

# Minter Ellison Health News

26 August 2010

## Case law

### Victoria

#### *Hooper v Efe*

In March 2004 Mrs Hooper consulted with Dr Efe for possible breast reduction surgery. Mrs Hooper had a complex medical history, including poor wound healing. In April 2004 Dr Efe performed breast reduction surgery on Mrs Hooper using a superolateral pedicle procedure. Between May and September Dr Efe managed Mrs Hooper's delayed wound healing of her left breast. The wound was managed conservatively with minor debridements and regular dressings. In mid September whilst in Tasmania Mrs Hooper visited a general practitioner for the purpose of managing her wound dressing. The general practitioner formed the opinion that the wound required surgical intervention and referred her to a surgeon. Mrs Hooper underwent three surgical debridements of her left and right breasts and bilateral reconstructions.

Mrs Hooper alleged negligence with respect to the advice and medical treatment provided by Dr Efe.

It was not in issue that there are a number of different surgical procedures available for the performance of breast reduction surgery. These included the superolateral pedicle procedure, inferior pedicle procedure and a free nipple graft. Mrs Hooper claimed that Dr Efe's pre-operative advice was inadequate as she only discussed one procedural option with her. Dr Efe gave evidence that in the course of the consultation she recommended the superolateral procedure, and mentioned the option of a free nipple graft, but discounted it due to Mrs Hooper's medical history. The issue that arose was whether the advice that the free nipple graft should not be considered was justified. The court was satisfied that as there was no evidence that Mrs Hooper would have chosen the procedure over the superolateral pedicle, it was not necessary to consider that aspect. It was held that Mrs Hooper failed to establish that Dr Efe's advice in relation to this was inadequate.

The second issue in contention was whether Dr Efe's choice to perform the breast reduction using the superolateral pedicle procedure breached her duty of care. The chief complaint was that in choosing to operate using the superolateral procedure as opposed to the inferior pedicle procedure, Dr Efe unreasonably exposed Mrs Hooper to a

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higher risk of complications. Mrs Hooper relied upon expert evidence of four plastic surgeons to support her claim. Dr Efe relied on her expertise in anatomy and a report by Mr Carlisle, a fellow plastic surgeon. After consideration of the expert evidence the Court was not convinced by the opinion of Mr Carlisle.

Dr Efe argued that she would have preferred to have performed the free nipple procedure but discounted it as an option due to Mrs Hooper's past medical history. No other expert witness or evidence supported this view. Saccardo J held that this pointed to an error in the processes employed by Dr Efe in assessing the surgical approach best suited to managing Mrs Hooper's surgery. Dr Efe further claimed that the superolateral procedure was her preferred choice because it resulted in better blood supply to the breast. All of the expert witnesses were of the view that the inferior pedicle procedure was the preferred method of performing large breast reductions as the procedure resulted in a more reliable blood supply. The superolateral procedure was only appropriate for small breast reductions. All of the experts were of the view that the superolateral procedure was inappropriate for Mrs Hooper as it gave her the least chance of avoiding complications. The Court held that choosing to employ the superolateral procedure unnecessarily exposed Mrs Hooper to an increased risk of developing complications, and in doing so Dr Efe failed to employ the care which could reasonably be expected of a plastic surgeon. The court held that had Dr Efe elected to manage Mrs Hooper's surgery using the inferior pedicle procedure it was more likely than not that Mrs Hooper would have made a full recovery. Therefore Dr Efe breached her duty of care.

Dr Efe attempted to rely on the defence in section 59 of the *Wrongs Act* which states that a professional is not negligent if they act in a manner which is "widely accepted in Australia by a number of respected practitioners in the field". However this defence was rejected as Dr Efe failed to provide evidence to support her view.

Mrs Hooper also argued that Dr Efe's post-operative wound management was inadequate. Dr Efe stated that through her conservative management the left breast was continuing to heal slowly and that it was free from infection. It was noted that a more aggressive management may have sped up the healing process, but would not have impacted on the number of debridements that were necessary. The Court was not satisfied that Dr Efe failed to employ the care reasonably expected of a breast reduction surgeon by employing a conservative regime.

