

Professional Services Case Note

April 2007

Halverson & Ors v Dobler Halverson by his tutor v Dobler [2006] NSWSC 1307

On 11 February 2001 Kurt Halverson suffered a cardiac arrest and hypoxic brain damage leaving him with catastrophic injuries.

In proceedings commenced in the Supreme Court of NSW it was his case that Defendant General Practitioner, Dr. Dobler, failed to exercise due care in the treatment of Kurt Halverson from 1995 until 10 February 2001 further, that Dr Dobler should have identified Kurt as having a cardiac problem before he suffered the catastrophic event of 11 February.

The plaintiff submitted to the court that Dr Dobler was in breach of his duty of care to Kurt. It was alleged there were a number of occasions when Kurt's symptoms could have, and should have caused Dr Dobler to refer him to a cardiologist for assessment. Dr Dobler's failure to carry out, or order to be carried out, an electrocardiogram (ECG) after the detection by Dr Dobler of a heart murmur on 1 February 2001, that was followed by a further syncopal (loss of consciousness) event on 4 Feb 2001, also amounted to a breach.

Expert Evidence

In a somewhat novel approach, the expert evidence of five general practitioners was heard concurrently, as was the expert evidence of five cardiologists.

The plaintiff called two expert General Practitioners (GPs) and the defendant called three expert GPs. There was general agreement among the GPs on the appropriateness and sufficiency of Dr Dobler's diagnosis and treatment up until the events of February 2001.

McClellan CJ preferred the views of Drs Mackey and Chambers, in relation to the response which Dr Dobler should have made to the February events.

Dr Mackey was of the view that even if the heart murmur had not been detected, an ECG would have been warranted after the syncopal event on 4 February 2001. Dr Chambers was of the view that Dr Dobler had ample opportunity whilst Kurt was at the hospital to begin some cardiological investigations. Dr Chambers believed that a reasonable GP would have organised: routine blood tests, ECG, cardiac echo, sleep deprived EEG, and review with a cardiologist.

The doctors called on behalf of Dr Dobler were of the view that all of Kurt's syncopal events, as well as his other symptoms were explicable in terms of benign vasovagal postural faints, intercurrent illness and migraines and that on this basis there was no cause for pursuing cardiological investigations following the 4 February syncope.

Standard of Care

Section 50 of the Civil Liability Act 2002 (NSW) under the heading 'standard of care for professionals' provides that a professional does not incur liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that was widely accepted in Australia, (at the time the service was performed) by peer professional opinion as competent professional practice.

Section 50 also instructs that peer professional opinion does not have to be universally accepted to be considered widely accepted and the fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one, more or all opinions from being relied on. Notwithstanding, peer professional opinion cannot be relied on if the court considers the opinion is irrational.

McClellan CJ rejected the proposition that s 50 set the standard of care to be applied to all professional negligence cases. His Honour preferred the plaintiff's characterisation of s 50 as a special defence that applies in professional negligence cases:

*Accordingly the standard of care **is still the standard that was endorsed in Rogers v Whitaker**, but if a defendant is found to be negligent under this standard he or she can avoid liability if they can establish that they acted in a manner which was widely accepted in Australia by peer professional opinion as competent professional practice. Per McClellan CJ at [180] (emphasis added)*

His Honour dismissed the section heading 'standard of care for professionals' on the basis that it was extrinsic material which in this instance must give way to the clear words of the section.

McClellan CJ held that by failing to investigate via an ECG in response to the syncopal event on 4 February 2001 Dr Dobler fell short of the requisite standard of care.

Turning to the s 50 'defence' McClellan CJ found that Dr Dobler would not be liable *'if it is established that when he failed to obtain an ECG he acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice'* at [187]

His Honour was **not** satisfied that this was established, as there was a division of opinion among the general practitioners called in the case. His Honour noted that would not prevent Dr Dobler from being able to rely on the opinion of experts favourable to him, if that opinion is widely held in accordance with s 50(3).

However it was McClellan CJ's finding that the expert GP opinions in support of Dr Dobler were based upon inappropriate assumptions about the facts.

