Who Wins When the Pregnant Athlete Plays?

The Legal Intersection of Discrimination, Negligence and Feminist Jurisprudence

Kendra Hagan*

1. Introduction

This paper will outline the landmark Australian 'pregnant netballer cases'[1] of *Gardner v National Netball League* (2001) 182 ALR 408 and *Gardner v All Australian Netball Association Ltd* (2003) 174 FLR 452 in relation to the impact they have had upon clarifying the issue of sex discrimination as it relates to the pregnant athlete. The subsequent unsettling flow on effect these decisions have had upon the law of negligence will then be discussed. Finally, given that issues pertaining to the pregnant athlete are intrinsically linked to an understanding of women's rights within the combined hyper-male discourses of sport, medicine and law, this paper will also provide a limited commentary on the potential role of utilising feminist jurisprudence perspectives in finding appropriate legal pathways forward through the current uncertainty.

2. Context

The realm of sport is associated with notions of fierce competition and public displays of strength. It has been constructed as essentially a male domain.[2] The experience of

---

* B Social Work (UWA). Currently completing a graduate Law degree at Murdoch University.

[1] The lead up to these cases and the subsequent judgements sparked a great deal of public debate and was heavily covered by the media. For examples see Jacquelin Magnay, 'Netballer Sues Over Pregnancy Ban', *The Sydney Morning Herald* (Sydney), 5 June 2002 and Denise McNamara & Lauren Ahwan, 'Netballer's Pregnant Pause Ends In Damages Payout', *The Age* (Melbourne), 14 March 2003.

[2] Marnie Haig-Muir, 'Qualified Success? Gender, Sexuality and Women's Golf' (1988) 14 *Sporting Traditions* 37, as at page 37 states "Sport is a key institution where males learn, develop, practice and

pregnancy is one related to care-giving roles and private sphere relationships. Biologically, it is solely a female experience. How then, to make socio-legal sense of the pregnant athlete?

Until recent times, the issue of pregnancy in sport was not even viewed of as a discussion point. As a general rule, the athlete, upon learning of her pregnancy, would simply cease competing.[3] Medically and socially the situation has changed. There are greater numbers of women competing in sport,[4] pregnancy has become a far more visible experience, and many women are choosing to remain physically active throughout their pregnancies, a situation that is, in most cases, medically encouraged.[5]

The increasing number of pregnant athletes,[6] whether it is at the amateur or professional level, has caused a great deal of uncertainty within Australian sporting, medical and legal

---

perpetuate 'manly' skills and values. Because it both constructs and is constructed by dominant views of masculinity and femininity sport is an important way to 'do gender'. Also see Catherine Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) 36 where she notes that it is "men's physiology (that) defines most sports".

[3] See Anne Barker's interview with Sue Taylor, President, Netball Australia on Radio National's *Sports Factor* on 22 June 2001: see http://www.ausport.gov.au/fulltext/2001/sportsf/s316328.htm viewed 26 April 2007; Julia Werren, 'Law, Pregnancy and Sport: What are the repercussions when a pregnant lady plays?' (2006) 14 *Journal of Law and Medicine* 45, 45.

[4] Pru Goward, Federal Sex Discrimination Commissioner, *The Current Playing Field 1991-2002*, Women and Sport Forum (20 May 2003) : see http://www.hreoc.gov.au/speeches/sex_discrim/TheCurrentPlayingField.htm viewed 20 April 2007.

[5] Dr Trevor Mudge, Vice President of the Federal Australian Medical Association, *Belated Triumph for Pregnant Netballers*, Media Release (25 March 2002) : see http://www.ama.com.au/web.nsf/doc/WEEN-5GB4AM viewed 26 April 2007; Sports Medicine Australia, *Exercise in Pregnancy*, Fact Sheet 2 (2000) : see http://www.sma.org.au/pdfdocuments /Fact.Sheet_2.pdf viewed 13 April 2007.

