

# Minter Ellison Health News

7 July 2010

## Case Law

### New South Wales

#### ***Peterson v South Eastern Sydney Illawarra Area Health Service & Elliott***

The plaintiff sustained a severe orthopaedic injury to his right ankle and lower leg in October 2003. Although the plaintiff made no complaint regarding his initial treatment, which included surgical reduction of the fractures, he alleged that the follow-up care he received was below the expected standard. In particular, the plaintiff claimed that there was an unreasonable delay in the timely arrangement of further surgical treatment in respect of either a non-union or a delayed union of the fractures to his distal right tibia. This allegedly caused deterioration in the plaintiff's condition.

The plaintiff instituted proceedings against South Eastern Sydney Illawarra Area Health Service and Dr Robert Elliott, his treating doctor ('the defendants').

Subsequent to the original surgery, the plaintiff developed an infection at the fixator pin insertion sites on his right lower leg. The infection required the plaintiff's external fixator device to be removed in February 2004 when union of the plaintiff's fractured tibia had not yet been achieved. Levy DCJ considered that, in light of expert opinion as to peer professional practice widely accepted in Australia, it was reasonable for the treating doctor not to operate at this time because of the risk of further infection and because it was possible that bone union could still have occurred in the course of natural healing. Additionally, because the tibial fracture was very distal, it would have been difficult to obtain adequate fixation using the devices available at the time.

Subsequent to the infection, Levy DCJ considered that continued non-surgical intervention was also reasonable. Based on a comparison between x-rays and previous radiographs, it was rational for the treating doctor to take the view that bone union was progressing. Although some of the expert evidence indicated that this view was below the expected standard of care, Levy DCJ held that the view of the treating doctor should be preferred because it was the treating doctor who bore the professional risk arising from his management options. He considered the concerns expressed by the treating doctor should not be readily dismissed in favour of a more aggressive non-clinical and hindsight surgical opinion when there was legitimate room for a range of such opinions.

Levy DCJ noted that the fact that the treating doctor's management plan was ultimately shown to have been unsuccessful in producing early union of the fractured tibia did not mean that the management plan was below the standard that was expected of a

reasonable doctor in the circumstances. The subsequent decision to revise the previously decided management plan did not mean that earlier decisions were made incorrectly or negligently.

The plaintiff also contended that he should have been advised about alternative treatment options, and argued a failure to warn. However, Levy DCJ held that this duty was triggered only if the patient asked further questions in relation to the proposed treatment, which did not occur. In the present case, the management plan of the treating doctor was reasonable and there was no reason to expect the complications of delayed union that were subsequently encountered.

Consequently, there was found to be no breach of duty of care.

Levy DCJ also went on to make findings in relation to causation. It was held that, to succeed on causation, the plaintiff must show that the negligence complained of either caused or materially contributed to the harm for which the plaintiff claims damages. In this case, the original injury sustained by the plaintiff was so severe that it 'almost inevitably' involved the plaintiff developing some lasting disability in the form of post-traumatic osteoarthritis regardless of the initial surgery that was performed. The plaintiff failed to establish what materially different disabilities would have arisen as a result of any alleged negligence on the part of the defendants.

Further, the plaintiff had sustained a fall in January 2004, approximately 10 weeks after the surgery, which caused him to injure his right foot and ankle. Levy DCJ held that, while this was only considered in passing in the expert reports, a 'commonsense analysis' indicated that the fall gave rise to an inference of fresh injury, namely loosening of the fracture components, that could have been of significance to the process of the fracture healing. Levy DCJ held that, in light of the subsequent complaint of pain, 'this is probably what happened', constituting a *novus actus interveniens*.

Verdict and judgment was entered for the defendants.

[Click here for decision](#)


## Western Australia

### ***WA Country Health Service v Wright (No 2)***

On 3 July 2004, William Wright ('the respondent') presented at Broome Hospital complaining of stomach pain. After observation and treatment with analgesics, the respondent was discharged before presenting again on 5 July. The respondent was found to be suffering from septic shock complicated by cardiovascular and respiratory failure. The respondent brought a claim for negligence against the Broome Hospital ('the Hospital').

