

Minter Ellison Health News

18 February 2010

Case law

New South Wales

Klewer v The Royal Alexandra Hospital for Children

Mr Klewer ('the plaintiff') commenced proceedings on 22 January 2009 for personal injury arising from the alleged negligence of the Royal Alexandra Hospital for Children ('hospital') on or about 17 February 1992 when he was four years of age.

This court application relates to failure to comply with requirements to deliver expert opinion. When commencing proceedings for medical negligence, the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') require that plaintiffs file and serve an expert report that includes an opinion supporting the breach of a duty of care, the general nature and extent of damage alleged, and the causal relationship between the damage and the breach. The plaintiff did not file such a report.

On 17 June 2009, consent orders were issued requiring the plaintiff to serve expert medical evidence on liability by 15 July 2009. The plaintiff did not comply with the timetable. On 1 July 2009, the plaintiff's solicitors informed the hospital's solicitors that an expert report would be available in 'a week or two'. On 27 July 2009, solicitors for the hospital wrote requiring the provision of expert evidence by 31 July 2009. The period in which to serve the expert report was extended by consent to 14 August 2009.

On 26 August 2009, the hospital sought an order from the New South Wales Supreme Court ('the Court') dismissing the proceedings because expert reports had not been filed in accordance with the UCPR. On or around 3 September 2009, the plaintiff's solicitors withdrew from the proceedings. The plaintiff engaged new solicitors and, as a consequence of the replacement, the hospital's motion was stood over for a period of time. The plaintiff's solicitors filed an affidavit explaining they had difficulty finding a suitably qualified paediatric neurosurgeon, but would serve a report prior to 25 December 2009. The affidavit further explained that an expert in infectious diseases was required, the expert was currently overseas, and the report was not expected until the end of February 2010.

The Court held that the provisions of the UCPR make it clear that a person commencing proceedings for medical negligence must file and serve an expert report supporting the negligence. A failure to file an expert report does not of itself invalidate the commencement of the proceedings, however, the failure empowers the Court to grant an application by a party to dismiss the whole or any part of the proceedings.

SYDNEY
MELBOURNE
BRISBANE
CANNBERRA
ADELAIDE
PERTH
GOLD COAST
DARWIN
AUCKLAND
WELLINGTON
HONG KONG
SHANGHAI
JAKARTA
LONDON

www.minterellison.com

MinterEllison

LAWYERS

The Court noted that sometimes the passage of time may be for good reason. In this case, the link between a breach of duty and the damage was not apparent on the evidence submitted. If the matter was dismissed at the point in proceedings that it had reached, the plaintiff would have a significant prospect of obtaining an extension of time. Therefore, it was held that a further delay of one or two months would not prejudice the defendant, particularly given that the delay in obtaining the report was not the fault of the plaintiff. The Court ordered that the plaintiff file and serve expert medical evidence by 26 February 2010, that the hospital's motion for dismissal of the proceedings for want of due dispatch be stood over for directions on 15 March 2010, and that the hospital's motion for dismissal of the proceedings otherwise be dismissed.

[Click here for decision](#)

Health Care Complaints Commission v Gregorio (no 2)

Ms Jocelyn Gregorio ('the respondent') was employed by the Department of Ageing, Disability and Home Care and was based at the Tariro Unit of the Metro Residences at Westmead as a Registered Nurse and nurse in-charge of the Unit. On 28 April 2005 she witnessed Erica Havasi, a member of the domestic staff, drag Client A by his ankles along a cement path into the Tariro Unit. The respondent failed to record or report the incident and also failed to record any injuries sustained by Client A as a result of being dragged along the path.

The Health Care Complaints Commission ('the HCCC') brought two complaints against the respondent alleging unsatisfactory professional conduct and professional misconduct. The complaints alleged that she had demonstrated a lack of adequate knowledge, experience, skill, judgment and/or care in the practice of nursing and/or had been guilty of improper or unethical conduct relating to the practice of nursing.

The Tribunal found that both the complaints against the respondent proved that she was guilty of professional misconduct and suspended her for six months.

