Courts cautious on exemplary damages: doctor insists on abortion

Backwell v AAA

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There is an increasing tendency in personal injury actions in Australia for plaintiffs to claim exemplary damages in addition to compensatory damages. There are not many recent Australian authorities on the issue of exemplary damages, so the decision of the Victorian Court of Appeal in the case of *Backwell v AAA* ([1997] 1VR 182) is of interest to personal injury lawyers for the light it sheds on the judicial attitude to this issue.

Facts

This case arose from a mistake made at an artificial insemination clinic in Melbourne in 1983. The defendant was a doctor at the clinic and the plaintiff (AAA) was her patient. The patient sought artificial insemination treatment as she had suffered eight miscarriages in four years as a result of an extreme histo-incompatiblity between her and her husband. The gynaecologist who referred her to the defendant stressed that it was important that she be inseminated with semen from a donor whose blood group was Rh negative. On 12 May 1983, however, as a result of a mistake made by a nurse, AAA was inseminated with sperm from a donor whose blood was Rh positive, and who had a racial background and physical features quite different from those of her husband. The defendant advised AAA of the mistake and asked her to return to the clinic on 30 May for a pregnancy test. The test was positive.

The basis for the claim for exemplary damages was the defendant's conduct during a consultation she had with the plaintiff on the following day. The plaintiff gave evidence at the trial that the defendant told her she would have the pregnancy terminated because she would not be able to pass the child off as her husband's, and publicity about the mistake could result in the closure of the clinic (at the time these events occurred there was a fierce debate in the press about fertility issues as a result of the recent development of IVF technology). She also alleged the defendant told her that if she did not have an abortion she could not continue treatment at the clinic and no other artificial insemination program in Australia would accept her. The defendant did not deny making these threats, but claimed she was solely motivated by concern for the plaintiff's welfare.

The threats were, not surprisingly, effective, and the plaintiff underwent an abortion on 4 June 1983. As a result of these events she developed a depressive disorder, for which she received counselling and psychiatric treatment. She sued the defendant for damages in the Supreme Court of Victoria, and a jury awarded her $60,000 in compensatory damages and $125,000 for exemplary damages. The defendant appealed against the verdict with respect to the exemplary damages on the grounds that the trial judge had misdirected the jury on the question of exemplary damages and that the amount awarded by the jury was excessive.

The decision of the Court of Appeal

The appeal was upheld unanimously, although Tadgell JA dissented as to the further disposition of the case. Ormiston JA (with whom Brooking JA concurred) found that the trial judge misdirected the jury on three matters, and the award of exemplary damages should therefore be reduced to $60,0000. Tadgell JA agreed that the jury had been misdirected, but thought it was not appropriate for the Court of Appeal to reassess the damages. His view was that the court should order a retrial, on all issues, including compensatory damages.

The first error which the court found in the trial judge's charge to the jury was his decision to allow them, in assessing the exemplary damages, to consider the defendant's conduct on the date the mistake was made (12 May 1983), as well as her conduct after the pregnancy was confirmed. Ormiston JA considered that the conduct on 12 May, although it may well have constituted negligence, was not of a kind that *"demonstrated deliberate wrongdoing or a wanton or reckless disregard for the welfare of the plaintiff"*, and could not, therefore, support a claim for exemplary damages. He was concerned that there was a danger that by allowing the jury to take into account the defendant's conduct on 12 May, the trial judge had given the jury the wrong impression regarding the standard to be applied: *"it was possible that [the jury] concluded that either merely negligent errors or errors of a kind which might amount only to that much misused phrase 'gross negligence' would justify the award of such damages."* (at 204).

The trial judge's second error was found in his direction to the jury regarding the need to show restraint and moderation in awarding exemplary damages. In his charge, the trial judge advised the jury that they should be *"reasonable and just"* in assessing exemplary damages and he warned them to be *"careful to see that the punishment is neither too great nor too little for the conduct which is deserving of punishment"*, The Court of Appeal found such directions were insufficient to comply with the requirements specified by Gibbs CJ in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* ([1985] 155 CLR 448, at 463), as the language used by the trial judge was not "identical in either form or connotation" to the warnings which Gibbs CJ prescribed. This very literal approach to authority exhibits a real concern about the size of awards of exemplary damages and a desire to impose limits on them, by impressing on juries, in clear and unequivocal terms, the need to show restraint and moderation.