[6] There are now, in fact, a number of examples of pregnant athletes performing at elite levels in sport such as Robyn Maher who was pregnant when she played as captain of the Australian Women's Basketball Team, Michelle den Dekker who was pregnant when she played in the 1995 Netball World Championships, and former USA soccer international Joy Fawcett who played throughout her pregnancy. For further discussion see Stephen Cauchi, 'Netball Body to Ban Pregnant Women' *The Age* (Melbourne), 19 June 2001.

fraternities.[7] We have witnessed sporting organisations attempt, albeit sometimes clumsily, to balance the right of the pregnant athlete to play with their own increasing fear of negligence litigation either from the pregnant athlete or possibly her child once born.[8] Medical professionals have also been forced to grapple, hypothetically at least, with dual duty of care questions in advising the pregnant athlete and the possible impact this may have upon confidentiality responsibilities.[9] In light of these competing rights and responsibilities, legal cases and law academic discussions have largely framed the pregnant athlete in terms of discrimination and negligence law.[10]

3. The Pregnant Netballer Cases

On the 17th of June 2001, Australia's leading sporting body in netball, Netball Australia,[11] made the decision to ban pregnant women from playing netball. The ban was primarily introduced to prevent possible future legal action against Netball Australia should a pregnant netballer and/or her foetus suffer an injury due the pregnant player's participation in the game.[12] At the time of the ban, Trudy Gardner was captain of the Adelaide Ravens, a netball team playing in the National Netball League finals series

---

[7] Hayden Opie 'Medico-Legal Issues in Sport' (2001) 23 *Sydney Law Review* 375, 386-388.
[8] *Gardner v National Netball League* (2001) 182 ALR 408; [2001] FMCA 50.
[9] Judith Mair and Dianna T. Kenny, 'Fetal Welfare: Midwives' Perspectives in Australia' (1996) 9 *Australian College of Midwives Journal*, 9.
[10] Two very good discussions on the issue of law, sport and pregnancy are: Julia Werren, 'Law, Pregnancy and Sport: What are the repercussions when a pregnant lady plays?' (2006) 14 *Journal of Law and Medicine* 45; Hayden Opie 'Medico-Legal Issues in Sport' (2001) 23 *Sydney Law Review* 375, 386-392.
[11] "Netball Australia" is the registered business name of the All Australian Netball Association.
[12] See Anne Barker's interview with Sue Taylor, President, Netball Australia on Radio National's *Sports Factor* on 22 June 2001: see http://www.ausport.gov.au/fulltext/2001/sportsf/s316328.htm viewed 26 April 2007.

overseen by Netball Australia. Ms Gardner was 15 weeks pregnant, disclosed her pregnancy, and was immediately banned from competing in the remainder of the finals.[13]

Ms Gardner lodged a complaint against the ban with the Human Rights and Equal Opportunity Committee on the grounds of discrimination based upon pregnancy[14] and also sought an injunction on the ban to allow her to continue playing in the finals series and avoid losing match payments and sponsorship opportunities.[15] In *Gardner v National Netball League*,[16] after reviewing arguments from both sides including expert medical testimony, Federal Magistrate McInnis rejected the notion of pregnancy as an illness constituting a contractual breach,[17] and found there to be insufficient medical grounds to justify banning Ms Gardner from playing netball at her current stage of pregnancy. McInnis FM further found that it should be for the pregnant netballer, in consultation with appropriate medical advice, to decide if she wishes to continue participating in the game and an injunction was granted allowing Ms Gardner to compete in the remainder of the finals series.[18]

In 2003, in *Gardner v All Australia Netball Association Ltd*,[19] the ban was found to have been discriminatory under section 22 of the *Sex Discrimination Act 1984* (Cth) (SDA).[20] Netball Australia accepted that it had acted in a discriminatory manner based upon

---

[13] There were only three or four games remaining in the season and Ms Gardner had in fact planned her pregnancy in light of this as detailed in *Gardner v National Netball League* (2001) 182 ALR 408; [2001] FMCA 50 at para 21.
[14] Under section 7 of the *Sex Discrimination Act 1984* (Cth).
[15] Under section 46PP of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
[16] (2001) 182 ALR 408; [2001] FMCA 50.
[17] Ibid para 15.
[18] Ibid para 57-58.
[19] (2003) 197 ALR 28.
[20] This section relates to the provision of goods, services, and facilities.

