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Wei Fan v South Eastern Sydney Local Health District (No 2)

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Wei Fan v South Eastern Sydney Local Health District (No 2)

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Wei Fan v South Eastern Sydney Local Health District (No 2)[1] is a professional negligence decision given by Harrison AsJ on 31 August 2015. In this case, the plaintiff claimed damages for medical negligence on the basis of delayed diagnoses which caused him significant injuries.

This case serves as a good example of the importance of credible lay and expert evidence, particularly where the facts include multiple hospitals and multiple admissions. This case also provides a reasonable example of the interplay between different mitigating defences including contributory negligence, failure to mitigate and *volenti non fit injuria* (voluntary assumption of risk).

Ultimately, as the plaintiff's evidence was not substantial or credible, the plaintiff's claim failed. The court also went further and determined that (had the plaintiff been successful) there would have been a non-specific discount for contributory negligence.

Factual summary

Wei Fan attended Sutherland Hospital, Prince of Wales Hospital, and St George Hospital in the period between 20 January 2007 and 16 March 2007. These hospitals are collectively under the control of the defendant, South Eastern Sydney Local Health District. Mr Fan alleged that, during his admission at those hospitals, the hospitals were negligent because they failed to diagnose and treat his gall bladder condition (acute cholecystitis — being inflammation of the gall bladder) and his type 2 diabetes, because they wrongly allowed him to fall from his hospital bed on 11 March 2007, and because he was discharged from St George Hospital on 16 March 2007 when he was not fit to be discharged.[2] Accordingly, he brought proceedings against the hospitals in the Supreme Court of New South Wales for approximately $86 million in damages.

The hospitals denied the existence of the duty of care contended by the plaintiff, denied breach of duty and causation, pleaded s 5O of the Civil Liability Act 2002 (NSW) (CLA) as a defence, and alleged contributory negligence, failure to mitigate damage, and *volenti non fit iniuria*.[3]

No breach of duty of care

The court's first inquiry was whether there was a breach of s 5B of the CLA on breach of duty. It noted that this inquiry is not retrospective, but rather requires a consideration of what a reasonable person would have done looking forward from a point of time towards the injury.[4]

The court discussed the plaintiff's claim that at all material times he had type 2 diabetes and the defendant was negligent in not diagnosing the condition. However, when glucose test results were taken on 20 January 2007, the levels were, although indicative of elevated blood sugar levels, not necessarily indicative of diabetes. Further, Mr Fan's glucose levels were consistently monitored during January-March 2007, and after this date. As such, it was clear that the plaintiff's blood sugar levels were normal until just before his eventual diagnosis. For this reason, the court found that the medical staff who reviewed the plaintiff acted in accordance with competent medical practice, and there was no breach of duty of care in failing to diagnose and manage type 2 diabetes.[5]

The court then considered whether the plaintiff should have been diagnosed with acute cholecystisis. On 15 March 2007, Dr Davies diagnosed the plaintiff with chronic cholecystitis for the first time (a prolonged inflammation of the gall bladder). However, the plaintiff was never diagnosed with acute cholecystitis and at no time did the tests, including an ultrasound, or the plaintiff's symptoms support this conclusion. As such, the court held that there was no breach of duty of care in not diagnosing the plaintiff with acute cholecystitis.[6] Additionally, the court then went on to determine that there was no breach by delaying a cholecystectomy (removal of the gall bladder) as the plaintiff did not have acute cholecystitis and thus did not require an urgent operation.[7]

The court also considered if there was any breach of duty based on the fall from the hospital bed on 11 March 2007, the discharge from St George hospital on 16 March 2007, or in not providing Mr Fan with information and advice. In these cases, the court determined that there was no evidence that the hospitals or the staff acted contrary to competent medical professional practice, and thus there had been no breach.[8]

Causation

Despite finding that there was no breach of duty, the court went on to consider the other issues put before the court, including causation: s 5D of the CLA.

The court noted that, in order for the plaintiff to succeed, he must show that it is more probable than not that, but for the breach, particular harm would not have been suffered.[9] Accordingly, the questions before the court were whether, if the plaintiff's diabetes had been monitored, diagnosed and treated sometime during his admission, he would have developed complications including peripheral neuropathy and whether he would have fallen and fractured his skull on 9 March 2007.[10]

The court accepted expert evidence from Dr Carter who stated that peripheral neuropathy develops over a prolonged period of time and that it is extremely uncommon for peripheral neuropathy to develop over a course as short as 14 months (being the period between the initial admission and the diagnosis).[11] Dr Carter was of the view that, if peripheral neuropathy had developed over this period, then it is unlikely it could have been avoided, and was thus not caused by any delay in diagnosis.[12]

The court also considered the expert evidence on whether any delay in performing the cholecystectomy was causally linked to the plaintiff's injuries. The court accepted the view of the experts, which was that the delay in treatment made no difference to the plaintiff's condition, and in fact was favourable, as there are increased risks involved in operating too early on a patient with cholangitis.[13]

Accordingly, the court determined that the plaintiff's claim failed. Despite this, the court went on to consider the defences raised by the defendant.