At first instance, Fenbury DCJ held the Hospital liable in negligence to the respondent. In particular, it was held that the Hospital should not have discharged the respondent on 3 July and that if the respondent had been kept in Hospital, the cause of the sepsis on 5 July would have been properly diagnosed and treated.

The Hospital appealed to the Court of Appeal of Western Australia on the basis that the primary judge decided the case on a basis that was not pleaded or raised at trial and that the evidence did not support a finding that the sepsis of 5 July could have been avoided if the respondent was kept in hospital for observation.



Newnes JA , with whom Owen JA and Jenkins J agreed, held that, in accordance with the High Court's decision in *Dare v Pulham* (1982) 148 CLR 658, the relief which may be granted to a party must be founded on the pleadings except in cases where the parties choose to disregard the pleadings and fight the case on issues at the trial.

The respondent's case at trial was that he had pneumonia on 3 July. This was critical to the respondent's case because it affected the likelihood that further investigation and treatment would have prevented the respondent's illness on 5 July if he had been kept in hospital for observation. Unless the illness on 3 July could be identified as pneumonia, it could not be established that the illness could have been treated to prevent sepsis from developing on 5 July.

Yet the primary judge concluded that, on the evidence, he was unable to find that the respondent was suffering from pneumonia at any stage. This meant that the case found by the primary judge was not a case litigated at the trial. Newnes JA held that it was not open to the primary judge to determine the case on the basis that he did.

The respondent filed a notice of contention that the primary judge should have found that the respondent was at all material times suffering from pneumonia and that, had he been kept in hospital for observation, this would have been diagnosed and treated. Newnes JA held that the primary judge correctly found that the respondent had failed to make out a case that he had pneumonia on 3 July. Accordingly, the notice of contention was dismissed.

The Hospital's appeal was therefore allowed.

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## New Zealand

### ***Health Practitioners' Disciplinary Tribunal: Wayne John Reid, Enrolled Nurse***

The acting Health and Disability Commissioner (the Commissioner) investigated the treatment provided to Baby A by Whanganui Accident and Medical Clinic (WAM) and Whanganui District Health Board (DHB). Baby A's parents complained to the Commissioner after Baby A was seen by medical staff at WAM and Whanganui Hospital, and discharged. Baby A died shortly after from meningitis.

Baby A was assessed at WAM by Dr B, who prescribed medication to lower Baby A's temperature. Dr B was unsure of the cause of Baby A's illness and recommended that Baby A be reviewed at Whanganui Hospital Emergency Department. Baby A's parents went to the Emergency Department and Baby A was assessed by paediatric registrar Dr E and by paediatrician Dr F. Drs F and E told Baby A's parents that they suspected Baby A had a viral illness. Baby A's temperature had reduced and Drs E and F told Baby A's parents that it was appropriate for Baby A to be taken home.

Baby A died the following morning from meningococcal septicaemia. The Commissioner found no breach of the Code of Health and Disability Services Consumers' Rights (the Code) by either WAM or Whanganui DHB. WAM was found to have provided appropriate care to Baby A. The Commissioner noted that Drs E and F ensured that Baby A's parents knew that they should bring Baby A back to Hospital if he became more unwell. Baby A's parents were found to have been provided with adequate and appropriate information from Whanganui DHB.

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[Click here for decision on penalty](#)

***Health Practitioners' Disciplinary Tribunal: David Graeme Torrance, Registered Nurse***

It was alleged that, while caring for two patients, Mr R and Ms N, in his capacity as a registered psychiatric nurse, Mr Torrance failed adequately to assess and manage risk to the patients, failed adequately to document the care he provided, and failed to complete an adequate handover of care before going on leave. Mr Torrance pleaded guilty to the charges.

Mr Torrance was the care coordinator for Mr R and Ms N, who lived together, meaning that Mr Torrance was responsible for having ongoing face to face contact with the patients and managing their care and documentation.

The Tribunal found Mr Torrance guilty of professional misconduct, noting his obligations to monitor, document and observe his patients and their mental state. It found that there were "significant failures" in the care given by Mr Torrance, including a failure to arrange for Mr R to see a psychiatrist notwithstanding clear evidence of psychosis following a reduction in Mr R's medicine.