McClellan CJ concluded:

'I do not think that it has been established that it is widely accepted as competent professional practice when a boy is hospitalised following a third episode of syncope, in the presence of a viral illness and recently detected heart murmur, to only treat the viral illness and not investigate the syncope or perform basic cardiological investigations' at [188]

His Honour was not prepared to make a finding of irrationality insofar as Dr Dolber's failure to perform further cardiological investigations was concerned. However, his Honour held that s 50 could not relieve Dr Dobler from liability.

Causation

The evidence of four eminent cardiologists was heard concurrently.

The central question was whether an ECG performed at any time, but more particularly shortly after the 4 February event, would have revealed a prolonged QT interval (or other significant abnormality) and would have prompted a continuous care response for Kurt.

On this matter the cardiologists were divided. Professors Harris and McGuire believed that the cause of the syncopal episode of 4 February 2001 was more likely to be benign. On the other hand, Professors Saul and Richards believed the most likely cause to be a cardiac arrhythmia.

All the cardiologists agreed that it was possible that an ECG taken at the relevant time **could** have revealed a long QT interval. However they disagreed as to the likelihood that it **would** be revealed.

Dr Dobler's experts Professors Harris and McGuire, contended that the stressor that precipitated Kurt's cardiac arrest was either random or unknown and that in the ECGs following the cardiac arrest, a long QT interval had only ever been detected in Kurt in the presence of environmental factors that were not present in the period preceding the arrest.

Consequently, they assessed that an ECG between 4 and 10 February was unlikely to reveal any abnormalities. Professor McGuire was of the view that there was a greater than 80 percent chance that the ECG would be normal at any specific time. Professor Harris's estimate was in the order of 80 to 90 percent.

The Plaintiff's experts, Professors Saul and Richards were of the view that a viral illness can precipitate an arrhythmia in people with Long QT Syndrome. In their opinions the viral illness was the only stressor present during both the 4 February and 11 February malignant event and that this was its cause. Professors Harris and McGuire protested this assessment because it was undocumented in scientific literature that a viral illness can precipitate an arrhythmia in such a case. Professors Saul and Richards were confident that ECGs taken around the time of those events would have revealed a long QT interval with a probability of over 50%

His Honour described the situation as one where the issue of causation simply cannot be answered with scientific certainty. Relying on *March v E&M H Stramare Pty Ltd* and applying the common sense test, his Honour found on the balance of probabilities that Kurt had long QT syndrome and it was this which caused the cardiac arrest on 11 February.

McClellan CJ further held that the events of 4 September 1995, 4 February 2001 and 11 February 2001 all had a cardiogenic cause precipitated by a viral illness present on each occasion and thus would have revealed an abnormality had an ECG been performed at the relevant time.

Loss of Chance

The plaintiff submitted that if they could demonstrate on the balance of probabilities that Dr Dobler had breached his duty of care but failed to persuade the court that, on the balance of probabilities that breach was the cause of his damage he was nevertheless entitled to recover damages, being the value of the chance lost that he would have had a successful outcome if an ECG had been performed.

The defendant rejected this submission, but in the alternative submitted that if accepted and the chance was found to be between 50% and 100% then the plaintiff should be awarded damages according to that percentage of the total sum.

McClellan CJ considered the case of *Rufo v Hosiking [2004] NSWCA 391*

His honour felt bound by the Court of Appeal's decision in *Rufo*. In *Rufo* the chance was assessed at less than 50%. His Honour noted that Santo JA in *Rufo* at 688-690 suggests that the loss of chance analysis should also apply where the chance is greater than 50%. However, that approach was rejected on the basis that it would displace the presently accepted standard of proof in medical negligence cases.

Damages in full were awarded to all the plaintiffs on the basis that on the balance of probabilities an ECG administered after 4 February would have revealed Kurt's Long QT Syndrome. His Honour assessed the chance of that occurring to be at least 65% and maybe greater. Further it was held that if Kurt's condition had been identified the chance that he would not have been effectively managed and cardiac arrest avoided was negligible.

Discussion/Implications

McClellan CJ's judgement is notable in a few respects. In two instances his Honour heard expert medical evidence concurrently. It is also notable for his Honour's insightful interpretation of section 50 of the Civil Liability Act 2002 (NSW). His Honour's considered judgement is authority for the principle that section 50 does not define the standard of care applicable in medical negligence cases but is instead a defence to a finding of negligence in accordance with the principles of *Rogers v Whitaker* the law based test that presently defines the standard of care.