The Tribunal also ordered that the respondent arrange and be subject to clinical supervision by a more senior registered nurse or other appropriate health professional, approved by the NSW Nurses and Midwives Board ('Board'), that the supervision be centred on the Australian Nursing and Midwifery Council's National Competency Standards for the Registered Nurse competency standards, and that the supervision continue for a period of at least 12 months until the Board is satisfied that the clinical supervision should end.

The Tribunal further ordered that during the period of supervision, the respondent is not to act as or to accept an appointment to the position of Nursing Unit Manager, an equivalent nursing position or another more senior nursing position.

[Click here for decision](#)



New Zealand

Health and Disability Commissioner Report: General and Gastrointestinal Surgeon, Dr B, and a District Health Board

The Commissioner received a complaint from Ms A about the services provided to her by Dr B. Ms A attended an obesity surgery assessment with Dr B, at which he used inappropriate and offensive language when talking to Ms A about required lifestyle changes. Following a complaint by Ms A to the hospital at which the assessment took place, Dr B apologised for his language, but said that it was obvious that they did not have a therapeutic relationship and that it was not in Ms A's best interests for Dr B to continue to help her.

The Commissioner found that Dr B's language and conduct had been demeaning, insulting and unprofessional. He had failed to communicate effectively, and did not provide services in a manner that optimised Ms A's quality of life. He also failed to facilitate the resolution of Ms A's complaint.

Dr B was found to have breached Rights 1(1), 4(4), 5(2) and 10 of the Code. As the District Health Board (the DHB) did not take adequate action to address Dr B's behaviour or to ensure Ms A's complaint was dealt with appropriately and promptly, the DHB was found vicariously liable for the breaches of Rights 1(1) and 10 of the Code.

[Click here for decision](#)

Health and Disability Commissioner Report: Counties Manukau District Health Board and General Practitioner, Dr D

The Health and Disability Commissioner (the Commissioner) investigated a complaint about the services provided by Dr D and Counties Manukau District Health Board (CMDHB) to Mr A, who suffered from leg ulcers.

Mr A was admitted to Franklin Memorial Hospital on a Saturday in mid 2008, where Dr D diagnosed him with a chest infection. Dr D prescribed oral antibiotic treatment and ordered blood tests for Monday. The results of Mr A's blood tests, which became available on Tuesday, indicated acute renal failure and sepsis. He was taken by ambulance to Middlemore Hospital, but died on Thursday due to the advanced stage of his condition.

The Commissioner found that Dr D's working diagnosis and management of Mr A was reasonable in the circumstances, and accordingly Dr D had not breached the Code of Health and Disability Services Consumers' Rights (the Code). The standard of wound care provided by CMDHB was also found to be appropriate; however the Commissioner noted that the DHB had failed to ensure Mr A received appropriate quality and continuity of care. In this respect, CMDHB had breached Rights 4(1), 4(4) and 4(5) of the Code. The Commissioner commended CMDHB on its comprehensive response to Mr A's case and the steps taken to improve quality of care for future hospital patients.

[Click here for decision](#)

News

Aged Care

Healthscope posts 17.5% profit rise

Healthscope Limited has posted a 17.5 per cent rise in half year net profit, and says it expects stronger earnings in the second half.

[Click here for story](#)

Healthscope still targets aged-care

Healthscope Limited remains committed to entering the aged-care market.

[Click here for story](#)

E-Health

Release of e-health foundations to be laid

The Federal Government has introduced legislation that lays the foundations for a future secure electronic health system.

[Click here for story](#)

[Click here for Healthcare Identifiers Bill 2010](#)

[Click here for explanatory memorandum to Healthcare Identifiers Bill 2010](#)

[Click here for Healthcare Identifiers \(Consequential Amendments\) Bill 2010](#)

[Click here for explanatory memorandum to Healthcare Identifiers \(Consequential Amendments Bill\) 2010](#)

Government moves closer to national e-health system

The Federal Government plans giving every patient and healthcare provider a unique identifier as a major step towards setting up an Australia-wide e-health system.

[Click here for story](#)

NSW to use imaging, radiology systems to create patient identifier

NSW Health is planning an enterprise archive and registry project to streamline its 20-plus patient identifier systems into a uniform health identity number service based on existing medical imaging and radiology systems.

[Click here for story](#)

General Health

States waver on health pact

A centrepiece of the Federal Government's efforts to plug gaping holes in the health workforce may be in trouble, amid claims some States may try to renege on a \$1.6 billion deal to fund a national co-ordinating body set up to fix the problems.

