

Leading  
Healthcare Indemnity



**Avant**

Mediation - 17 September 2010  
Mr John Smith & Mrs Sue Smith v Dr Bob Jones

1. John & Sue Smith (the plaintiffs) are the parents of Jack, born 31 January 2001. Jack suffers Down's syndrome and consequent developmental delay, intellectual disability and behavioural difficulties.
2. Dr Bob Jones (the defendant) is an obstetrician who was retained by Mrs Smith in 2000 (she was then aged 34) for management and advice regarding her pregnancy with Jack, and previously for management and advice regarding her pregnancy with Jill, born 4 years earlier. Following Jill's birth, Mrs Smith suffered post-natal depression.

3. Dr Jones recommended testing to exclude Down's syndrome and directed a blood sample from Mrs Smith to Failsafe Laboratories (the laboratory).
4. The referral letter from Dr Jones to the laboratory misstated Mrs Smiths' gestation, as a result of which the laboratory reported the test data to the defendant as "*un-interpretable because the test is done too early*".
5. Dr Jones did not advise the plaintiffs of that report, nor did he request interpretation of the test data, or refer Mrs Smith for a further test or recommend amniocentesis so as to exclude Down's syndrome.

6. The plaintiffs' expert says that it is not possible to determine the risk figure that would have been generated had the laboratory been given the mother's correct gestational age. At best the plaintiffs may establish that (had the referral letter recited the correct gestational age) the test report would have placed the mother in an increased risk category for Down's syndrome.
7. The plaintiffs' claim is governed by the provisions of the *Civil Liability Act 2002 (NSW)*.

## Liability

8. Dr Jones admits that he breached his duty of care in a number of respects including:
- Provision of an incorrect LMP date to the laboratory;
  - Failure to properly review the laboratory report;
  - Failure to notify the plaintiffs that the test result was uninterpretable;
  - Failure to organize appropriate investigations and advice.

9. The following matters remain in issue:

- a) the advice the mother would have been given following a report (based on the correct gestational age) indicating that Mrs Smith was in an increased risk category for Down's syndrome;
- b) in particular, whether Mrs Smith would have been offered amniocentesis, with its attendant risks, following such result;
- c) whether Mrs Smith would have undergone the procedure of amniocentesis, with its attendant risks, given such result and the advice that she would have been given;
- d) if Mrs Smith had undergone amniocentesis, and on the assumption that amniocentesis would have confirmed the diagnosis of Down's syndrome, the advice she would have then been given;
- e) whether Mrs Smith would have elected to terminate the pregnancy.

## Quantum

10. Mr Smith is a stockbroker.
11. Mrs Smith is a medical journalist. She had some time off after the birth of her first child and has not worked at all since Jack's birth. She has been Jack's sole carer. Mr and Mrs Smith have not sought to arrange commercial care for Jack.
12. Their claim has been calculated to total \$3,903,988 as per the schedule.

## **Areas of legal dispute** - where law not settled in Australia

- The categorisation of wrongful birth claims
  - pure economic loss; or
  - economic loss consequential upon personal injury
- The criteria for assessment of damages
  - means of the parents; or
  - needs of the child

- The time frame over which damages should be assessed
  - until child is 18, or some later stage;
  - for lifetime of parents; or
  - for lifetime of child
- The definition of 'costs' in relevant legislation
  - direct only, ie actual expenses incurred, and likely to be incurred;
  - whether includes 'cost' of gratuitous care, calculated either by reference to lost income, eg parent abandons paid employment to care for child, or calculated by reference to cost of commercial care