

Professional Services Case Note

June 2007

Walker -v- Sydney West Area Health Service [2007] NSWSC 526

The plaintiff, Timothy Walker, commenced an action against the Sydney West Area Health Service, a statutory authority that administered public health services in and around the Blue Mountains of NSW.

The plaintiff claimed damages for a personal injury he sustained on the evening of 17 March 2001. During that evening the plaintiff fell from a tree that he had climbed in an emotionally disturbed and possibly intoxicated state. As a result of the fall he suffered an injury to his spine that resulted in quadriplegia.

The plaintiff alleged that his conduct in climbing the tree and the injuries in consequence thereof, were attributable to the negligence of the defendant in the manner in which it had earlier afforded him medical (psychiatric) treatment.

The plaintiff had an extensive history of psychological and psychiatric disturbance from a young age. He had a troubled childhood and adolescence. He made a suicidal gesture at the age of 15. By 2000 the plaintiff's behaviour was of sufficient concern to his mother for her to contact the 'Mountains Area Access Team,' a group administered by the defendant. An assessment by that organisation concluded that the plaintiff needed immediate help, and hinted that he may have been dangerous and/or suicidal.

On 28 February 2001 the plaintiff attempted to commit suicide. He was in the company of his brother Ben and a friend, Joel Watson in the vicinity of rail tracks. As a fast moving train approached, Mr Watson threw the plaintiff off the railway tracks and narrowly avoided getting hit by the train himself.

The police were called and the plaintiff was taken to the Nepean Hospital. After evaluation by a psychiatric registrar, the plaintiff was admitted as a voluntary inpatient at the Pialla psychiatric centre until he was discharged during the afternoon of 6 March.

On 17 March, in the backyard of his mother's house, the plaintiff told his brother that he was going to hang himself. His brother then told the plaintiff that he would hang himself in order to teach the plaintiff a lesson, so that the plaintiff might understand what he had put his mother and brother through. The plaintiff's brother grabbed an extension cord and formed a noose. The plaintiff seized the noose and climbed the tree. The plaintiff then attempted to loop the noose over a branch but his brother prevented him. The plaintiff's brother remained on the ground and attempted to coax the plaintiff down from the tree.

As the plaintiff began to climb from the tree a branch broke or he slipped and the plaintiff fell, sustaining the subject injury.

The case principally concerned the application of principles of tort law and the provisions of the *Civil Liability Act 2002* (NSW) to the largely unchallenged factual circumstances. However, one fact that was in dispute concerned the quantity of alcohol the plaintiff had consumed on 17 March, and/or the evening of his fall and the extent to which he was affected by alcohol.

Justice Simpson of the New South Wales Supreme Court, considered that the plaintiff's consumption of alcohol prior to the accident was relevant to the issue of causation, and also to the application of ss 49 and 50 of the *Civil Liability Act*

(NSW) Section 49 provides that in determining whether a duty of care arises, it is not relevant to consider the possibility that a person may be intoxicated or the likelihood that such a person may be exposed to increased risk because of their reduced capacity to exercise skill and care. Furthermore, the content of the standard of care is not affected by the person's intoxication. However, s 49 also provides that a person is not owed a duty of care merely because that person is intoxicated.

Section 50 provides that where the person whose injury is the subject of the proceedings was intoxicated at the time of the act that caused the injury, such that their capacity to exercise reasonable care and skill was impaired, then, no damages are to be awarded for liability unless the subject injury was likely to have occurred even if the person had not been intoxicated.

Simpson J was satisfied that s 49 was irrelevant to the circumstances of this case. Her Honour found that neither the existence, nor the standard of the duty of care owed by the defendant to the plaintiff was in any way affected by the plaintiff's intoxication on the evening of 17 March. Simpson J noted that s 50 may have a bearing on the assessment of damages were the plaintiff to succeed in his claim that the defendant was negligent.

