Supreme Court Notes

by Anita Del Medico

TORT - Medical negligence - Whether omission by medical practitioner or gynaecologist to warn patient of relevant risks of proposed method of contraception constitutes a breach of duty of care - Tests to be applied for standard of care and causation.

Young v NT of Australia & Ors (Mildren J) 22/5/92

The plaintiff claimed, inter alia, that the Third Defendant (Dr Anderson a specialised gynaecologist employed by the First Defendant at the Royal Darwin Hospital) and the Fourth Defendant (Dr Evans, a resident medical officer also employed by the First Defendant at the RDH), were liable in damages to her for inserting an intra-uterine contraceptive device ("IUCD") without her informed consent. She claimed that their failure to inform her of the relevant risks (perforation of the uterus and pelvic inflammatory disease - "PID") amounted to a breach of duty of care. As a result of their omission, the Plaintiff suffered, inter alia, from both these afflictions.

Judgment for the plaintiff in the sum of $274,178.00. Both the third and Fourth Defendants found to be negligent in not advising the Plaintiff of the risk of uterine perforation. Third Defendant in breach of duty of care in not counselling the Plaintiff of the increased risk, in her case, of contracting PID after insertion of an IUCD, in light of her medical history.

Plaintiff argued that there was no responsible body of medical opinion which would have failed to have informed her of the relevant risks of insertion of an IUCD in her case. The Defendants argued the correct test to be applied was that fomulated by McNair J in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at 587, viz, that a medical practitioner "...is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."

Held: (1) The test to be applied is that formulated by King CJ in *F v R* (1983) 33 SASR 189 at 192-194: what a careful and responsible medical practitioner should disclose depends on the circumstances; the relevant circumstances include the nature of the matter disclosed, the nature of the treatment, the desire of the patient for information, the temperament and health of the patient and the general surrounding circumstances. The duty extends only to matters which might influence the decision of a reasonable person in the situation of the patient, ie the degree of the risk involved and the harm which may ensue if the risk is run.

The question to be asked is whether the doctor, in the disclosure or lack of disclosure which has occurred, acted reasonably in the exercise of his professional skill and judgment or, as Bristow J put it in *Chatterton v Gerson* [1981] 1 ALLER 257, in the way a careful and responsible doctor in similar circumstances would have done.

(2) Evidence as to the practice prevailing in the medical profdession is relevant, but not decisive in all circumstances. Although in many cases, an approved professional practice as to disclosure may well be decisive, the ultimate question is not whether the Defendant's conduct accords with the practices of his profession or some part of it, but whether it conforms to the standard of reasonable care demanded by law. That is a question for the Court and cannot be delegated to any profession or group in the community (per King CJ in *F v R* [supra] at 194).

Gover v State of SA (1985) 39 SASR 543, *Ellis v Wallsend District Hospital* (1989) Aust Torts Rep 980-259, *Whitaker v Rogers* (1990) Aust Torts Rep 81-062, *E v Australian Red Cross Society* (1991) 27 FCR 310 at 356, followed.

Bolam v Friern Hospital Management Committee (supra), *Sidaway v Board of Governors of the Bethlehem Royal Hospital* [1985] AC 871, referred to but not followed.

(3) It was necessary for the plaintiff to show that, had she been told of the relevant risks, she would not have consented to the insertion of the IUCD. The relevant test of causation is a subjective one: the question is not whether a reasonable person would have refused to consent to the procedure, but whether the plaintiff would have so refused.

Gover v State of SA (supra), *Ellis v Wallsend District Hospital* (supra), followed.

Action for damages for, inter alia, breach of duty of care by medical practitioner/gynaecologist.

G Eames QC with S Gearin, instructed by NTLAC, for the plaintiff.

T Pauling QC with I Bruninghausen, instructed by the Solicitor for the NT, for the defendants.

CRIMINAL LAW - Statutory interpretation - *Traffic Act* s 28 - Special case stated from CSJ.

Thomson v Andrews (Angel J) 18/9/92 (Alice Springs).