pregnancy but argued that their actions were exempt due to their status as a voluntary body under section 39 of the SDA. In his decision, Federal Magistrate Kenneth Raphael adopted a narrow interpretation of this section, as recommended by the Sex Discrimination Commissioner acting as *amicus curiae*,[21] and found the exemption did not apply. Thus, the banning of Ms Gardner constituted unlawful sex discrimination on the basis of pregnancy and Netball Australia was ordered to pay Ms Gardner $6750.00 in compensation for lost match fees and damages plus costs.

4. Discrimination

Based upon provisions of the *Convention on Elimination of All Forms of Discrimination Against Women*,[22] one aspect of the SDA is to eliminate discrimination on the grounds of pregnancy[23] in area's such as: work; education; the provision of goods, facilities and services; and the activities of clubs.[24] So whilst sport is not named in the legislation specifically as a distinct sphere of unlawful discrimination, it is usually encompassed by one or more of the aforementioned areas as was the case in *Gardner v All Australian Netball Association Ltd*.[25] Additionally, this case also demonstrates that the exemption clauses in the SDA can be reasonably expected to be interpreted narrowly to ensure the

---

[21] Pru Goward, Federal Sex Discrimination Commissioner, *Pru Goward Welcomes Decision in "Trudy Gardner" Case* (13 March 2003) : see http://www.hreoc.gov.au/media_releases/2003/07_03.html viewed at 20 April 2007.

[22] 1249 UNTS 12. The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) was adopted by the United Nations General Assembly in 1979 and entered into force on the 3rd of September 1981. The CEDAW is essentially an international bill of rights for women which includes a commitment by signatories to incorporate the principle of equality of men and women into their legal systems and abolish all discriminatory laws against women. Additionally, the CEDAW affirms the reproductive rights of women and actively identifies culture and tradition as significant in the conceptualisation of gender roles.

[23] See section 7. Note this section also includes grounds of potential pregnancy.

[24] *Sex Discrimination Act 1984* (Cth) s 3(b).

[25] (2003) 174 FLR 452.

overall purpose of the SDA, eliminating discrimination on the basis of sex, is upheld.[26] Thus, voluntary sporting bodies should not assume that exemptions under section 39 of the SDA will apply to them.

The cases are generally regarded as having provided clear guidance on the issue of the pregnant athlete as it relates to sex discrimination on the basis of their pregnancy - that the courts will view it as prima facie discriminatory to prevent the pregnant athlete from participating in a sport because she is pregnant.[27] The foundation of guidelines now published by the Australian Sports Commission (ASC) on pregnancy in sport[28] is also to be found in the judgements of these cases. The ASC guidelines cover issues of health, law, and ethics and proscribe that the decision of whether the pregnant athlete plays sport or not, is up to the pregnant athlete based upon her own individual circumstances, medical recommendations, and with coach/sporting organisation consultation. The ASC guidelines have now been adopted by most individual sporting codes into their own guideline/policy materials including those of Netball Australia.[29]

5. Negligence

[26] This is keeping with the Courts emphasis of interpreting statutes in a manner consist with the terms of international conventions. See *IW v City of Perth* (1997) 191 CLR 1, 14; *X v Commonwealth* (1999) 200 CLR 177, 223.

[27] There are, of course, possible exceptions that may arise based on the nature of the sport. For example see *TKD Australian Taekwando Inc* [1997] VADT 68.

[28] Australian Sports Commission, *Pregnancy in Sport: Guidelines for the Australian Sporting Industry* (2002).

[29] Netball Australia, *Pregnancy Policy* (1 November 2004). Other similar policies include: Softball Australia, *Pregnancy Guidelines for Associations and Clubs* (February 2004); Tennis Australia, *Member Protection By-Law* (2001).