Simpson J summarised the plaintiff's claim of negligence:

- 1) a claim that the plaintiff ought to have been detained as an involuntary patient for a period of at least two weeks for the purpose of the administration and monitoring of anti-depressant medication; and that, pursuant to the *Mental Health Act 1990* the defendant ought to have sought a compulsory Community Treatment Order;
- 2) a claim that the plaintiff ought, during the period of his hospitalisation and following his discharge, have been prescribed medication, or given a trial of medication, incorporating either anti-depressant or anti-psychotic medication, or both;
- 3) a claim that the defendant failed, during the period of the plaintiff's hospitalisation, to provide adequate counselling or other therapies;
- 4) a claim that the defendant failed to provide adequate care for the plaintiff following his discharge.

Simpson J observed that the effect of the decision in *Rogers v Whitaker [1992] HCA 58* has been modified by s 50 of the *Civil Liability Act* which reinstates the Bolam test with respect to the standard of care owed by medical professionals.

Her Honour cited the restatement in *Sideway v Governors of Bethlem royal Hospital [1985] AC 871*:

"The Bolam principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with the practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgement."

With regard to the adequacy of treatment given to the plaintiff, there was a conflict of expert medical opinion expressed in the reports of Dr Phillips for the plaintiff and Dr Telfer for the defendant.

In cross-examination Dr Phillips acknowledged that, having regard to the plaintiff's alcohol use, and his manifest intention not to abstain, caution was called for in the prescription of drugs; particularly when the drug is likely to be used in combination with alcohol. Dr Phillips' final position was that the decision to admit the plaintiff to Pialla and to watch and observe him without medication was *'not unreasonable'*.

Simpson J found that the criticism that inadequate follow up was afforded to the plaintiff could not be sustained in the light of recorded home visits.

The final matter her Honour dealt with concerned whether the plaintiff ought to have been admitted as an involuntary patient under the provisions of the *Mental Health Act*.

Dr Phillip's view was that the plaintiff ought to have been detained as an involuntary patient because this would have facilitated a longer stay as an in-patient and have permitted treatment to be administered.

Simpson J suggested that a less drastic position was that the defendant employees ought to have exercised an option to ensure that a Community Treatment Order under s 131 of the *Mental Health Act* was operative.

Her Honour found that both of these alternatives involve an allegation that the defendant, as a public authority, failed to exercise special statutory powers conferred upon it. Such a claim is subject to s 43A of the *Civil Liability Act* and therefore cannot succeed unless the plaintiff establishes that the failure to exercise the power was, in the circumstances, so unreasonable that no authority could properly consider not taking that course to be a reasonable exercise of the power.

Simpson J considered the operation of the *Mental Health Act*.

The Act confers limited powers upon individuals such as the medical superintendent of Pialla, which if exercised in appropriate circumstances, would result in the referral to a magistrate for judicial consideration of the options available under s 51 of the *Mental Health Act*.

The options that were available to the defendant's employees depended upon whether the plaintiff was found to be mentally ill, mentally disordered, or neither. If mentally disordered, then, by reason of s 35 he could only have been detained for 3 days.

If after the implementation of the statutory procedures the plaintiff had been found to be mentally ill, then his involuntary detention by the defendant would have been authorised only until it became possible to bring him before a magistrate for the purpose of an inquiry under s 41. From that point the outcome would have been in the hands of the magistrate.

The special statutory power that the medical superintendent was exercising did not extend to detaining the plaintiff nor to making a Community Treatment Order. Simpson J found that the course proposed by Dr Phillips was not open to any of the defendant's employees. Furthermore Her Honour was of the view that on the material, it was not clear that, at relevant times, the plaintiff was either mentally ill or mentally disordered.

Simpson J found that the medical staff of Pialla acted in accordance with practice that was widely accepted in Australia by peer professional opinion as competent professional practice. Her Honour concluded that it was insufficient to say, as Dr Phillips did, that he would have made different decisions. It was also insufficient to say, on the basis of after acquired intelligence that a particular combination of medications ought then to have been prescribed.

Her Honour entered a verdict for the defendant.

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