This loss is one which the Court holds should be considered a distinct and recognisable head of damage in its own right. The

Court remits the assessment of the quantum of damages to be awarded to the High Court but observes that it would be preferable for the parties to arrive at an amicable settlement in relation to the issue of quantification in order that closure might be achieved.

6 Finally, the Court holds that while punitive damages can, in principle, be awarded for a claim in negligence (even where the defendant has been punished by the criminal law), it finds that that it is unable to conclude that this a proper case for a punitive award to be made.

### **Reasons for the judgment**

#### The issue of upkeep costs

7 The upkeep claim is an action seeking relief in respect of a particular consequence of parenthood – the duty to provide material support for one’s child – and its success therefore depends on the recognition of the obligations of parenthood as actionable damage **[87]**. For this reason, the Court considers that the claim as framed must fail. The law views the responsibilities of parenthood as obligations of a legal and moral character which arise in relation to the birth of new life; these obligations are incapable of valuation as “loss” in any meaningful sense and cannot be the subject of a claim for damages **[90]–[94]**. Given that the Appellant and her husband have accepted Baby P as their own (and assumed the status of parents), they must be taken to have accepted the responsibility of maintaining Baby P (financially and in all other respects) **[93]**.

8 Furthermore, the Court considers that the recognition of the upkeep claim would give rise to a potential conflict of interest between the parents’ private interests in the litigation and their duties *vis-à-vis* their children **[95]**. In order to establish a case for the recovery of upkeep costs, parents would have to prove that their children represent a net loss to them. Such an exercise encourages the exaggeration of any infirmities and the diminution of benefits as might exist in their children, in order that the account may be as favourable as possible. This is conduct which is fundamentally at odds with the overarching duty that parents have to provide, care for, and love their children **[100]**.

## The loss of autonomy issue

9 The Court was invited to follow the lead of the UK in making an award for “loss of autonomy” – that is to say, an order of damages to compensate the Appellant for the fact that she had been denied the opportunity to live her life in the way that she wished and planned **[115]**. However, the Court considers that it should not recognise a loss of autonomy as actionable damage in its own right for three reasons: (a) the concept of “autonomy” is too nebulous and contested a concept to ground a claim **[119]**; (b) the notion of a loss of autonomy does not cohere with the existing law on “damage” in the tort of negligence **[120]–[121]**; and (c) recognition of such a head of damage would undermine existing legal doctrines designed to keep the boundaries of liability within limits **[124]**. However, this is not to say that the Court does not recognise the relevance of autonomy as an important background consideration **[125]**. Instead, what is required is a more developed and substantive (as well as nuanced) notion of “autonomy” that takes into account existing family building practices, kinship arrangements, and the socially-constituted value of genetic relatedness **[126]**.

10 In the circumstances, the Court recognises that the Appellant’s desire to have a child of her own, with her Husband, is a desire that is a basic human impulse, and its loss is keenly and deeply felt **[127]**. The ordinary human experience is that parents and children are bound by ties of blood and this fact of biological experience – heredity – carries deep socio-cultural significance **[128]**. Persons (such as the Appellant) who *consciously choose* to undergo IVF do so because of a deep desire to experience, as far as it is possible, the ordinary experience and incidents of parenthood. And when, as in the present case, a person has been denied this experience due to the negligence of others then she has lost something of profound significance and has suffered a serious wrong **[129]**. This loss of “affinity” can also result in social stigma and embarrassment arising out of the misperceptions of others, as was the case here **[131]–[135]**.

11 The Court concludes that the Appellant's loss of "genetic affinity" should be a recognisable head of loss **[126]**. As for the quantum of damages, the Court considers that it should be set at 30% of the financial costs of raising Baby P, with the precise quantum to be determined by the High Court **[150]**

#### The issue of punitive damages

12 For a long time, the award of punitive damages in Singapore was thought to have been constrained by the decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129 ("*Rookes*"), which lays down three extremely limited situations in which the English courts would be prepared to award punitive damages in the tortious context **[153]**, **[158]**, **[170]**. The Court holds that the decision in *Rookes* should no longer be a part of Singapore law **[175]**.

13 Moving forward, punitive damages may now be awarded in tort where the totality of the defendant's conduct is so outrageous that it warrants punishment, deterrence, and condemnation **[176]**. Proof of intentional wrongdoing or conscious recklessness is not a prerequisite to the award of punitive damages in tort; a punitive award may also be made where the wrongdoing was as a result of the defendant's negligence **[201]**, **[206]**. It is available even in circumstances when the defendant has already faced disciplinary or criminal sanction; while the fact that the defendant has already been punished is a weighty factor to be considered when deciding whether to award punitive damages, it is neither determinative nor conclusive **[187]**.

14 However, the Court is unable to conclude that this is a proper case for a punitive award. The facts as they currently stand are simply too scant to support a finding of outrageous conduct **[208]**.

*This summary is provided to assist in the understanding of the Court's judgment. It is not intended to be a substitute for the reasons of the Court. All numbers in square brackets refer to the corresponding paragraph numbers in the Court's judgment.*

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