[Click here for story](#)

[Click here for report](#)



UWA fails in final bid to secure stake in cancer treatments

The University of Western Australia says it will have less money to fund research as a result of a court ruling that allowed a former staff member to keep his \$98 million stake in a research company.

[Click here for story](#)

Health Insurance

NIB's cheap DNA test could prove costly

The insurer NIB has begun offering its customers cut-price genetic tests which could unwittingly expose them to higher premiums or even leave them unable to get life insurance or insurance payouts.

[Click here for story](#)

Insurance for the disabled scheme comes to the fore

It's going to be a nervous wait for the high profile backers of a Medicare style levy to fund disability services as the Productivity Commission runs the ruler over estimates which show an extra \$2.5 billion, or 0.4 per cent of annual income, would need to be collected.

[Click here for story](#)

Rise in bulk billing rates

In the December quarter 2009, a total of \$3.9 billion was paid in Medicare benefits for 79.1 million services. This represented 3.5 services and about \$179 in benefits for every Australian.

[Click here for story](#)

[Click here for statistics](#)

Hospitals

Mayo Clinic joins class action against CSL

The Mayo Clinic, one of America's most prestigious and well-funded hospitals, has joined a multimillion-dollar class action lawsuit against Australian blood plasma group CSL, claiming it was part of a damaging international cartel that fixed plasma prices.

[Click here for story](#)

Doctoring hospital patient data should be criminal offence, says physician

Manipulating hospital performance data should be made a criminal offence in the same way corporate directors are prosecuted for cooking the books, according to an article in The Medical Journal of Australia.

[Click here for story](#)



Pharmaceuticals

Patients pay more after PBS 'reforms'

Reforms designed to get better value for the \$7.7 billion spent each year through the Pharmaceutical Benefits Scheme have resulted in more drug price rises for patients than price cuts.

[Click here for story](#)

Preventative Health

Study backs gastric bands for obese teens

The benefits of losing weight during the teenage years are so great that severely obese adolescents should be offered stomach-restricting surgery, according to the results of Australian research.

[Click here for story](#)

New Zealand

Audit reveals care concerns

An emergency audit of a Christchurch rest home has raised concerns over the levels of patient restraint being used and problems with its dietary service.

[Click here for story](#)

ACC says sorry for botched mailout

ACC has apologised "unreservedly" to thousands of businesses and individuals whose private information about workplace injuries was sent to the wrong companies.

[Click here for story](#)

Hospice standards investigation

The standard of care at Cranford Hospice in Hastings is to be investigated after a complaint to the health and disability commissioner.

[Click here for story](#)

Cannabis 'ok' for medicinal use - Law Commission

Cannabis would be allowed for medicinal use and low-level pot-smokers sent to rehab instead of prison under proposals revealed this afternoon by the Law Commission.

[Click here for story](#)

Family wants answers after autistic boy's death

The family of an intellectually disabled, autistic boy found dead after he escaped from a secure respite home has demanded answers about safety at the facility.

[Click here for story](#)



Further Information**Brisbane**

Shane Evans

T +61 (0)7 3119 6450**Sydney**

Lynne Peach

T +61 (0)2 9921 4800**Canberra**

Paul McGinness

T +61 (0)2 6225 3257**Melbourne**

Jacinda de Witts

T +61 (0)3 8608 2276**Adelaide**

Chris Sweet

T +61 (0)8 8233 5406**Perth**

Deborah Templeman

T +61 (0)8 9429 7510**New Zealand**

Paul Radich

T +64 (0)4 498 5019To email Australian lawyers use firstname.lastname@minterellison.comTo email New Zealand lawyers use firstname.lastname@minterellison.co.nz**Disclaimer**

The information contained in this update is intended as a guide only. Professional advice should be sought before applying any of the information to particular circumstances. While every reasonable care has been taken in the preparation of this update, Minter Ellison does not accept liability for any errors it may contain. This Update contains hyperlinks to websites. Minter Ellison does not claim any association with websites which are not clearly identified as Minter Ellison sites. Hyperlink users should observe a website's terms of use and copyright. Minter Ellison disclaims liability for the accuracy or use of material on others' sites.

