

## EVIE TOOMBES v DR. PHILIP MITCHELL

Evie Toombes was born on 19 November 2001 with spina bifida. This is a developmental disease suffered when the neural tube which forms the spinal cord does not develop or close properly. She suffers permanent and debilitating injuries including a neuropathic bladder, bowel incontinence and intermittent vomiting. She has only recently undergone an ileostomy. She has a problem of low potassium and has been hospitalised on almost a monthly basis to deal with this. She is tube fed. She has loss of sensation in the pelvic girdle with lower limb weakness which leads to occasional wheelchair use.

The Claimant is now 19 years old and, despite her severe limitations, she has proved to be a formidable and courageous young woman. She is a highly accomplished leading para showjumper and acts as a disability ambassador.

She brought an action in her own right against the general practitioner whom she alleges gave negligent advice to her mother, prior to her conception. This advice led to her mother conceiving the Claimant without delaying and following a regime of ingestion of folic acid supplement prior to conception.

The Defendant contended that the correct characterisation of the claim was that it was one for “wrongful life” and hence was bound to fail pursuant to the provisions of the Congenital Disabilities ( Civil Liability ) Act 1976 which prohibits such a claim. This was endorsed by the courts in the leading case of **McKay v Essex Area Health Authority**<sup>1</sup> and has remained the law since 1982.

The Claimant challenged the allegation that her claim was one for “wrongful life” in the sense dealt with in the legislation and in **McKay**. In particular, she argued that her claim did not import any argument that she should have been aborted, nor that her parents should have been advised never to conceive a child. Her claim was founded upon the contention

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<sup>1</sup> [1982] 2 All ER 771.

that had the Claimant's mother been provided with the correct advice, she would have followed that advice and delayed conception.

Although this would have resulted in the birth of a normal, healthy child which was genetically different from the Claimant ( i.e. a brother or sister of the Claimant and not the Claimant herself ), she asserted that her claim was legitimate and came within section 1 (1) and (2) (a) of the Act. Section 1 provides:

***"1. Civil liability to child born disabled.***

*(1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.*

*(2) An occurrence to which this section applies is one which –  
(a) affected either parent of the child in his or her ability to have a normal, healthy child; ..."*

In order to address this fundamental issue of law the parties agreed that there should be a trial of a preliminary issue of law based upon an agreed set of facts. These facts were agreed solely for the purpose of the trial of the preliminary issue and the Defendant maintains that he was not negligent and that any alleged negligence did not cause or materially contribute to the Claimant's injuries.

The preliminary issue was heard by Lambert J in a two day hearing in November 2020. Judgment in favour of the Claimant was handed down on 21 December 2020. Following a close analysis of the law, it was held that the Claimant did indeed have a cause of action for damages against the Defendant for his breach of duty to her mother prior to the Claimant's conception which led to her being born disabled.

This is a landmark decision which was arrived at by reverting to first principles of the true construction of the Act and by finding that the decision in **McKay** was not binding on the court.

A fuller article and analysis of this case will be contained in the forthcoming Civil Liability Newsletter in the New Year.