Director of Proceedings v O'Neil — [2001] NZAR 59

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High Court Wellington

AP 149/99

21 June, 11 August 2000

Gendall J and Ms L C Te A Dyall

Headnotes

Complaints Review Tribunal — Negligence by midwife — Baby suffered severe brain damage and later died — Whether out of pocket funeral expenses should be awarded — Damages for humiliation, loss of dignity and injury to feelings — Meaning of injury to feelings — Quantum of damages — Punitive damages sought — Whether conduct amounted to flagrant disregard of person's rights — Whether respondent had been sufficiently punished — Health and Disability Commissioner Act 1994, ss 35, 47, 52, 57 — Human Rights Act 1993, s 93 — Human Rights Commission Act 1977, s 45 — Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996

The appellant had sought declarations from the Complaints Review Tribunal that the respondent midwife had breached certain provisions of the Code of Health and Disability Services Consumer Rights and also damages pursuant to s 57 (1)(a), (c) and (d) of the Health and Disability Commissioner Act 1994 ("the Act"). This followed the birth of a baby boy in November 1996 who suffered severe brain damage during birth and who died a month later. The respondent acquiesced in the making of the declarations but resisted the claims for compensatory and punitive damages. However, the Tribunal ordered the respondent to pay $20,000 for "humiliation, loss of dignity and injury to the feelings of the aggrieved person". The Tribunal held that "injury to feelings" did not encompass grief but was confined to "humiliation and loss of dignity". When considering the claim for punitive damages, the Tribunal concluded the respondent had been punished enough through the media to the extent that she suffered depression, was unemployed and unable to pursue an alternative career and by Nursing Council disciplinary proceedings and penalties. It declined to award $469 being the funeral expenses that the parents of the child incurred in excess of the payment received from the Accident Rehabilitation and Compensation Insurance Corporation for such funeral expenses. On appeal it was argued that the Tribunal was wrong to decline the funeral expenses that the parents had to pay, and that although the Tribunal was correct in concluding that humiliation to the parents was deserving of compensation, there was further "injury to

feelings" in the form of grief and distress which deserved additional compensation and the $20,000 was inadequate. It was also submitted that the Tribunal should have awarded exemplary or punitive damages. Counsel for the respondent accepted it was proper for the Tribunal to award damages for humiliation but argued there was no such thing as "humiliation of ignorance" and this award should be quashed.

Held (allowing the appeal on the funeral expenses, but dismissing the rest of the appeal and the cross-appeal)

(1) The parents' out of pocket expenses for their child's funeral were recoverable and should have been awarded pursuant to s 57(1)(a) of the Act. It was an expense reasonably incurred for the purpose of the activity (the funeral) which arose directly out of the breach of the Code. The parents were not barred by s 52(2) of the Act because they were not persons who had suffered personal injury within the meaning of the Accident Rehabilitation and Compensation Insurance Act 1992.

McLaren Transport Ltd v Somerville [1996] 3 NZLR 424 distinguished.

(2) The purpose of the category of damages provided by s 57(1)(c) was to provide compensation for injury to the mind, emotion or soul of a person, other than to his or her body. The words "injury to feelings" did not have to be read or interpreted ejusdem generis with the foregoing words. There was no reason damages to compensate for injuries such as feelings of happiness or tranquillity should not be available. The existence of a common law claim did not preclude aggrieved persons seeking "fair, simple, speedy" relief in the form of s 57(1) damages. Further, the parents had no common law claim for nervous shock, their claim was based on grief and loss.

(3) "Humiliation by ignorance" was a phrase used by the Tribunal to justify the granting of damages. It meant no more than the pain suffered by the parents upon their learning of the events, actions and decisions of the midwife. It was not necessary for the Tribunal to resort to such intricate reasoning. The parents suffered profound grief. That was not humiliation but a sense of loss.

(4) It did not necessarily follow that an additional award of damages was appropriate. It was necessary to look at the totality of the injury and the emotional state of the complainants. The task of fixing quantum of general damages was that of the trial Judge and an appellant Court would only intervene if the amount were outside the range that could reasonably be awarded in the circumstances of the case.

(5) The award of $20,000 was not excessive. It could not be seen as too high when viewed as against the profound suffering of the parents which flowed directly from the respondent's negligence. Neither could the award be seen as too low. It was a significant award, within the proper range. There was no error by the Tribunal to justify the Court interfering with the award.