Contributory negligence, failure to mitigate and volenti non fit injuria

The defendant claimed that, if the court was to find that there was a breach of duty before 9 March 2007 by delaying the cholecystectomy, and if the court were to find that the plaintiff's damage occurred because he left the hospital on 9 March 2007 and suffered a further fall on 11 March 2007, then such loss was caused entirely (100%) by the plaintiff's own contributory negligence. The defendants alleged that contributory negligence arose because the plaintiff deliberately chose to leave the hospital against medical advice.[14]

The court noted that contributory negligence consists of:[15]

> ... a "failure of a plaintiff to take reasonable care for the protection of his or her person or property": see *Astley v Austrust Ltd* (1999) 197 CLR 1; 161 ALR 155; 73 ALJR 403; BC9900546 at [21].

Alternatively, the defendants submitted that any injury was caused or contributed by the failure of the plaintiff to mitigate his loss by failing to remain at hospital on numerous occasions, and by failing to attend an appointment on 12 February 2007.[15]

At para 303, the court stated that:

> In *Richardson v Schultz* (1980) 25 SASR 1 at 20, Williams J distinguished between contributory negligence and failure to mitigate on the basis that: "contributory negligence is concerned with negligence of the plaintiff before the cause of action has matured by the occurrence of some damage; after damage has occurred and an action in tort is vested in the plaintiff, he has a duty to take care to mitigate his loss" (referring to Street, the Law of Torts (4th Edition) p 448).

The defendant also relied upon the doctrine of *volenti non fit injuria,* submitting that, by voluntarily declining to attend appointments and remain at hospital, the plaintiff voluntarily assumed the risk of declining treatment. In this regard, the court referred to Fleming's *The Law of Torts*[17] which stated that the voluntary assumption of risk is available as a defence where the plaintiff fully comprehended the risk of injury that materialised and chose to accept it.[18]

The court, in the event that it was wrong to determine that the plaintiff's claim failed, determined that some allowance should be made for contributory negligence.[19] That allowance was unspecified, and was made on the basis that the plaintiff discharged himself on 9 March 2007 despite being scheduled for the cholecystectomy on 12 March 2007. It was also based on the fact that, as the fall occurred shortly after his discharge, he would not have had the fall in which he suffered a skull fracture had he remained in hospital.[20]

The court also found that, as a deduction would be made for contributory negligence, it would be unnecessary to make further deductions for failure to mitigate or *volenti non fit injuria.*

Conclusion

This case demonstrates the importance of having credible lay and expert evidence. In this case, many of the claims made by the plaintiff could not be substantiated by the factual evidence, were contrary to the court's determination of the credibility of the plaintiff's witnesses, and were not supported by the medical expert opinions given to the court. For this reason, there was great difficulty in the plaintiff meeting his burden of proof and ultimately the plaintiff was unsuccessful.

This case is also a good example of the defences available in medical negligence claims. It demonstrates that, in addition to the defences to breach of duty, namely s 5O of the CLA, on competent professional practice, there are also a number of mitigating defences including contributory negligence, failure to mitigate, and *volenti non fit injuria.*

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Footnotes

1. *Wei Fan v South Eastern Sydney Local Health District (No 2)* [2015] NSWSC 1235; BC201508304.
2. Above, n 1, at [14].
3. Above, n 1, at [16].
4. Above, n 1, at [240]–[243]. See also *Adeels Palace Pty Ltd v Moubarak*; *Adeels Palace Pty Ltd v BouNajem* (2009) 239 CLR 420; [2009] HCA 48; BC200910035 at [13]; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; [2005] HCA 62; BC200507887 at [126]–[129].
5. Above, n 1, at [244]–[250].
6. Above, n 1, at [251]–[253].
7. Above, n 1, at [256].
8. Above, n 1, at [257], [259], [261].
9. Above, n 1, at [267]. See also *Wallace v Kam* [2013] HCA 19; BC201302166 at [12].
10. Above, n 1, at [277].
11. Above, n 1, at [280].
12. Above, n 1, at [280].
13. Above, n 1, at [290].
14. Above, n 1, at [299].
15. Above, n 1, at [299]; CLA s 5R.
15. Above, n 1, at [301].
17. J Fleming, The Law of Torts (4th edn) The Law Book Company Limited, Sydney, 1971.
18. Above, n 1, at [304].
19. Above, n 1, at [305].
20. Above, n 1, at [305].