The ruling against Netball Australia's banning of pregnant athletes on the basis of discrimination has left many involved in the sporting arena worried as to possible negligence claims that could arise now that, in most circumstances, it would appear the pregnant athlete can choose to continue to play sport. The concerns do not so much surround the pregnant athlete as the plaintiff but rather the foetus, once born, taking legal action against parties such as other competitors, sporting clubs, medical professionals, or even its own mother for an in utero injury caused by the pregnant athlete's sporting activities. This is because the steps outlined earlier that a pregnant woman takes in deciding to participate in sport as per informed consent with medical advice, whilst they may waive her right to future negligence claims through the voluntary assumption of risk,[30] they do not, and can not, waive the rights of her unborn child to future legal action.

Foetal Legal Rights

The unborn child is not able to voluntarily assume the risk of injury it may sustain due to its pregnant mother participating in sports as a foetus does not have the same legal rights as a person under Australian law. These rights come with being born.[31] However, there is clear precedent in Australia that a child born with injuries sustained in utero has the right to a negligence claim against the person or persons responsible for their injury if their acts are found to have been wrongful.[32] This, like any negligence claim, would

[30] It will ordinary be recognised that if the pregnant athlete, as per any athlete, was made fully aware of the risks involved with her continued sports participation, then she will generally be considered to have voluntarily assumed the risk of possibly sustaining those injuries. Relevant stakeholders such as other competitors, sporting organisations and medical practitioners could therefore utilise the defence of voluntary assumption of risk if faced with future negligent action. See *Agar v Hyde; Agar v Worsley* (2000) 201 CLR 552; 74 ALJR 1219. Also see Pauline Sadler and Rob Guthrie, 'Sports Injuries and the Right to Damages' (2001) 3 *Sports Administration* 9 for a basic overview of negligence and sports.
[31] See *Watt v Rama* [1972] VR 353.
[32] Ibid; *X&Y v Pal* (1991) 23 NSWLR 26, 29-30 per Mahoney JA, 37-38.

involve demonstrating that the defendant owed a duty of care to avoid a reasonable foreseeable risk of harm to the foetus and that it was the defendant's act, including not acting, that has caused the injury.[33] There is not currently any case law where this has occurred within the context of the pregnant athlete, yet one can easily imagine scenario's that have the possibility of fitting the above negligence claim criteria with a particular focus on other competitors, the sporting organisation, medical practitioners, and the pregnant athlete.

Competitors

The least contentious of these groupings would appear to be that of those competing with or against the pregnant athlete. This includes team mates, opposing players, and referees. Players are generally not liable for injuries caused to another player if their actions have been within the rules of the game. In fact liability is said to only occur where a player acts outside the rules of the game in a manner which is not ordinarily and reasonably contemplated by fellow competitors.[34] It is reasonable to assume that the same level of duty would apply whether the other player is pregnant or not and that no higher duty would be owed to the pregnant athlete and her foetus. This is because to assume otherwise would create too onerous a duty on players whilst negatively impacting upon the way a sport is ultimately played.

[33] Hayden Opie 'Medico-Legal Issues in Sport' (2001) 23 *Sydney Law Review* 375, 388 notes that "any claim would face the potentially difficult hurdle of establishing a causal link between the incident on the sports field and the harm suffered by the foetus – harm that may not necessarily be identified until some considerable time after birth".

[34] *McNamara v Duncan* (1976) 26 ALR 584.