Mrs Hooper was awarded damages in the amount of \$133,884.

[Click here for decision](#)


## New Zealand

### ***Health Practitioners' Disciplinary Tribunal: Dr Richard Strawnson Stubbs***

**21 December 2009**

A charge of professional misconduct was laid before the Tribunal alleging that Dr Stubbs failed to provide adequate information to a patient, Mr N, prior to gastric bypass surgery and therefore failed to obtain informed consent and failed to adequately document care provided to Mr N.

Mr N consulted twice with Dr Stubbs in August 2005 to discuss the option of gastric bypass surgery. Dr Stubbs did not undertake a physical examination of Mr N until the second consultation, and the clinical notes he took for both consultations were brief. Dr



Stubbs did not at any stage ask Mr N's general practitioner for any information or background about Mr N's medical history. Dr Stubbs signed the consent form for a gastric bypass procedure in October 2005.

On Mr N's admission for surgery on 1 February 2006, blood tests and liver function tests were carried out. Dr Stubbs received a call to inform him that Mr N's liver function results were abnormal. The results indicated Mr N had serious cirrhosis of the liver, which significantly increased the risk of death and post-operative complications. When Dr Stubbs arrived at the hospital, he decided to proceed with the operation rather than wake Mr N and inform him of the increased risk. The surgery was carried out on 2 February and Mr N was discharged on 8 February.

One week after he was discharged, Mr N was admitted to Christchurch Hospital due to abdominal pain and malaena (blood in faeces). He underwent an operation but his condition subsequently deteriorated. Mr N was transferred to intensive care, but died on 19 February of liver and renal failure.

The Tribunal found it "indisputable" that there was a significantly greater risk of death in light of Mr N's abnormal liver function, and that Mr N should have had the opportunity to reconsider whether he still wanted to proceed with the operation. The Tribunal was satisfied that Dr Stubbs was obliged to disclose the increased risk of post-operative complications to Mr N, as this was a material factor of which he was unaware when he consented to the operation.

The Tribunal found all the particulars were proved, and that Dr Stubbs' conduct was a serious departure from and fell seriously below the standards considered acceptable by competent, ethical and responsible medical practitioners. Accordingly, the conduct amounted to professional misconduct and was found likely to bring discredit to the medical profession.

The Tribunal imposed conditions on Dr Stubbs' practice, censured him, fined him \$20,000 and ordered him to pay 50 percent of the costs and expenses of the Director of Proceedings and the Tribunal.

[Click here for decision](#)

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## Legislation

### Queensland

#### **Mandatory reporting relating to pool immersion incidents of a young child - *Building and Other Legislation Bill (No 2) 2010 (Qld)***

The Building & Other Legislation Bill (No 2) had its second reading in Parliament last week. The Bill introduces mandatory reporting requirements in relation to suspected incidents of young child pool immersions.

A pool immersion incident is defined to mean '*an event involving the immersion or partial immersion of a young child (less than five years of age) under water in a swimming pool which may adversely affect the health or wellbeing of the child and because of the immersion the child has died or has been deprived of air and the health and well being of the child has been adversely affected*'.



Section 23 imposes an obligation on the Queensland Ambulance Service to report immersion incidences within five days to the chief executive of health.

Division 5, section 245G provides that the person in charge of a hospital must notify the chief executive (health) of a pool immersion incident where a young child is examined by a doctor in the hospital. This is a mandatory requirement for all private and public hospitals. Notice must be given within five business days of the examination. Notification must include the name and date of birth of the child, the date of examination, address of the child's parents, and the address of where the incident occurred (to the extent the person has the information). The person in charge of a public hospital is considered to be the person responsible for the day-to-day operation and control of the hospital. In a private health facility the person in charge is the licensee of the private health facility.

It is not mandatory for an individual health professional to report an immersion incident. However, section 245H provides an opportunity for a health professionals (doctors or registered nurses) to notify the chief executive (health) if in their opinion a young child has been involved in a pool immersion incident. Where the health professional provides notification the professional will not be held to be liable criminally, civically or under an administrative process for giving the information.