(6) Before there was jurisdiction to award damages under s 57(1)(d) there had to be an action that was in flagrant disregard of the aggrieved person's rights. Punitive damages were to punish a wrongdoer, they were not compensation. Only in rare cases would they be awarded for

negligence. There had to be flagrant disregard or abuse of rights of another. Flagrant was a strong word which connoted outrageous behaviour. The Tribunal did not find a flagrant disregard of rights, it found the respondent had been punished enough. The type, manner and extent of the punishment together with a consideration of how and from whom it arose might be relevant factors in determining quantum of damages. Jurisdiction to award them arose if the statutory test in s 57(1)(d) was met.

McLaren Transport Ltd v Somerville [1996] 3 NZLR 424 and *Director of Proceedings v Nealie* [1999] 3 NZLR 603 considered.

(7) Attempts to use punitive damages to compensate were to be resisted. They should only be awarded in so far as compensatory damages did not adequately punish a defendant for extraneous conduct. Awards should be reserved for truly outrageous conduct which could not be punished in any other way. The respondent's errors or negligence, while serious and leading to tragic consequences, did not fall into the category of "flagrant disregard". There was no statutory foundation to award punitive damages. In any event, the Tribunal was entitled to look at the wide picture of "sufficient punishment".

Auckland City Council v Blundell [1986] 1 NZLR 732, *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA) and *Ellison v L* [1998] 1 NZLR 416 applied.

Observation

The compensatory award of $20,000 sufficiently penalised the midwife and the exclusion of punitive damages could be further justified on this basis.

Cases referred to in judgment

Aquaculture Corporation v New Zealand Green Mussel Co Ltd [1990] 3 NZLR 299 (CA)

Auckland City Council v Blundell [1986] 1 NZLR 732

Brickell v Attorney-General (High Court, Wellington CP 267/97, 9 June 2000, McGechan J)

Director of Proceedings v Nealie [1999] 3 NZLR 603

Ellison v L [1998] 1 NZLR 416

Laursen v Proceedings Commissioner (1998) 5 HRNZ 18

McLaren Transport Ltd v Somerville [1996] 3 NZLR 424

van Soest v Residual Health Management Unit [2000] 1 NZLR 179 (CA)

Watson v Dolmark Industries Ltd [1992] 3 NZLR 311 (CA)

Appeal

This was an appeal by the Director of Proceedings from a decision by the Complaints Review Tribunal which awarded $20,000 damages against the respondent. The respondent cross-appealed one finding of the Tribunal.

Dr David Collins for the appellant.

Gregory Everard and *Jacqueline Pearse* for the respondent.

J A L Oliver for the Complaints Review Tribunal.

JUDGMENT OF THE COURT.

[1] A baby boy was born at Hutt Hospital on 24 November 1996 suffering severe brain damage and he died

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at home on 29 December 1996. His mother had been under the care of a midwife during the crucial stages of her pregnancy and labour. The management of the mother's labour by the midwife was acknowledged to be negligent. Although it could never be established as a certainty, on the balance of probabilities the mismanagement caused or contributed to the brain damage. The midwife was disciplined by her profession. Separately the Director of Proceedings under the *Health and Disability Commissioner Act 1994* ("the Act") took proceedings before a Complaints Review Tribunal established under the *Human Rights Act 1993*. She sought certain remedies against the midwife. To a large extent they were granted and an award of $20,000 damages was made against the midwife. The appellant (hereinafter described as "the Director of Proceedings") was not satisfied with such award and brings this appeal from the decision of the Complaints Review Tribunal. As a separate matter there is a cross-appeal by the respondent ("the midwife") in relation to one finding of the Tribunal.

Proceedings before the Tribunal

[2] The Director had sought declarations that the midwife had breached certain provisions of the Code of Health and Disability Services Consumer Rights. Further she had sought damages pursuant to s 57(1)(a), (c) and (d) of the Act. The midwife had accepted that the alleged breaches had occurred, and acquiesced in the making of the declaration sought. She resisted however the claims for compensatory and punitive damages.

Statutory provisions

[3] The Act was enacted to protect the rights of those who availed themselves of health and disability services, to secure a fair, simple, speedy and efficient resolution of any complaints regarding infringements of the rights of consumers. It provided for the appointment of a Health and Disability Commissioner, the promulgation of a Code of Health and Disability Services Consumers' Rights and the provision of an advocacy service pursuant to the Act. The Code was promulgated in the form of Regulations in 1996, in what is known as a "Code of Health and Disability Services Consumers' Rights" which set out in an expansive way various rights that consumers of health services are entitled to expect.

