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Failure to Treat Case Raises Novel Medical Negligence Questions

Woods v. Lowns & Ors, NSW Supreme Court

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His Honour Mr Justice Badgery-Parker recently handed down judgment in a medical negligence case that raised "a substantial and novel question of law". A general practitioner was held liable for refusing to attend and treat a person with whom he did not have a doctor/patient relationship.

The facts surrounding the case are that Patrick Woods, now 18 suffered a major and prolonged fit whilst holidaying at The Entrance on 20 January 1987. The plaintiff's sister approached a nearby general practitioner, who refused to attend the fitting boy. The plaintiff's brother summoned an ambulance, and the plaintiff was taken by ambulance to The Entrance Medical Centre where he was treated with intravenous Valium by a general practitioner. The plaintiff was then taken to Gosford Hospital, by which time he had been fitting for no less than 1.75 hours. As a result of the prolonged fit (status epileptus) the plaintiff suffered brain damage and was rendered spastic quadriplegic.

The plaintiff sued the general practitioner who refused to attend, Dr Peter Lowns, three general practitioners at The Entrance Medical Centre and Dr Peter Propocis, a specialist paediatric neurologist who had been treating Patrick since 1979 for epilepsy.

The infant plaintiff sought damages in respect of his disablement. Patrick's parents sued for damages for injury by way of nervous shock.

The plaintiffs ultimately abandoned the claim against the three general practitioners who treated Patrick at The Entrance Medical Centre.

The judge found that Dr Peter Lowns, the general practitioner and Dr Peter Propocis, the paediatric neurologist were negligent in their actions and awarded damages of $3.2 million.

The plaintiff's sister gave evidence that after discovering her brother fitting, she ran 300 metres down the road to the home and surgery of the first

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defendant, Dr Lowns and asked him to attend the fitting boy. Dr Lowns denied ever having been approached.

It was put to Patrick's sister that she had been mistaken in believing she had approached Dr Lowns and had in fact spoken to someone else or sought aid from a place other than Dr Lowns surgery.

The judge rejected that suggestion and accepted that the plaintiff's sister had, in fact sought aid from Dr Lowns.

What is so novel about the case against Dr Lowns is that for the first time in Australia a doctor was held liable for damages because of a failure to attend upon or treat someone with whom he did not have a doctor/patient relationship.

Generally, there is no common law duty to render assistance to a person in an emergency where it is foreseeable that not assisting will result in injury or death. Something more than foreseeability of harm is required before a duty of care will arise. His Honour cited *Jaensch v. Coffey* ((1985) 157 CLR 424). and *Sutherland Shire Council v. Heyman* (page 58 *Woods v. Lowns & Ors* 9 February unreported). as authority for the proposition that in order to determine whether a duty of care exists in particular instances, a relationship of proximity must exist between the parties. The requirement of a relationship of proximity serves as a "touchstone and control" of categories of case. Proximity is not to be looked at merely in the context of the relationship between the parties and the particular facts of the case.

A "very powerful reason" (*Bankstown Foundry Pty Limited v. Braisting* (1986) 160 CLR 301 per Deane and Brennan JJ at 314 cited.). for finding a duty of care in this case is the existence of a unique statutory position in New South Wales which regulates the conduct of registered medical practitioners. Section 27(1)(h) of the Medical Practitioners Act 1938 renders a registered medical practitioner guilty of misconduct if he/she unreasonably refuses or fails to attend and treat a *person* in need of urgent treatment.

The plaintiff contended that the existence of such a provision would have led to a community expectation that these statutory provisions would be complied with by a medical practitioner.

The law, His Honour stated, should equate with community expectations of the law (page 60 *Woods v. Lowns & Ors).* The judge further said:

> "There is no reason to suggest that societal developments and public perception of what the contents of a particular duty should be are not to be taken into account when the imposition of a new duty of care is being considered".([1957] 1 WLR 582).

Dr Lowns was in his place of practice and asked to assist in a professional context. The medical condition of the plaintiff was one which was a recognised medical emergency calling for urgent attention.