According to McClellan CJ, upon raising the section 50 defence it is the defendant that bears the evidential onus of proving that the allegedly negligent practice was in fact widely held by Australian peer professional opinion to be competent professional practise at the time.

McClellan CJ also addressed the matter of 'loss of chance' damages. His Honour's judgement is authority for the principle that the prospect of 'loss of chance' damages is enlivened only when the plaintiff cannot prove causation on the balance of probabilities and accordingly the lost chance is less than 50%. Conversely, where causation is proved on the balance of probabilities 'loss of chance' damages may not reduce quantum.

Analysis

An interesting question is whether interpretation of the equivalent provisions of the Civil Liability Act 2003 (Qld) will be guided by the 'defence' formulation enunciated by McClellan CJ.

It is worth noting that s 50 (NSW) and s 22 (Qld) are not identical provisions:

Firstly, s 50 provides that the only relevant opinion is peer professional opinion in Australia. The s 22 formulation differs in that the relevant peer professional opinion is that of 'a significant number of respected practitioners in the field.'

More relevantly, one basis for McClellan CJ's analysis of s 50 as a defence was the phrase 'liability in negligence' contained in s 50 at [182]:

"In my view the section is intended to operate as a defence. The section is expressed so that "a person practising in a profession... *does not incur a liability in negligence*" if a certain state of affairs can be "established." The italicised words go to the issue of liability, not the issue of negligence.... There is force in the plaintiff's submission that the fact that the test is expressed in the negative indicates that Parliament did not intend to effect a more radical change in the standard of care to be applied to professional negligence cases'

On the issue of liability over negligence the CLA (NSW) s 50(1) defence interpretation is necessarily founded upon the proposition that to not incur a liability in negligence is distinguishable from not being in breach of a duty of care. In the first instance the professional is negligent and so has breached his/her duty, but for the defence that follows he/she is liable.

If that is so then it might be possible to distinguish the NSW provision from s 22(1) CLA (Qld) which implies no distinction between liability and negligence and instead focuses on breach of duty.

Section 22 of the Civil Liability Act (Qld) under the heading 'Standard of care for professionals' provides that a professional **does not breach a duty** arising from the provision of a professional service if it is established that the professional acted in a way that was at the time the service was provided, widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.

Section 22 also instructs that peer professional opinion does not have to be universally accepted to be considered widely accepted and the fact that there are

differing peer professional opinions widely accepted by a significant number of respected practitioners in the field concerning a matter does not prevent any 1 or more (or all) of the opinions being relied on for the purposes of the section.

Notwithstanding, peer professional opinion cannot be relied on for the purposes of section 22 if the court considers that the opinion is irrational or contrary to a written law. Neither does section 22 apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information, in relation to the risk of harm to a person, that is associated with the provision by a professional of a professional service.

On the question of Parliament's intention that s 50 operate as a defence to an otherwise negligent act it is instructive to examine the Ipp Report.

Included in the Panel's terms of reference were to among other things –

3(d) develop and evaluate options for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission;

The Panel considered the objections to the old Bolam rule, where deference is accorded to a 'responsible body' of medical opinion. The panel reformulated the Bolam rule and in response to Term of Reference 3(d) stated at 3.15:

"If it were thought right to require courts to defer to expert medical opinion relating to the standard of care applicable to medical treatment, the Panel's view is that the rule for determining the standard of care in all cases where a medical practitioner is alleged to have been negligent in providing treatment should be as follows: 'A medical practitioner is not negligent if the court is satisfied that the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the relevant field'"

Additionally the *Bolam* rule was modified by the panel to exclude from its operation the provision of advice to which the principles of *Rogers v Whitaker* apply as restated at s 21 of the CLA (Qld) At 3.18:

'The Civil Liability Act has restored the *Bolam* principle in respect of all areas of medical practice except where the allegation made is that there was a failure to advise of material risk.'

Finally the Panel recommended the insertion of the 'unless the court considers that the opinion was "irrational" provision found in CLA(NSW) s 50 (2) and CLA(Qld) s 22(2) to address the circumstances in which a court would be justified in not deferring to medical opinion.

The Ipp Report recommended and Queensland has enacted a modified *Bolam* rule with respect to the standard of care required by the law to be exercised by medical professionals in the provision of treatment and diagnosis. Whether s 22 of the CLA (Qld) will operate as a defence in Qld is still an open question.

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