The Tribunal concluded that "Mr Torrance had a casual attitude to the mental health of both Ms N and Mr R and appeared to assume that all would be right with them." It cancelled Mr Torrance's registration, censured him and ordered him to pay \$30,000 in costs. It considered that this amount, representing about one fifth of overall costs, was a fair contribution considering Mr Torrance's guilty plea. The Tribunal also ordered that Mr Torrance undertake a course of study approved by the Nursing Council relating to management of risk before he applies for re-registration.

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## News

### Aged Care

**Funding for better services to older Australians starts to flow**

Older people across Australia will receive better aged care services with additional funding for services starting to flow from today, Minister for Ageing Justine Elliot said.

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### E-Health

**Roxon outlines how e-health will work**

Federal Health Minister Nicola Roxon has provided further details on how the Federal Government's electronic health record project will work in practice, although details of exactly how budget funds will be spent on the project remain scarce.

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## General Health

### **Use of overseas doctors sparks inequity claims**

Two of the Commonwealth's superclinics have reportedly been allowed to circumvent federal laws to employ overseas-trained doctors, raising concerns they have an unfair advantage over existing practices.

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### **Rural incentives for doctors attacked by rural doctors**

Rural doctors have attacked the Federal Government's scheme paying up to \$120,000 to tempt GPs to move to country towns.

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### **Mental health experts praise Abbott's spending pledge**

Two of Australia's foremost authorities on mental health have welcomed Opposition Leader Tony Abbott's \$1.5 billion election pledge to boost services.

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### **Draft Boundaries for Your Medicare Local**

The Australian General Practice Network has provided an independent report to the government suggesting potential geographic boundaries for primary health care organisations.

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[Click here for Report, Parts 1 and 2](#)

[Click here for Report, Part 3](#)

### **R&D tax credit will operate from July 1**

The Australian Government has told companies hoping to access tax breaks for R&D that its controversial tax credit scheme will start from July 1, despite the fact the legislation supporting the scheme failed to pass the Senate.

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### **Surgeon appeal could expose legal minefield**

The jury that convicted surgeon Jayant Patel delivered its bombshell verdict without knowing how close the marathon trial came to being aborted.

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### **Perth doctor appears on sex charges**

A doctor accused of sexually assaulting a woman while examining her at Royal Perth Hospital has appeared in court and had his bail extended.

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## Hospitals

### **Surgery waiting list to be audited**

An external audit has been called into surgery waiting list irregularities in western Sydney, a sign of unease over a debacle that led to hundreds of patients wrongly being left off operating lists.

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### **Hospital costs soar as system faces overload**

Figures show the cost of the average hospital admission grew 14 per cent over and above the inflation rate in the five years to 2009.

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### **Doctors query local control of medical services**

Senior doctors have raised the alarm over an element of the Federal Government's health reform program. They warn that the original promise that the system would be "run locally" is under threat as States move to set up hospital networks.

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## Pharmaceuticals

### **Genetic testing decides who gets breakthrough drug**

A cancer drug is set to propel Australian health authorities headlong into a new era of personalised medicine, in which the results of genetic testing determine which patients have access to powerful therapies.

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## Preventative Health

### **Bowel program needs rethink**

Researchers have called for a rethink of the Federal Government's bowel cancer screening program.

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### **Cancer-linked baby bottles on way out**

Baby bottles containing a chemical that has been linked with endocrine dysfunction and increased risk of breast cancer will be phased out of supermarkets and department stores.

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### **Fast-food calorie count to 'shock consumers'**

Fast-food outlets face a push to compel clearer in-store labelling of their foods' energy content.

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### **Diabetes drug 'not worth the risk'**

Use of a common diabetes drug associated with a 39 per cent increased risk of heart attack is not justified when other drugs offer the same benefit, researchers have concluded.

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## **New Zealand**

### **Overdose toddlers need new livers**

Two children in the past three months have required liver transplants after being given painkillers, prompting medics to call for a review of over-the-counter medicine.

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### **Minister Announces new Pharmac appointments**

Current deputy Chair Stuart McLauchlan has been appointed as Chair of the board, taking effect from 1 July 2010.

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### **New midwife incentives under bonding scheme**

New midwives will have financial and training incentives under the government's bonding scheme.

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### **New Zealand media praised over suicide reporting**

New Zealand media have been placed above international counterparts in a report released today on the reporting of suicide.

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