[4] Rights 4(1), (2), (4) and (5) which the appellant alleged the midwife breached, and such was acknowledged, provide as follows:

RIGHT 4

RIGHT TO SERVICES OF AN APPROPRIATE STANDARD

(1) Every consumer has the right to have services provided with reasonable care and skill.

(2) Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.

(3) ...

(4) Every consumer has the right to have services provided in a manner that minimises the potential harm to, and optimises the quality of life of, that consumer.

(5) Every consumer has the right to co-operation among providers to ensure quality and continuity of services.

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[5] Investigation of any breaches of the Code fall within the functions of the Commissioner (s 35) and after investigation, if the Commissioner is of the opinion that there was a breach of the Code, certain remedies and actions are available. These include the right of the Director of Proceedings to participate in disciplinary and other proceedings (s 47) and also to take proceedings before a Complaints Review Tribunal. Section 50 of the Act provides as follows:

50. Proceedings before Complaints Review Tribunal — (1) This section applies to any health care provider or disability services provider in respect of whom or of which an investigation has been conducted under this Part of this Act in relation to any action alleged to be in breach of the Code.

(2) Subject to sections 49(2) and 53 of this Act, civil proceedings before the Complaints Review Tribunal shall lie at the suit of the Director of Proceedings against any person to whom this section applies for a breach, by that person, of the Code.

(3) ...

(4) Where proceedings are commenced by the Director of Proceedings under subsection (2) of this section, neither the complainant (if any) nor the aggrieved person (if not the complainant) shall be an original party to, or, unless the Tribunal otherwise orders, join or be joined in, any such proceedings.

[6] It is clear therefore that it is the Director who chooses to bring proceedings before the Tribunal, pursuing them on behalf of a complainant or aggrieved person who, by this procedure, largely waits in the wings. That is also the case on an appeal. The Complaints Review Tribunal which hears the proceedings is that constituted under s 45 of the Human Rights Commission Act 1977, which continued in force pursuant to s 93 of the *Human Rights Act 1993*.

[7] Apart from being able to seek a declaration that breaches of the Code have occurred the Director of Proceedings may seek damages pursuant to s 57 of the Act. The Tribunal may award damages against a "defendant" for a breach of any one or more of the provisions of the Code in respect of any one or more of the following:

(a) Pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved person for the purpose of, the transaction or activity out of which the breach arose:

(b) Loss of any benefit, whether or not of a monetary kind, which the aggrieved person might reasonably have been expected to obtain but for the breach:

(c) Humiliation, loss of dignity, and injury to the feelings of the aggrieved person:

(d) Any action of the defendant that was in flagrant disregard of the rights of the aggrieved person (s 57 (1)).

[8] Any damages recovered by the Director are to be paid to the aggrieved person on behalf of whom proceedings are brought and there is a limitation on damages to that provided within the jurisdiction of the District Court,

namely $200,000.

Matters that are not in dispute

[9] It was accepted by the midwife and her counsel that a declaration should be made as the midwife had breached the Code in the respects set

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out in Right 4(1), (2), (4) and (5) set out above. The factual narrative of events leading up to the tragedy make that abundantly clear. The breaches comprised, in general terms, negligence. The midwife had been subject to disciplinary proceedings by the Nursing Council which had made findings of "serious" shortcomings in professional standards or behaviour which were unacceptable inadequacies and failures, and resulted in the midwife being subject to a bar from practising her profession. Therefore, for the purpose of the hearing before the Tribunal its function was limited to determining the remedies, or the extent of such, available, or to be afforded, to the Director.

Remedies awarded by the Tribunal

[10] The Tribunal made declarations that the midwife had breached Rights 4(1), (2), (4) and (5) of the Code of Health and Disability Services Consumers' Rights as she had acknowledged. The Tribunal ordered the midwife to pay damages in the sum of $20,000 to the Commissioner on behalf of the complainants pursuant to s 57(1)(c) of the Act, that is for "humiliation, loss of dignity, and injury to the feelings of the aggrieved person". The Tribunal declined to award to the appellant the sum of $469 being funeral expenses that the parents of the child incurred in excess of the payment received from the Accident Rehabilitation and Compensation Insurance Corporation paid to the estate of the child for such funeral expenses.