The two questions of law upon which the case was stated for the opinion of the Supreme Court were:

(i) May a party to a prosecution for an offence under s 19 of the *Traffic Act* call as a witness a person only part of whose evidence may be received by way of certificate under s 27 of that Act, without first complying with the requirements of paragraphs (a) and (b) of s 28 of the Act?

(ii) If the answer to question (i) be yes, must the examination-in-chief of that witness be confined to matters outside the scope of such a certificate?

These questions arose at the hearing of the complaint in the CSJ, where defence counsel objected to the calling of a witness for the prosecution (the breath analysis operator) on the basis that the requisite notice under s 28 (14 days) had not been given. The complainant contended that this witness could be called and sworn and could give evidence about matters rel-

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evant to the issues *other than* those matters which could be covered by his certificate under s 27, despite the fact that s 28 had not been complied with.

Held, answering "no" to the first question: If either the prosecution or the defence intends to call the breath analysis instrument operator as a witness in a prosecution under ss 19(2), (4) or 20 of the *Traffic Act*, irrespective of what evidence is intended to be led from the breath analysis instrument operator, the requisite notice of not less than 14 days must be given to the other party.

The second question in the case stated did not arise.

Braun v Svikart (1990) 99 FLR 340, approved.

Heatherington v Brooks [1963] SASR 321, considered.

Police v Godfrey, Mr B McCormack SM 11/3/92, *Griffith v Errington* (1981) 7NTR 3, referred to.

Special case stated from CSJ.

R Davies, instructed by the Solicitor for Director of Public Prosecutions, on behalf of the complainant.

P Smith, instructed by NAALAS, for the defendant.

APPEAL - COSTS - Order for security for costs of arbitration - When Court of Appeal may interfere with exercise of discretion to order security by Judge at first instance - "Staged order" appropriate in certain circumstances.

DJM Developments Pty Ltd v NT of Australia (Court of Appeal: Angel Mildren & Morling JJ) 22/1/92.

Application for leave to appeal from a decision of Asche CJ granting an order to the NT of Australia for security for the costs to be incurred in respect of an arbitration in which it and the applicant company were parties. Security for costs in lump sum of $100,000 ordered, payable before the commencement of the arbitration.

Held, per curiam, granting leave to appeal and setting aside order of Asche CJ for security for costs in lump sum. Order, security in the sum of $39,000 payable as to $15,000 21 days prior to hearing, $8,000 on the date fixed for the commencement of the hearing, $8,000 on the 6th day of the artibitration of the hearing and as to the final $8,000, on the 11th day of the hearing. The arbitration proceedings were ordered to be staged in the event of non-payment. Liberty to apply to a single judge of the Court granted to vary the payments or increase the security in the event the estimated duration of the hearing exceeded or was likely to exceed 15 days.

(1) The fixation of the amount of the security to be given by the applicant was a matter calling for the exercise of judicial discretion. This being so, there is a presumption that the discretion has been properly exercised and the Court of Appeal should only interfere if it is persuaded that the exercise of the discretion plainly miscarried.

Australian Coal & Shale Employees' Federation v Commonwealth (1953) 94 CLR 621 at 627, followed.

(2) In order to succeed on application for leave to appeal, the applicant must show first, that the decision in question was attended by sufficient doubt to warrant its being reconsidered on appeal and must show that substantial injustice would result if it were allowed to stand. Here, the Territory failed to prove that it would be liable to pay the whole of the arbitrator's costs in the event they were not paid by the applicant. The allowance of the arbitrator's fees as part of the assessment of the Terruitory's costs of the arbitration, was erroneous. Further, the material before the Judge at first instance did not justify him in coming to the figure estimated to be the Territory's costs of defending the applicant's claims.

(3) As the arbitration is not imminent (as it was when the matter came to be considered at first instance), it would be appropriate now to make an order for the giving of security in stages. The other circumstances which commend the making of a staged order for security are that the arbitrator, being accredited in his field as an expert, may well be capable of shortening the hearing of expert evidence; in the early stages of the arbitration, he may be able to suggest procedures which will lead to the shortening of the hearing; the matter may settle at an early stage of the arbitration.