Dr Lowns admitted in evidence that had he been summoned (which he denied) he would have recognised the situation as a medical emergency and was equipped with intravenous Valium, with which he would have been able to inject the fitting child. The Judge found that Dr Lowns would have injected the child with Valium and it would have, on the balance of probabilities averted the catastrophic consequences of brain damage which ultimately prevailed.

In addition to these facts, the doctor's surgery was at most three or four minutes distance away from the doctor's house on foot.

Under the circumstances, and in the light of the catastrophic consequences which would arise had assistance not been rendered, the judge found that Dr Lowns was under a duty to attend and treat the plaintiff in this case.

The infant plaintiff also succeeded in a claim against Dr Peter Propocis, a specialist paediatric neurologist. Patrick came under the care of Dr Propocis after suffering his second bout of status epilectus in 1979. He remained under the care of Dr Propocis throughout the intervening period and was under his care when he suffered the major and prolonged fit which was resulted in his suffering permanent and irreversible brain damage.

The plaintiff's case against Dr Propocis was primarily that Dr Propocis was negligent in not advising and instructing the plaintiff's mother and father of the existence of Valium administered

rectally for immediate use during a prolonged fit. The plaintiff submitted that the tragic consequences of his prolonged fit on 20 January 1987 would have been avoided had they been so advised.

Dr Propocis submitted that his advice and instructions accorded with what would reasonably have been expected of a competent specialist paediatric neurologist at the relevant time.

Dr Propocis further submitted that rectal Valium was prescribed for use by lay persons in specific scenarios in which the plaintiff did not fall.

Three neurologists called on behalf of the fifth defendant endorsed this view.

It was found that the decision of Dr Propocis not to prescribe rectal Valium accorded with what was regarded by his Australian peers as the proper standard of good medical practice as at 1987. Thus, according with the principle laid down in *Bolann v. Friern Hospital Management Committee* ((1984) 155 CLR 459). and had that principle continued to prevail in Australia, the plaintiff's case against Dr Propocis would have failed.

However, His Honour concluded that there was risk that the plaintiff might experience a seizure, the duration of which was unknown or where he was far from medical care.

Under those circumstances, the reasonable response to such a foreseeable risk would have been to advise and instruct in the administration of Valium per rectum. Had they known of such treatment, it was found that Patrick's parents would have administered rectal Valium.

In the particular circumstances of this case, the judge found that had the plaintiff's parents been advised of the existence of rectal Valium, upon the refusal of Dr Lowns to attend the fitting child, Patrick's mother, Mrs Lesley Light would have administered rectal Valium which would probably have terminated the fit and prevented the tragic consequences.

Administration of Valium per rectum was not a treatment well known by specialist paediatric neurologists at the time that Patrick first came under the care of Dr Propocis. By 1985 at the latest, the use of rectal Valium had become more widely known, and Dr Propocis himself was prescribing rectal Valium in certain circumstances. He had satisfied himself that the risks of using such a treatment were outweighed by the likely benefit. The judge found that by 1985, even in the absence of specific questions, it was "incumbent upon [Dr Propocis] in the exercised of reasonable care and skill as specialist paediatric neurologist to instruct the parents about the use of rectal Dizapam and to equip them to administer it." (*Woods v. Lowns & Ors* 9 February 1995 unreported page 37. *Rogers v. Whittaker* (1992) 175 CLR 479 cited.)

Patrick's father, Mr Harry Woods, sued for damages in nervous shock and was awarded $57,800.

Patrick's mother, Mrs Lesley Lights, also sued in respect of nervous shock, however her claim was unsuccessful.

Ultimately, the judge found that on the balance of probabilities, if Dr Lowns had attended the infant plaintiff and administered intravenous Valium, the prolonged fit would have been brought to an end. He further found that if Dr Propocis had advised Mr Woods and Mrs Lights of the use of rectal Valium, Mrs Lights would have administered rectal Valium at such a time that would have brought the prolonged fit to an end. Further, such timely treatment would have, on the balance of probabilities, prevented brain damage occurring.

It is expected that the defendants will appeal.

Reminder

The Cancer Council have extended the deadline for returning their passive smoking survey, which was mailed to you last month.

Passive smoking and its effects is an important issue and we encourage you to return your survey as soon as possible.