

**CASE  
ALERT**

June 2003

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***P D v DR NICHOLAS HARVEY & ORS [2003] NSW SC 487***

**Facts**

This case arose out of the relationship of the plaintiff and her future husband (referred to as FH) as patients of the first defendant, Dr Nicholas Harvey, as treating doctor, an employee of the second defendant Dr Chen at the Alpha Medical Centre at Marrickville, New South Wales.

On 16 November 1998, the plaintiff and FH, underwent a joint consultation with Dr Harvey for the purpose of establishing that neither party carried the human immunodeficiency virus (HIV). Both the plaintiff and FH had blood tests at this consultation. All parties to the consultation understood the purpose of the tests was to address the plaintiff's concern that as FH was from Ghana, he was at a high risk of carrying HIV. Dr Harvey was aware that the plaintiff and FH were planning to be married, and were not engaging in unprotected sex.

Blood tests subsequently revealed that the plaintiff's tests were negative but FH was Hepatitis B positive and HIV positive. Each party was informed of their test results separately. The plaintiff requested to see FH's results but was denied access on the basis of confidentiality. Thereafter, the plaintiff requested the results from FH, in response to which he showed the plaintiff a fraudulent copy of his pathology report falsely indicating that he was Hepatitis B and HIV negative. This was not the case.

Dr Harvey referred FH to the Royal Prince Alfred Hospital Immunology Clinic "RPAHIC". Some time thereafter, the Clinic informed Dr Harvey that FH did not keep his appointment, however this was not followed up with either FH or the plaintiff.

The plaintiff and FH began engaging in unprotected sex in mid 1999, were married in July 1999 and had their first child in February 2000.

The plaintiff became aware she was HIV positive shortly before the birth of her first child in January 2000.

**The Plaintiffs Claim**

The plaintiff issued proceedings against Dr Harvey as treating doctor and Dr Chen as his employer for negligence, particulars of which include:-

1. Failure to provide any adequate pre test counselling to the plaintiff or FH.

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2. Failure to determine what the plaintiff and FH intended to do if one or the other was HIV positive.
3. Failure to personally counsel or arrange for a doctor to counsel the plaintiff when she attempted to receive her test results.
4. Failure to provide any post test counselling to the plaintiff or FH.
5. Failure to inform the plaintiff that FH was HIV positive.
6. Failure to take any adequate measures to ensure that FH attended for specialist treatment and/or counselling in relation to his infection.
7. Failure to warn the plaintiff of the risk of unprotected sexual intercourse given that her proposed partner FH was HIV positive.
8. Failure to take any steps to protect the plaintiff from the HIV infection where they knew or ought to have known that FH was intending to engage in unprotected sexual intercourse with her, she was a patient of the practice, and it was foreseeable that FH might not inform the plaintiff of his infection.

Alternatively, it was pleaded that the doctors were in breach of an implied term in the contract for medical treatment arising from the joint consultation that the plaintiff would be informed of FH's test results. This was rejected on the basis that FH was not found to have expressly, or by implication, consented to the disclosure of his test results to the plaintiff.

The doctors defended the matter on the basis that to disclose FH's condition as contended by the plaintiff would have breached their confidentiality to FH and that their duty did not extend to engaging or encouraging the joint counselling sessions that were alleged by the plaintiff.

### JUDGMENT

Cripps J explored the allegations of negligence arising from the non disclosure of information given the constraints of patient confidentiality in the *Public Health Act*.

Cripps J concluded that it was correct to state that confidentiality prevented the disclosure of FH's test results, however it was not correct to state that disclosing to the plaintiff her test results, and referring FH to the RPAHIC on the basis of his test results, in the absence of any

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follow up, was sufficient to discharge the duty of care owed by Dr Harvey to both parties in these circumstances.

Cripps J concluded that the actions undertaken by Dr Harvey fell below the standard expected of a registered medical practitioner in these circumstances.

Without breaching patient confidentiality, it was the view of Cripps J that Dr Harvey should have done more, in particular sought advice from experts in the field, including the Medical Defence Union. Cripps J submitted that had the doctor undertaken these steps, it would have been made clear to Dr Harvey of the need to further counsel FH to make him aware of the risks of his medical condition and his legal and ethical obligations to inform the plaintiff. On the basis that these steps should have been taken, without breaching patient confidentiality, Dr Harvey's omission in not doing so constituted a breach of the duty of care he owed to the plaintiff.

Cripps J rejected the argument that FH's forgery of his pathology report constituted a *novus actus interveniens*, effectively breaking the chain of causation.

On the basis of the *common sense* approach to causation adopted in March -ats-Stramere, a duty of care owed to the plaintiff extended throughout her period as a patient of the clinic, and common sense suggested that the ultimate cause of her injury was a lack of steps taken at all material times, short of disclosure of FH's test results, that should have been taken in these circumstances to protect the plaintiff's interests.

The defendants were found to be in breach of their duty of care, and hence held responsible for the plaintiff contracting HIV in or about August 1999. Damages were awarded in the sum of \$727,437.00, including general damages in the amount of \$205,000.00.

**SUMMARY**

The Judgment of Cripps J is instructive on the point of what action will constitute a discharge of the duty of care owed to a patient to protect their interests, when disclosure of information regarding the patient's health risks is in breach of confidentiality owed to another patient.

Cripps J, whilst not challenging confidentiality, made it clear when reliance is placed on a doctor to inform a patient of their risks of contracting a life threatening condition, the doctor should safely assume they are expected to do everything short of breaching confidentiality in the discharge of that duty.

***Please contact either Tim Hancock or Justin Beirne if you require any further information regarding the implications of this case.***