[Click here for Bill](#)

### ***Alteration of Monetary Jurisdiction of Queensland Courts - Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010 No.26 (Qld)***

The Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010 No. 26 (Qld) was assented to on 13 August 2010. The bill is "directed at facilitating earlier resolution of criminal matters and achieving a more effective use of public resources across the justice system."

New civil monetary limits are to be set for the courts on a date yet to be fixed. The amendments increased the Magistrates Court monetary limit to \$150 000, the District Court monetary limit to \$750 000, and the Supreme Court from \$750 000.

[Click here for Act](#)

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## News

### E-Health

#### **E-Health just like online banking: Roxon**

Accessing your personal electronic health record via an online portal in 2012 will be just like using online banking, according to Health Minister Nicola Roxon.

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#### **Government unveils e-health record trial sites**

The Australian Government will rely on a Howard government e-health project to kickstart its \$467 million personally controlled e-health records strategy.

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## General Health

### **Outdated medical procedure behind injury**

The medication practice that led to the catastrophic neurological injuries of a Sydney woman, Grace Wang, during an epidural was reportedly phased out of other hospitals more than a decade ago.

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### **Deadlock 'bad news for reform'**

Key planks of Prime Minister Julia Gillard's health reform program have been thrown into doubt. Experts are warning the chance of significant changes to the system may have evaporated.

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### **NHMRC Research Funding Facts Book 2010**

The National Health and Medical Research Council has recently released the NHMRC Research Funding Facts Book 2010 which contains key statistics related to NHMRC's research funding and research activity over the last ten years.

[Click here for research book](#)

### **Sydney doctor loses deregistration appeal**

A Sydney doctor, who was deregistered for verbally abusing patients and failing to properly treat a man for skin cancer, has lost an appeal.

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## Health Insurance

### **NIB increases profit 159 percent**

NIB Holdings Limited has increased full year net profit by 159 per cent and says it expects further growth in the market in the current year.

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## Pathology

### **CSL's thinning investor blood**

Brian McNamee's plan to buy back \$900 million in shares could produce a highly unique result – a highly profitable company with virtually no shareholder funds.

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### **CSL unveils \$900m share buyback**

CSL Limited posted an 8 per cent fall in full-year net profit and said it would buy back up to \$900 million in shares.

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## Pharmaceuticals

### **Go ahead for tumour drug**

A cancer drug that requires a genetic test before it can be prescribed has been recommended for funding through the PBS in a move that signals a new era of drug therapy determined by the likelihood a person will respond.

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### **Biota sees profits tumble as the swine-flu frenzy fades**

Biota Holdings Limited has warned that royalties from key influenza drug Relenza could continue to decline in the short term.

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## Preventative Health

### **GP's query rational behind kids' flu shot**

Australian Medical Association Vice-President Steve Hambleton said GPs needed to know why the Therapeutic Goods Administration had suspended CSL's Australian-made seasonal flu shot only for children under six rather than under nine.

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### **Kidney disease rethink likely to cut time on dialysis**

Starting dialysis earlier in patients with chronic kidney disease provides no benefits, says a Sydney study likely to rewrite the rulebook on treatment for kidney failure.

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## New Zealand

### **Concerns raised over specialist doctor shortage**

New Zealand is hemorrhaging specialist doctors and struggling to replace them, an issues paper prepared by the Association of Salaried Medical Specialists says.

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### **Auckland GP pleads guilty**

Auckland GP Hongsheng Kong today pleaded guilty to ten charges of falsifying records and six charges of fraudulently using a document to obtain advantage representing \$345,000.

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### **Stem cell research trial faces more delays**

The latest bid for stem cell research to be done on paraplegics has been held up by an ethics committee.

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**Rules tightened for overseas-trained doctors**

Health authorities have tightened rules around the monitoring of overseas-trained doctors, following concerns being expressed for several years over supervision.

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**\$100,000 penalty for surgeon over death of bypass patient**

A surgeon who has been the subject of several complaints about failing to properly inform patients has been ordered to pay more than \$100,000 in fines and costs after the death of a patient.

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