[11] In assessing damages for "humiliation, loss of dignity and injury to feelings" the Tribunal concluded that the parents, and the mother in particular, suffered "significant humiliation and loss of dignity" in knowing that her levels of discomfort during the labour may have caused the midwife to "unwittingly, sacrifice the interests of the baby for the interests of the mother". It concluded, further, that the parents:

> ... suffered the humiliation of ignorance from the failure of the [midwife] to inform them of the risks to the foetus revealed by the traces and the need to obtain a longer trace [of the foetus heart rate] and the need to obtain a longer trace at an earlier stage of the labour. This particular humiliation was compounded, in our view, by the reasons given by the [midwife] for this failure to inform and for the various delays: she was overwhelmingly concerned for the comfort and well being of the mother, the pain the mother was experiencing and the way this could be dealt with in light of the mother's birth plan and fear of needles; she wanted to bring the mother to a level of comfort which would allow a full 20 minute foetal heart trace to be obtained. We think these reasons constitute a truthful account of the [midwife's] motivation during the labour. There is also a terrible irony in them because they show a conformity with the only provision of Right 4 of the Code which has not been cited in these proceedings: the right to have services provided in a manner consistent with the mother's needs.

[12] The Tribunal concluded that the phrase "injury to feelings" did not encompass "the enormous and debilitating grief which the parents of the baby had suffered as a result of his death". It accepted counsel's submission that the phrase "injury to the feelings" in s 57(1)(c) is defined

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and confined to the foregoing words "humiliation and loss of dignity" and does not extend beyond that type of suffering.

[13] With regard to the claim for exemplary or punitive damages the Tribunal concluded that the midwife had been very substantially punished through media publications and coverage of the events, to the extent that she had come to suffer a severe form of depression, was unemployed and unable to pursue an alternative career. The Tribunal concluded that the Nursing Council disciplinary proceedings and penalties, severe in themselves, should be regarded as the ordinary consequences of the breach of the Code and not on their own warrant the exercise of a discretion against an award of punitive damages. But it said that the extraordinary consequences of the breaches of the Code by the midwife resulted in media portrayal, speculation and allegations (not always accurate) relating to the midwife's conduct. The Tribunal did not determine whether there had been a flagrant disregard of a patient's rights but concluded that the midwife had been punished enough and added:

> It should be clear to the [parents] that we accept that the media interest in this matter has been destructive and distressing to them as well as to the [midwife]. We believe that it has not been helpful to the process of resolving the appalling grief and sense of loss that they continue to experience. But for the decision of the Health and Disability Commissioner to involve the media in this case there would have been no need to focus on the feelings of the [midwife] at all. This case could, and should, have focused simply on their feelings and the conduct of the [midwife] which gave rise to them.

[14] The Commissioner has challenged the remark that it was she who involved the media, although it is tolerably clear that she named the midwife in her report which was sent to a significant number of groups.

[15] On this appeal counsel for the Director submitted that the Tribunal was wrong in declining to award, as a fixed pecuniary loss, the sum of $469 being the balance of the funeral expenses that the parents had to pay. Counsel further submitted that whilst the Tribunal was correct in concluding that humiliation to the parents was deserving of compensation, nevertheless there was further "injury to feelings" in the form of grief and distress which was deserving of additional compensation and the award of $20,000 was inadequate. Counsel submitted that the Tribunal was wrong to exclude from the categorisation of "injury to feelings" matters such as grief and distress arising from and after the death of the infant. That is, "injury to feelings" encompassed more than humiliation and indignity.

[16] Thirdly, counsel submitted that the Tribunal should have awarded exemplary or punitive damages against the midwife and that the Tribunal was wrong to conclude that it should not make such award because (so it was said) the midwife had been sufficiently punished.

[17] For completeness we record that the actual claims presented to the Tribunal by the Director had been for the $469 special damages or costs, $40,000 for damages for humiliation, loss of dignity and injury to feelings, and $20,000 by way of punitive damages. It is not clear whether those figures were assessed or fixed by the parents of the child, or the Director.

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Out of pocket expenses of $469

[18] These comprised the balance of the funeral account. The Tribunal said that as the baby's estate was entitled to cover under the then Accident Rehabilitation and Compensation Insurance Act 1992 for funeral expenses and was paid a certain amount, the parents had no entitlement simply because the estate may have been inadequately compensated by the Accident Compensation regime. The Tribunal said that it did not accept that the inadequacy of compensation arising from the rights conferred by the Accident Compensation legislation could properly form the basis of a claim arising from another statute. Whether or not that be correct, and we do not have to express a view on it, it overlooks the crucial fact that in this case the Accident Compensation payment was made to the estate (albeit obviously intestate) of the deceased infant whereas the pecuniary loss claim under the present Act is the personal loss of the parents that they incur by way of contract as between themselves and the funeral directors. They were personally liable for such expense and were not acting as executors or administrators.