Sporting Organisers

The extent of the duty of care owed by a sporting organisation to the pregnant athlete's unborn child is not as clear due to the lack of case law directly on the subject of the pregnant athlete. An examination of related case law shows us that whilst it is reasonable to assume an employer has a duty of care to the unborn child of an employee as per *Hughes v Sydney Day Nursery* [2000] NSWSC 462, the case of *Agar v Hyde; Agar v Worsley* (2000) 201 CLR 552 guides us that it the personal responsibility of players in accepting risks associated with sporting activities and the non-responsibility of sporting governing bodies to adjust rules to minimise these risks. Therefore, it could be suggested, that the sporting club does owe the pregnant athlete's unborn child a duty of care. It could further be suggested, but not with certainty, that the sporting organisation who follows the steps as per ASC guidelines and who, due to discrimination legislation, are unable to ban the pregnant athlete have also discharged their duty of care to the unborn child. The area of greatest uncertainty as to sporting organisation's discharging their liability comes upon circumstances where a sporting administrator is aware (or should be aware) that the pregnant athlete has either not obtained the appropriate medical advice or, by continuing to play, is not heeding such medical advice. This scenario may impose a greater duty upon the sports administrator but what this means in practice remains unclear.[35]

Medical Practitioner

[35] Tim Frampton, Representing Australian & New Zealand Sports Law Association (ANZSLA), 'National Forum on Pregnancy and Sport' (Discussion held at the National Sport and Pregnancy Forum, Sydney, 1 August 2001) : see http://www.ausport.gov.au/women/docs/Abstract6.pdf viewed 20 April 2007.

It is clear under Australian law that a medical practitioner owes a duty of care to the unborn child when treating the pregnant mother.[36] In the scenario of advising the pregnant athlete, there would be an obvious breach if the medical practitioner failed to adequately warn the pregnant athlete of the possible risk to her unborn child associated with her on-going sporting participation.[37] It is a far more complex situation, if the medical practitioner has warned the pregnant athlete of serious risks to the unborn feotus and the pregnant athlete elects to continue playing. The question being is the duty of care to the unborn child significant enough to justify breaking the bounds of confidentiality owed to the pregnant athlete by informing relevant stakeholders such as the sporting organisation, child protective services, or even the other parent. So far, academic writings have suggested that it would be in the public interest to uphold the bounds of confidentiality to promote appropriate maternal/foetal medical care and relationships.[38]

Pregnant Athlete

The most controversial of these possible negligence scenarios is if the pregnant athlete was found to owe her unborn child a duty of care whilst playing sport. A number of people have drawn comparisons between the courts finding a mother liable for injuries she caused her unborn child in a car accident in *Lynch v Lynch* (1991) 25 NSWLR 411 to that of the possible case of a mother being held legally responsible for injuries her child

[36] *X&Y v Pal* (1991) 23 NSWLR 26. For further discussion see Judith Mair and Dianna T. Kenny, 'Fetal Welfare: Midwives' Perspectives in Australia' (1996) 9.
[37] Julia Werren, 'Law, Pregnancy and Sport: What are the repercussions when a pregnant lady plays?' (2006) 14 *Journal of Law and Medicine* 45, 52.
[38] See Julia Werren, 'Law, Pregnancy and Sport: What are the repercussions when a pregnant lady plays?' (2006) 14 *Journal of Law and Medicine* 45; Hayden Opie 'Medico-Legal Issues in Sport' (2001) 23 *Sydney Law Review* 375, 386-392.

sustained in utero due to the mother's sports participation whilst pregnant.[39] And whilst it is important to note that the judgment in *Lynch v Lynch*[40] was expressly confined to motor vehicle accidents and overtly avoided making a general principle ruling that could be applied to the pregnant athlete, there is neither case law precedent nor legislation in Australia preventing such an action.

The repercussions of such a maternal duty of care would be significant far beyond the sporting field. If the law of negligence were to go in this direction it would bring into direct competition maternal and foetal rights, creating legal complexities such as dual duty of care conflicts to the pregnant woman and to her unborn child.[41] It has the potential to ultimately challenge a pregnant woman's fundamental human right to autonomous decision making, invading all aspects of the pregnant woman's life and, in essence, defining the pregnant woman primarily in terms of her reproductive status and function.[42]

6. Feminist Jurisprudence

One of the shared aims of feminism and anti-sex discrimination legislation has been to enable women an equality of access to life pursuits in all areas including sport. However,

---

[39] Hayden Opie 'Medico-Legal Issues in Sport' (2001) 23 *Sydney Law Review* 375, 390-391 Sport' (p390-391). Please note that Hayden Opie does not himself draw these comparisons but instead details those who have.