The final ground for upholding the appeal was the trial judge's failure to direct ▶

the jury that if, but only if, the sum that they had in mind to award as compensatory damages was inadequate to punish the defendant for her conduct could they award exemplary damages. This ground of appeal was based on one of three "considerations" expressed by Lord Devlin in *Rookes v Barnard* ([1964] AC 1129, at 1227), which is one of the leading English authorities on the issue of exemplary damages. The trial judge held that this principle was inconsistent with Brennan J's rejection of *Rookes v Barnard* in the *XL Petroleum* case. The Court of Appeal, however, found that the differences in law between England and Australia did not provide a basis for rejecting Lord Devlin's principle. It would seem, therefore, at least in Victoria, juries must now be directed that exemplary damages can only be awarded if compensatory damages are insufficient to punish the defendant.

Having decided that each if these misdirections had a tendency to inflate the exemplary damages awarded by the jury, the majority set about the task of reassessing them. Their judgement, however, offers very little guidance as to the method to be adopted in performing this task. Apart from stating that it would be *"an over-simplification to merely subtract the $60,000 award of compensatory damages from the award exemplary damages, leaving the punitive element at $65,000, and the total award at $130,000"*, and that it was not relevant to consider whether the defendant was insured, the decision to reduce the exemplary damages to $60,000 was unaccompanied by any explanation other than the unilluminating comment that *"in the end it is a matter of impression what value in monetary terms should be placed on the contumelious disregard of [the plaintiff's] interests by [the defendant's] behaviour"* (at 216).

The judgements in this case exhibit a very cautious, conservative approach to the issue of exemplary damages. The fact that the damages awarded by the jury were reduced by more than 50% despite the majority's belief that the defendant's behaviour *"was rightly seen by the jury as calling for condemnation and rightly ... calling for a substantial award of exemplary damages"* sets an unfortunate precedent, from the point of view of plaintiffs, for future claims. The judgement of Tadgell JA gives even more cause for concern: he not only thought the award of exemplary damages was *"perversely high by a factor of between three and four"*, but he expressed doubts as to whether the case was an appropriate one to award such damages at all. Given the egregious nature of the defendant's conduct in this case, it is hard to imagine any circumstances in which His Honour would consider exemplary damages to be appropriate.

The overwhelming impression from the judgements of the Court of Appeal is that the circumstances in which exemplary damages will be awarded in personal injury actions are likely to remain rare, and the few awards that are made will be strictly scrutinised by superior courts.

The plaintiff was refused special leave to appeal to the High Court on 5 August 1996. ■

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Class actions: do they have a future?

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Many in the manufacturing and insurance industry are opposed the introduction of reforms that improve the position of consumers. Since the introduction of Part IVA of the *Federal Court Act*[1] we have witnessed a steady increase in anti-class action propaganda in the press in Australia. Much of this can be traced, in origin, to industry lobbying and media campaigns for 'tort law reform' first commenced in the USA over 30 years ago.

The general focus of this campaign has been to portray manufacturers and insurers as the 'victims' of greedy unmeritorious plaintiffs and of a legal system in need of serious 'reform'. The sorts of 'reforms' advocated involve any step that will make it difficult for ordinary people to litigate against suppliers and manufacturers of goods and services on anything resembling a level playing field. 'Reforms' such as caps on damages, abrogation of judicial control over expert evidence, shorter limitation periods, increased cost and procedural penalties against litigants, the abolition of lawyer advertising, elimination of joint and several liability, elimination of strict product liability etc.[2] Class actions are one element on this hit list for 'tort reform'. They were vehemently opposed from the outset and will continue to be opposed so long as they represent any threat to the status quo.

The reality is, of course, quite different and does not make good press. This is particularly the case with class actions. For example, Part IVA of the Act did not create new rights, it merely defined a new procedure. In the last 5 years since Part IVA was introduced there have been very few class actions commenced in Australia and many of those which have been filed have been stayed on procedural grounds.[3] There is no explosion of class actions in Australia, nor will there likely ever be, when regard is had to the structural and legal hurdles placed in the way of plaintiffs wishing to access this procedure.

The promise and the reality

Class actions have the potential to:

- increase access to justice;
- make it economic for numerous small claims to be effectively litigated;