[19] It is true that pursuant to s 52(2) of the Act:

> (2) Where any person has suffered personal injury (within the meaning of the Accident Rehabilitation and Compensation Insurance Act 1992) covered by that Act, no damages (other than punitive damages in accordance with section 57(1)(d) of this Act) arising directly or indirectly out of that personal injury —
>
> (a) May be sought by or on behalf of that person in any proceedings under section 50 or section 51 of this Act,
>
> (b) May be awarded to or for the benefit of that person in any such proceedings.

[20] However that section relates to damages sought by or on behalf of "*that* person" who has suffered personal injury. The Director claims, not on behalf of the deceased but on behalf of the parents. Claims for expenses incurred subsequent to the death of that person, and paid by others do not in our view fall within this excluding provision. The provision simply precludes a person who is entitled to accident compensation, claiming damages (other than punitive damages) under the Health and Disability Commissioners Act 1994. It simply means there is to be no double payment. Because it is accepted that the parents have a claim under s 57(1)(c) as they are persons

"aggrieved", it must also be the case that they are persons "aggrieved" who have suffered pecuniary loss. There can be a clear distinction between a "person aggrieved" and a person who has suffered personal injury.

[21] Reference was made in the Tribunal's decision to the dicta of Tipping J in *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 where His Honour said (at p 433):

> Despite the suggested inadequacies of the present scheme we have, for better or for worse, in New Zealand a no fault accident compensation scheme. Its purpose is to compensate. It is not, in my judgment, a proper function of the Courts to develop the law of exemplary damages so as to remedy any

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> perceived shortcomings in the statutory scheme. If the scheme is regarded as being inadequate the proper remedy lies elsewhere ....

But those remarks were directed to the specific issue of the remedy of exemplary damages being expanded as a backdoor method of making up for inadequate ARCIC cover. The remarks are not relevant or appropriate to the situation where, as here, the parents having no cover under the Accident Compensation legislation incurred personal contractual out of pocket expenses in engaging funeral directors and incurred expense over and above that which, separately, the estate received payment from ARCIC.

[22] We have no doubt that this expense is recoverable and should have been awarded pursuant to s 57(1)(a) of the Act. It is expense reasonably incurred by the parents for the purpose of the activity, namely the funeral of their dead infant, which arose directly out of the breach of the Code. The parents are entitled to compensation for such loss and were not barred by s 52(2) of the Act because they were not persons who had suffered personal injury within the meaning of the Accident Rehabilitation and Compensation Insurance Act 1992. This aspect of the appeal is of lesser significance but it is allowed. There will be an award of damages under s 57(1)(a) in the sum of $469.

The claim under s 57(1)(c) for damages for humiliation, loss of dignity, and injury to feelings

[23] The Director of Proceedings, through her counsel, accepts that it was proper for the Tribunal to award damages for "humiliation" and that the figure of $20,000 was appropriate. But further compensation is sought for what she says were injury to feelings. Counsel for the midwife in the cross-appeal contends that there can be no such thing (as described by the Tribunal) "humiliation of ignorance" and accordingly this award should be quashed. He further submitted that the Tribunal was correct in restricting the meaning of the words "injury to feelings" to mean humiliation or loss of dignity.

[24] Whilst lawyers, in particular, delight in dealing with definitions and through a process of semantic analysis the particular wording of statutes, s 57(1)(c) must be looked at and interpreted in the context of the Act as a whole and its clear purpose. The purpose of that category of damages is to provide compensation for injury to the mind, emotion or soul of a person, other than to his or her body.

[25] We cannot see why the words "injury to the feelings" should be read, or interpreted ejusdem generis with the foregoing words of s 57(1)(c). If it were so, then those words would have no meaning because humiliation and loss of dignity, although describing a class of or similar emotions are really complete in themselves. So too, there are other feelings such as happiness, contentment, tranquillity which may be injured or hurt by a breach of rights, yet could not be categorised as humiliation. We see no reason at all why damages to compensate for such injuries should not be available.

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[26] Reference made by the Tribunal to:

> Parliament did not intend to replace common law actions based on claims of nervous shock by enacting s 57(1)(c) of the Act

[redacted]

discloses an error. First, we do not see that the existence of a common law claim precludes aggrieved persons seeking "fair, simple, speedy" relief in the form of s 57(1) damages. They may choose their remedy. Secondly, the parents of this child had no common law claim for nervous shock, and were not presenting any argument to support that. Claims for "nervous shock" must be based upon a recognisable mental injury, and grief, emotional stress and anxiety, falling short of a recognisable psychiatric disorder cannot give rise to a common law claim for damages: *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA). The parents' claim, here, was not based upon nervous shock, but grief and a sense of loss through the eventual demise of the baby.

