6. BIOMEDICAL LAW AND ETHICS

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Introduction

6.1 The year under review saw a significant decision on professional discipline in *Ang Pek San Lawrence v Singapore Medical Council* [2015] 1 SLR 436 ("*Lawrence Ang*"). In addition, in *ACB v Thomson Medical Pte Ltd* [2015] 2 SLR 218 ("*ACB*"), the High Court considered the public-policy laced issue of whether a claim for the maintenance of a healthy child conceived after a botched in-vitro fertilisation ("IVF") procedure should be allowed.

Professional discipline

6.2 In *Lawrence Ang*, the disciplinary committee ("DC") had convicted Ang of professional misconduct under s 45 of the Medical Registration Act (Cap 174, 2004 Rev Ed) for his failure to make arrangements to ensure that a neonatologist would be present at or placed on standby for the delivery of a patient's baby despite the fact that there were certain clinical indicators which, in the DC's view, suggested the need for such arrangements to be made.

6.3 The decision of the Court of Three Judges is significant because it lays down guidelines for the Singapore Medical Council ("SMC") in the prosecution of medical professionals. Of these guidelines, three stand out for mention. First, the court reiterated the distinction first articulated in *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR(R) 612 that s 45 of the Medical Registration Act embodies two limbs of professional misconduct, *viz*, (a) where there was a deliberate and intentional departure from the standards of medical practice observed or approved by competent and reputable members of the profession; and (b) where there was such serious negligence as to portray the abuse of the privileges of the profession. The court in *Lawrence Ang* elaborated that each limb entailed different and separate

elements of inquiry and that this required disciplinary committees to be conscious as to which limb was being applied. In this case, the court criticised the DC for failing to identify the limb under which it was assessing the conduct of Ang. The court also emphasised that the standard of proof was higher than the civil standard of proof.

6.4 Second, the court made clear that convictions could not rest on generalised and ambiguous standards. In this case, the SMC attempted to justify the DC's decision by reference to "good clinical practice". While recognising that the SMC Ethical Code and Ethical Guidelines may have adopted such language, this still required disciplinary committees to articulate what that meant in the specific context and circumstances of the case. This required the DC to identify and establish (a) how and when the duty alleged to have been breached arose; and (b) whether the failure to discharge that duty was deliberate and intentional or otherwise seriously negligent, depending on the applicable limb of professional misconduct being invoked.

6.5 Third, the court was critical of the DC's treatment of the expert evidence. In particular, this was because the DC had accepted evidence in relation to the charge on which Ang was convicted when such evidence was in fact rejected when assessed in the context of other charges of which Ang was acquitted. The court further underscored the need for the DC to have considered and explained its reasons for preferring one view of the experts over another. This effectively imposes a high requirement to state reasons, probably commensurate with the high burden of proof on the prosecution: see in this connection, but in the context of criminal prosecutions, the decision of the Court of Appeal in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676.

6.6 These three aspects of the court's decision demand exacting standards from the prosecution and disciplinary committees. Indeed, similar contentions that the prosecution and disciplinary committees had failed to be specific in the formulation of charges and in the determination of guilt were raised in *Lim Mey Lee Susan v Singapore Medical Council* [2013] 3 SLR 900. Although whether such allegations are made out will be obviously context-specific, the court's pronouncements of these principles in *Lawrence Ang* are, nevertheless, to be welcomed.

Claim for damages for raising a child

6.7 In *ACB*, the plaintiff and her German husband had previously undergone IVF treatment. This led to the delivery of their first child, a son. Keen on having more children, the couple underwent IVF treatment again. On this occasion, however, the plaintiff's egg was mistakenly fertilised with the sperm of an Indian male instead of the

plaintiff's husband's. The plaintiff eventually gave birth to a healthy daughter ("Baby P"). The couple later discovered the mistake when they found that Baby P's skin tone and hair colour differed from them and their son. Baby P's blood type also did not match those of the couple.