[40] (1991) 25 NSWLR 411, 414-415.

[41] A topic which is usually raised in legal terms when discussing the issue of abortion and is largely in its infancy in Australia. For further discussion see Judith Mair and Dianna T. Kenny, 'Fetal Welfare: Midwives' Perspectives in Australia' (1996) 9 *Australian College of Midwives Journal* 9, 9-10; Lee Ann Marks, 'The "Seymour Report" on Fetal Welfare and the Law in Australia' (1995) 2 *Murdoch University Electronic Journal of Law* : see http://www.murdoch.edu.au/elaw/issues/v2n3/marks23.txt as viewed 23 April 2007.

[42] See Julia Werren, 'Law, Pregnancy and Sport: What are the repercussions when a pregnant lady plays?' (2006) 14 *Journal of Law and Medicine* 45, 53-55.

are we really shocked when the traditionally male discourse of law struggles to cope with the repercussions of the pregnant athlete actually continuing to play sport? This struggle, represented in the uncertainty of negligence law outlined above, occurs due to the legal system (and medical and sporting discourses) historically defining women, especially pregnant women, in limited and unsustainable ways.[43] The 'pregnant netballer cases', and the subsequent debate surrounding them, demonstrate a challenge to the legal infrastructure and its construction of women and their rights. Whilst it is not for this paper to explore in any depth, such a challenge would be best answered utilising a feminist jurisprudence critique.

Additionally, it is worth noting that a feminist approach to this area of law could actually provide a practical arena where competing strands of feminist jurisprudence could unite to address the current legal uncertainties. For example, aspects of cultural feminism,[44] could be used to help explore issues associated with the inherent interconnectedness between the pregnant woman and another. Radical theories, which critique the limitations of the 'sameness/difference' approach used in discrimination legislation, could instead encourage recognition that the needs of women will create legal complexities not easily resolved while the legal system remains an essentially male construct founded on the dominance of women.[45] Furthermore, there is room for post-structural approaches which move away from artificially created binary opposites, both

[43] For interesting case discussions as to how the law has defined the pregnant woman in the past see Mary Becker, 'From *Muller v Oregon* to Fetal Vulnerability Policies' (1986) 53 *University of .Chicago Law Review* 1219, 1222-1223.
[44] See for example Robin West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1.
[45] Catherine Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) 36.

socially[46] and legally, towards alternative ways of defining gender within the law and pregnancy within sport.[47] It is possible that we have found a legal scenario which potentially incorporates cultural feminism, radical feminism, and post-structural feminism in a harmonious relationship. There is great potential for further research and reflection that utilises a combination of these theories to develop appropriate ways forward within the legal field that upholds women's fundamental human rights whilst addressing negligence concerns.

6. Conclusion

The decisions in *Gardner v National Netball League*[48] and *Gardner v All Australia Netball Association Ltd*[49] have provided a clear pathway for pregnant woman to play sport and be protected under the SDA from sporting organisations' blanket bans. This, in turn, has created uncertainty in negligence law as to the existence and standards of duty of care for competitors, sporting organisations, medical practitioners, and the pregnant athlete herself to the unborn child of the pregnant athlete. The 'pregnant netballer cases' have a far wider reach than that of just netball. Indeed, it is about whether as a society we allow women to define their own activities and their own bodies. The legal directions that can be taken potentially have huge repercussions for women, both socially and legally, and for this reason it is imperative that a collaborative feminist jurisprudence framework is utilised to ensure the right path is chosen.

---

[46] Effectively challenging those who wish to primarily define women as care-givers and mothers whilst define sportswomen as masculine and tomboys. This meshing of characteristics serves to dispel the existing binary opposites.
[47] See Joan W. Scott, 'Deconstructing Equality-versus-Difference: or, The Uses of Poststructuralist Theory for Feminism' 14 (1988) *Feminist Studies* 33.
[48] (2001 182 ALR 408; [2001] FMCA 50.
[49] (2003) 174 FLR 452.