[27] If the Tribunal's reasoning be correct then no aggrieved person can receive compensation for injured feelings other than humiliation or loss of dignity. That is why, we suspect, it engaged in the exercise of defining the parents' injury as being "humiliation of ignorance". We do not see that such mental gymnastics are necessary. But "the feelings" of a person which are capable of being injured encompass a much wider range than the feeling of "dignity" which if harmed may give rise to a state of humiliation. The Act is designed to compensate aggrieved persons who may suffer mental, emotional or spiritual injuries (to feelings) in an infinite variety of ways.

[28] Humiliation may involve loss of dignity and certainly will involve injury to feelings of self-worth and self-esteem. Humiliation, we would have thought, would always involve a loss of dignity. A loss of dignity would always have involved in injury to feelings. That would include a feeling of pride in oneself and general contentment. Yet whilst injury to such feelings may involve humiliation that will not always be the case. Injury or death to others who are loved ones, does not usually result in humiliation which is an emotion relative to self worth and self esteem, whereas grief is a sense of loss quite unrelated to self worth.

[29] The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

[30] "Humiliation by ignorance", as so described by the Tribunal, was a turn of phrase used so as to justify the granting of damages. In our view it meant no more than the pain sustained or suffered by the parents upon their learning of the events, actions and decisions of the midwife. That is, had they known of the significance of events or decisions, they

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may have questioned them. But later realisation of earlier ignorance, is no more than a feeling of injury in the sense of betrayal, arising out of an unawareness that they may have better understood had they been told. But we do not think it was necessary for the Tribunal to resort to such intricate reasoning. What the parents suffered was profound grief. That is not humiliation, but a sense of loss. It is described by Blanchard J, delivering the judgment of the majority in *van Soest v Residual Health Management Unit* at p 198:

> Everyone who suffers the sudden loss of a relative with whom he or she has a loving relationship will experience grief, and probably intense grief, either continuously or intermittently over a period of weeks and months. Often that grief will never completely fade away. The loss of a child, for example, is always with us. If grief per se is not to be the subject of a claim for damages, and no one seems to suggest that it should be, how can it be determined what degree of grief and its accompanying anger should sound in damages? It is all very well to argue, as Mullany does, that because technically a small cut on the finger caused by the negligence of some person would sustain a claim for damages, albeit nominal only, the Courts should take a similar attitude to the negligent infliction of grief People do not bother to sue for very minor injuries. Therefore, he says, they will not bother to sue for minor amounts of grief. With respect, it is naive to believe that this is how a prospective plaintiff suffering from grief would see the situation. Minor flesh wounds will heal before grief fades. It will be easier to forgive someone who negligently causes us a slight physical injury than to forgive someone who has negligently killed or maimed our loved one.

The emotion or feeling of grief usually is profound involving an extreme sense of loss which may include, depending on the circumstances of the loss, feelings of anger, resentment, bitterness. Those are feelings which are painful and comprise in a very real sense, injury to the feeling of equilibrium and general wellbeing that should exist with a human being in the normal course of life. For our part, we are satisfied such injured feelings fall within s 57(1)(c) and we do not think that the true purpose and aim of the legislation can be met by excluding damages as a remedy for such injured feelings.

[redacted]

[31] Nevertheless, it does not necessarily follow that in this case an additional or increased award of damages is appropriate. The appellant says that that should be the case giving that the sum of $20,000 was awarded for "humiliation", and therefore there being "injury to feelings" a further sum should be awarded. In our view it is necessary to look at the totality of the injury and the emotional state of the complainants. Injury to feelings often comprises a complex mix of feelings and emotions which are often hard to compartmentalise and surely overlap. That is the case here.

[32] Counsel for the Director referred us to several Employment cases, as well as English examples of awards for mental anguish or nervous shock. So, too, we were referred to *Laursen v Proceedings Commissioner* (1998) 5 HRNZ 18 where an award of $20,000 for humiliation and loss of dignity was upheld but Gallen ACJ said, (at p 28):

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> Making a comparison with other cases is difficult, since in the end it is only the Tribunal hearing the complaint which is in a position to make a full and overall assessment. On the basis of the information before me, I agree with the contention of the respondent that the amounts awarded in New Zealand in this area appear to be lower and out of step with those awarded in comparable jurisdictions.

