

Contraception failure and wrongful birth claims

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Case histories are based on actual medical negligence claims, however, certain facts have been omitted or changed by the author to ensure the anonymity of the parties involved.

Medical negligence claims involving an allegation of 'wrongful birth' can arise from a negligent failure of contraception. In these wrongful birth claims, the patient sues the medical practitioner who failed to prevent her conception and subsequent pregnancy. This article outlines some risk management strategies for general practitioners to minimise the possibility of a claim arising from a failure of contraception involving the use of the long acting contraceptive implant, Implanon.



Case history

A 25 year old nurse presented to her general practitioner requesting advice about contraception. The patient had been prescribed the oral contraceptive pill but found it difficult to remember to take the pills because of her shift work. After discussing the various contraceptive options, the patient decided to have an Implanon implant. The patient booked an appointment for the insertion of the implant on the third day of her next menstrual period. The GP performed the insertion procedure.

Five months later, the patient re-presented to the GP because she had missed her last two menstrual periods. The patient's serum beta-HCG was positive and a pelvic ultrasound confirmed a 10 week pregnancy.

Medicolegal issues

In this case, the general practitioner had some concerns regarding his insertion technique of the implant. When the patient re-presented with amenorrhoea, the GP examined the patient's arm and was unable to palpate the implant rod. The GP had no recollection of checking that the implant was in situ after completing the insertion procedure. At the time of performing the procedure, he was not aware that if the applicator was not held upright the implant could fall out of the applicator before insertion. The patient's medical records simply contained the notation: 'Unable to tolerate pill: Implanon'. There was no documentation of the site of the implant, the technique used or confirmation that the implant could be palpated in situ following the procedure. The GP believed the patient's

pregnancy could have been the result of the implant rod not actually being inserted into the patient's arm, rather than a failure of the contraceptive device itself. He was concerned that, if this was the case, the patient may seek reimbursement of the costs incurred as a result of her unintended pregnancy due to his failure to insert the implant correctly.

Discussion

Contraception failure resulting in an unintended pregnancy may lead to a medical negligence claim against a GP involving an allegation of 'wrongful birth'.

Wrongful birth claims include negligent failure of:

- contraception – eg. failure to insert a contraceptive implant, prescribing errors involving the oral contraceptive

pill (eg. drug interactions with antibiotics or anticonvulsants, prescribing Trisequens instead of Triquilar)

- sterilisation – eg. failure to follow up postvasectomy sperm count results, incorrect application of a Filshie clip to the round ligament instead of the fallopian tube
- other procedures - including failure to diagnose pregnancy, failed termination of pregnancy, incorrect genetic counselling and failure to diagnose a fetal abnormality.

In these claims, the mother sues the medical practitioner who failed to prevent her pregnancy and damages are awarded to the mother for the birth of the child born as a result of the negligent failure of contraception, sterilisation or other procedure. In deciding whether damages are awarded for wrongful birth, it is irrelevant whether the baby is born perfectly normal or has birth defects - although damages are likely to be higher if the child has congenital defects. Currently it is not clear whether the mother is only entitled to damages for pain and suffering and any loss of income due to the pregnancy and birth, or whether she is also entitled to recover damages for the costs of raising the child.

In a recent Queensland case, the plaintiffs (parents) were awarded damages for the cost of raising their healthy child, having established wrongful conception as a consequence of a failed tubal ligation.¹ According to the judgment, the defendant gynaecologist negligently failed to warn the patient of the possibility that the tubal ligation may not be effective (at operation, the gynaecologist could only identify one fallopian tube and he assumed the other tube had been removed during a previous operation). The plaintiffs were awarded just over \$200 000, including a total of \$105 249.33 for the cost of raising their child. The Queensland Court of Appeal upheld the trial judge's verdict and leave to appeal to the High Court has been granted. The outcome of this appeal will

determine whether the plaintiffs are entitled to damages for the cost of raising their child and this decision will significantly impact upon the damages awarded in wrongful birth claims.

Risk management

General practitioners can minimise the risk of a claim arising from contraception failure involving the insertion of Implanon by following the guidelines in the Implanon Product Information and by ensuring they are adequately trained in the use and insertion of the implant.

According to the manufacturer, some important points in relation to the insertion of Implanon include:

- check the implant is visible inside the needle of the applicator just before insertion - incorrect handling of the applicator may cause the implant to drop out from the cannula before insertion
- immediate palpation of the implant in situ after insertion, to check that insertion was completed successfully - insertion must be in the space between the biceps and the triceps of the patient's nondominant arm, directly under the skin and as superficial as possible
- directly after insertion, check that the needle of the applicator no longer contains the implant - after insertion of the implant, the obturator is visible in the needle
- if there are concerns that the implant has not been inserted, refer the patient for ultrasound localisation. Until placement of the implant is confirmed, the patient should be advised that an alternative method of contraception is necessary. This advice should be carefully documented in the patient's medical records.

SUMMARY OF IMPORTANT POINTS

- Failed contraception resulting in an unintended pregnancy may lead to a medical negligence claim for 'wrongful birth'.
- Before prescribing and using Implanon, GPs should undertake adequate training in the use and insertion of the implant and ensure they are familiar with the product information. If not, patients should be referred to an experienced colleague or specialist clinic.

Conflict of interest: none declared.

Reference

1. *Melchior & Anor v Cattanach & Anor*. [2000] QSC 285.

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