6.8 The plaintiff sued, *inter alia*, the fertility clinic and the embryologist who carried out the IVF procedure. The plaintiff's actions under the tort of negligence and for breach of contract included a claim for Baby P's upkeep. ("the upkeep claim") This claim included expenses relating to:

(a) the care of Baby P in Beijing, where she would live with the plaintiff, her husband, and the son;

(b) Baby P's pre-schooling educational needs in Beijing, where she would be cared for;

(c) schooling in a German International School in Beijing;

(d) tertiary education in a German college or university;

(e) necessities (including apparels and food) until Baby P was financially independent;

(f) Baby P's hobbies and extra-curricular activities until she reached the age of adulthood and was financially self-reliant;

(g) travel and holiday expenses;

(h) medical expenses and/or medical insurance; and

(i) an additional helper to look after Baby P until she started schooling.

6.9 In support of the upkeep claim, the plaintiff relied on the decision of the majority of the High Court of Australia in *Cattanach v Melchior* [2003] 215 CLR 1 ("*Cattanach*"). There, a bare majority allowed a claim for the expenses of bringing up a healthy child conceived after the mother was negligently advised that the sterilisation procedure was complete and no contraception was required. The majority in *Cattanach* declined to follow the decision of the House of Lords in *McFarlane v Tayside Health Board* [2000] 2 AC 59 ("*McFarlane*") (where a contrary decision was reached on facts very similar to those in *Cattanach*), even characterising *McFarlane* as an instance of British courts drifting too far away from ordinary tort principles.

6.10 The defendants, unsurprisingly, relied on *McFarlane*. There, some six months after McFarlane had undergone a vasectomy, the surgeon negligently informed McFarlane that his sperm count was negative and that he and his wife no longer needed to use contraception.

Eighteen months later, McFarlane's wife gave birth to their fifth child, Catherine. A majority of the House of Lords found that McFarlane's wife was entitled to general damages for the pain, suffering, and inconvenience of pregnancy and childbirth. However, the House of Lords was unanimous that the McFarlanes were not entitled to be compensated for the costs associated with raising Catherine.

6.11 Rejecting the plaintiff's claim, Choo Han Teck J gave two reasons why the plaintiff was not entitled, in law, to claim damages for Baby P's upkeep. First, it would be "going beyond what should constitute a reasonable restitution for the wrong done" to allow the plaintiff's claim for the lost opportunity to an abortion: *ACB* at [14]. In any event, this claim appeared to be a "mere afterthought as the plaintiff did not even plead her missed opportunity to abort Baby P": *ACB* at [14].

6.12 Second, both *McFarlane* and *Cattanach* were distinguished on the basis that, here, "the plaintiff had wanted a second child all along": *ACB* at [15]. *McFarlane* and *Cattanach* were "wrongful birth", "unwanted birth" or "unwanted pregnancy" cases: *ACB* at [15]. Here, however, "Baby P was not an unwanted birth in the sense that the plaintiff mother did not want to have a baby at all. The plaintiff just wanted a baby conceived with her husband's sperm": *ACB* at [15]. Because of this "crucial difference", it could not (*ACB* at [15]):

> … be said that the plaintiff and her husband were not contemplating having to expend money to bring up a child. On the contrary, the reason they engaged the defendants was so that they could have a child.

Continuing, Choo J observed that (*ACB* at [16]):

> … no parent would want her child to grow up thinking that she (the child) is a mistake. Were the plaintiff to succeed in her upkeep claim … every cent spent in the upbringing of Baby P will remind her that it was money from a compensation for a mistake. Baby P should never have to grow up thinking that her very existence was a mistake. A parent is obliged to maintain his infant child. It does not matter whether the child is his or her natural child, or an adopted child. When a parent has accepted his role in respect of that child, the obligation is his (and his spouse's). He cannot be a parent and have someone else pay to bring up the child.

6.13 Though not an issue before the court, Choo J also weighed in on the question of "whether an upkeep claim [should] be allowed for wrongful birth cases": *ACB* at [16]. Observing that this issue is a "contentious one [with] a divergence of views expressed" and that legislation may be required to regulate it, Choo J, nevertheless, agreed with Lord Millet in *McFarlane* that "[t]here is something distasteful, if

not morally offensive, in treating the birth of a normal, healthy child as a matter for compensation": *ACB* at [16], citing *McFarlane* at 111D.

6.14 Choo J's decision appears correct given the facts of *ACB*. That said, it remains the case that it is still open for a local court to decide whether *McFarlane* or *Cattanach* (or, indeed, an entirely different approach) should apply in wrongful pregnancy cases.