But his Honour went on to observe that the question of disparity must be borne in mind. In the present case the award was substantial when viewed against other awards in this jurisdiction and we note that the amount claimed was $40,000, which means little in itself other than to set a maximum. The task of fixing quantum of general damages is that of the trial Judge, or jury, or original tribunal that sees, hears and assesses the parties and the evidence. An appellate Court will only intervene if convinced that the amount is too high, or too low, so as to be outside the range that could reasonably be awarded as appropriate to the circumstances of the case.

[33] In past ages, claims for pain, suffering and loss of enjoyment of life were common and general damages assessments for compensation for such injuries was always an imprecise exercise. Recently, in *Brickell v Attorney-General* (High Court, Wellington CP 267/97, 9 June 2000) McGechan J discussed this and said (at paras [143]-[144]):

> **[143]** ... There is little to be gained from comparison with awards made abroad, ... Purchasing power of money and social conditions vary too much between countries for automatic cross-border applications. Nor do I gain much help from the level of lump sums allowed for pain and suffering under original accident compensation legislation, which were a special and politically bargained entity, or from current political pronouncements, not yet legislated. Nor do I gain much from approaches adopted in relation to awards made by the Employment Court in cases of unjustifiable dismissal. A deliberately conservative pattern has been set by the Court of Appeal (not without dissent). That underlying caution is to be kept in mind but it is a special field.
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> **[144]** I am driven back to first principles, proceeding cautiously ... The test essentially is one of fairness and community expectations. I borrow the words of Lord Devlin in *H West & Son Limited v Shephard* [1964] AC 326, 356-7:
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> > What is meant by compensation that is fair and yet not full? I think it means this. What would be a fair-minded man, not a millionaire, but one with a sufficiency of means to discharge all his moral obligations, feel called upon to do for a plaintiff whom by his careless act he had reduced to so pitiable a condition? Let me assume for this purpose that there is normal consciousness and all the mental suffering that would go with it. It will not be a sum to plumb the depths of contrition but one that will enable him to say that he has done whatever money can do. He has ex hypothesi already provided for all the expenses to which the plaintiff has been put and he has replaced all the income which she has lost. What more should he do so that he can hold up his head among his neighbours and say with their approval that he has done the fair thing?
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> While there are dangers in the fair but "not yet full" formulation, unless it is understood as a control ensuring reasonableness and to prevent excess,

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[redacted]

this essentially is the flexible and general approach to be adopted to quantifying the unquantifiable. It really distils to doing justice on the facts involved, always an intuitive exercise.

[34] Counsel for the midwife, in support of the cross appeal, submitted that the award of $20,000 was excessive. We do not agree. It could not be seen to be too high or too low, when viewed as against the admitted profound suffering of the parents. No doubt their pain was exacerbated by certain events and consequences arising after the infant was released from hospital, and outside the midwife's control. But, in the end the pain and anguish flowed directly from the negligence.

[35] Correspondingly, we do not accept the argument for the Director of Proceedings that $20,000 was too low. It was a significant award. An appellate Court should only interfere with an award of general damages if there is some error of law or principle evident in the way in which the award was reached, or if the award constitutes what might be described as a wholly erroneous assessment of the appropriate damages. In this case, the award was within a proper range available to the Tribunal and we cannot conclude that it was so inadequate as to fall outside that range. We are not disposed to say that the Tribunal erred in its discretion so as to justify this Court interfering with the award.

The claim for punitive damages

[36] The Director of Proceedings had sought punitive damages in order to "punish" the midwife. As we have said, the Tribunal declined to make such an award, on the basis that it felt the midwife had been punished more than enough in any event. The Tribunal did not determine that the midwife's actions were in flagrant disregard of the rights of the parents. It proceeded on the same basis that it adopted in another case, (the appeal to the High Court being reported as *Director of Proceedings v Nealie* [1999] 3 NZLR 603), namely that even if that had been a flagrant disregard of a complainant's rights, it was not appropriate to "further punish" the wrongdoer.

[37] Before there is jurisdiction to award damages under s 57(1)(d) there has to be an action that was in flagrant disregard of the aggrieved person's rights. Whilst s 57(1)(d) does not specifically refer to "punitive" damages, it is clear that on a reading of all the provisions of the Act, the subsection relates to punitive damages. In s 52(2) there is reference to punitive damages "in accordance with s 57(1)(d) of this Act" in the context the person entitled to accident compensation not being able to claim under the Act, other than for punitive damages. Counsel accept that to be the case.

[38] Punitive damages are awarded to punish a wrongdoer. Such damages are by way of exemplary punishment, not compensation. Generally, they are awarded for intentional torts or wrongdoings, or breach of fiduciary duties. In *McLaren Transport Ltd v Somerville* Tipping J upheld an award of punitive damages for negligence, on the basis that unintentional wrongs could found such a remedy, but only in

rare cases. There had to be serious wrongdoing, perhaps reckless, but as His Honour said (at p 434):

> ... was the negligence so bad as to require an award of exemplary damages? .... Exemplary damages for negligence causing personal injury may be awarded if, but only if, the level of negligence is so high that it amounts to an outrageous and flagrant disregard for the plaintiffs safety, meriting condemnation and punishment.

[39] We note His Honour's reference to "flagrant disregard", such being the equivalent or required test under s 57(1)(d). There has to be flagrant disregard or abuse of rights of another. "Flagrant" is a strong word. It connotes "outrageous" behaviour or "glaring, notorious or scandalous" acts or omissions. Counsel for the Director of Proceedings submitted that the breaches of the Code, or negligence of the midwife were "serious" and to such an extent that they could be described as "flagrant". He relies in part upon the decision of the Nursing Council and opinions expressed by various expert witnesses before the Tribunal. But although the Tribunal shall have regard to findings of a disciplinary body, in the end, it was a matter for the Tribunal to make its own assessment on the facts and evidence that it heard. It did not find "flagrant" disregard of rights and although counsel argued that that was because, following *Nealie*, it said even if there was "flagrant disregard" there had been punishment enough, the Tribunal's assessment of the gravity of the conduct was as we have already recorded at para [11]. That is, the midwife's motivation was well meaning in the sense that she was endeavouring to meet what she saw as the mother's needs, comfort and wishes (in terms of Right 4 of the Code) but in doing so failed to meet the needs of the foetus and the rights of the mother to be kept informed.

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[40] Counsel submitted that it was wrong in principle for the Tribunal to decline to award punitive damages on the basis that the midwife had been punished enough. The disciplinary proceedings were not regarded by the Tribunal as punishment and it did not err in law in this regard. It viewed the aggressive media exposure and pursuit of the midwife as extraordinary punishment and consequences. The High Court, in *Director of Proceedings v Nealie* had upheld a similar approach to that adopted in the present case. For our part we think that the manner, type and extent of punishment together with a consideration of how and from whom it arises, may be relevant factors in determining quantum of punitive damages. Jurisdiction to award them, arises if the statutory test in s 57(1)(d) is met. Quantum is very much a discretionary exercise for the Tribunal. Moderation is required and attempts to use punitive damages to compensate are to be resisted: *Auckland City Council v Blundell [1986] 1 NZLR 732*. Furthermore, exemplary damages, designed to punish only, should be awarded only in so far as compensatory damages do not adequately punish a defendant for extraneous conduct: *Aquaculture Corporation v New Zealand Green Mussel Co Ltd [1990] 3 NZLR 299 (CA)*; *Watson v Dolmark Industries Ltd [1992] 3 NZLR 311 (CA)*. Awards should be reserved for truly outrageous conduct which cannot be punished in any other way: *Ellison v L [1998] 1 NZLR 416*, 419.

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[41] We are fully satisfied that the midwife's errors, or negligence, whilst serious and leading to a tragic outcome do not fall into the category envisaged by the strong words "flagrant disregard". The midwife had regard to some of the mother's rights but erred through negligently managing the labour which also involved the rights of the foetus. But there was no statutory foundation, in our view, to award punitive damages. Flagrancy, in the sense intended by the statute did not exist. In any event, the Tribunal in the exercise of its discretion was entitled to look at the wide picture of "sufficient punishment". If the compensatory monetary award is to be seen as sufficient punishment, so too may factors such as the Tribunal considered in this (and *Nealie*).

[42] For completeness, we add that in our view the compensatory award of $20,000 sufficiently penalised the midwife and the exclusion of punitive damages can be further justified on that basis.

[43] We are not persuaded that this Court should interfere with the awards and orders of the Tribunal (except in relation to the sum of $469) because these were essentially discretionary. We have made observations as to our interpretation of s 57(1)(a), (c) and (d), but have in the end reached the same result as the Tribunal in relation to the award of compensatory damages for injury to feelings and excluding punitive damages.

[44] The appeal fails except to the extent that the midwife shall pay, pursuant to s 57(1)(a) the sum of $469 by way of pecuniary loss suffered by the complainants. The midwife's cross appeal also fails.

[45] Costs are reserved. If counsel are unable to reach agreement they may submit memoranda.

Reported by: Lindy Course, *Barrister*

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