Application for leave to appeal against order for security for costs.

G Antonino, appearing by leave on behalf of the appellant company.

T Riley QC, instructed by the Solicitor for the NT, for the respondent.

CRIMINAL LAW - APPEAL - ss 137(1), (2) and 138 Police Administration Act - what is a "reasonable period" of time to continue to hold a person taken into lawful custody - admissibility of confessional material obtained during such extended detention - voluntariness or otherwise of such confession - discretion to exclude.

Heiss & Kamm v The Queen (Court of Criminal Appeal: Gallop, Martin & Angel JJ) 7/10/92

The applicants for leave to appeal had each been found guilty of murder by a jury at trial. They each applied for leave to appeal against conviction. The second ground of appeal (the first having been abandoned) alleged that the Trial Judge had erred on the voire dire in finding certain confessional material to be voluntary and further, in holding that this material not be excluded as a matter of discretion. It was argued by the applicants that as the provisions of s 137(2) of the *Police Administration Act* ("the Act"), had been relied upon by the police to detain each applicant in custody for questioning (notwithstanding the obligations under s 137(1) of the Act to bring each of them before a Justice or Court as soon as practicable after being taken into custody), it was impor-

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tant for the administration of criminal justice that the Court consider the issues raised by the proposed grounds of appeal.

Held, per curiam (in a joint judgment), granting leave to appeal (on the basis of the public importance raised by the issues in this case concerning the application of s137 (2) of the Act), but dismissing the appeals:-

(1) To establish that the Trial Judge had erred in his findings of fact, both applicants needed to show either that there was no evidence to support the particular finding,or that the evidence was all one way: *Kyriakou, D'Agosto & Lombardo* (1987) 29 ACrimR 50, *O'Donoghue* (1988) 34 ACrimR 397, *Rostron v R* (unreported CCA 8/11/91), applied.

(2) Unless it was established that the Trial Judge acted upon wrong principles or otherwise fell into error so as to enable the appeal court to exercise its own discretion in substitution for his, the appeal court would not interfere with the Trial Judge's exercise of discretion. *House v R* (1936) 55 CLR 499, followed.

[The police investigations having been conducted separately in relation to each applicant, their Honours ruled on the challenged aspects of each of the investigations separately.]

Specific Findings in Relation to Heiss: (i) The Trial Judge's finding that Heiss' arrest was lawful and authorised by the Act [ss 123, 134 & 116(6)], upheld. The investigating officer had genuinely apprehended Heiss for a lesser crime; the arrest was not a device (and therefore unlawful or improper) exercised for the ulterior purpose of taking Heiss into custody for interrogation on the more serious charge. The Police General Orders dealing with this aspect of an investigation make good sense and should be carefully observed, but they do not have the force of law and are for guidance only: they cannot affect the lawfulness of an arrest.

Hallam v Karger (1985) 18 ACrimR 221 at 229, not applied.

On the voire dire, the defence argued that the duration of Heiss' incarceration before and during the interrogations, and the persistent questioning of one investigating officer, were oppressive to the extent that the Court could not be satisfied that his choice to speak was not the product of an overborne will.

(ii) The Trial Judge's rejection of this submission and his reasons for doing so (pp 26-28 CCA judgment), upheld.

McDermott v The Queen (1948) 76 CLR 501 at 511, *MacPherson v The Queen* (1981) 147 CLR 512 at 519, applied.

It had been submitted on voire dire that by reason of the circumstances of the extended detention (which was illegal), it would be unfair to the applicant to allow the statements under challenge to be admitted into evidence (the evidential reliability of the statements was thereby questioned), and the Trial Judge should exercise his discretion to exclude them.

(iii) The Trial Judge's ruling that he was satisfied, on the balance of probabilities, that there was nothing on the facts that affected the reliability of any of the challenged confessional statements so as to render it unfair to the applicant to admit them into evidence upon his trial, upheld.

Observations in Relation to s 137 of the Police Administration Act:

(iv) From the moment a person is arrested, the time for bringing him before a Justice or a court commences to run and, if that is not achieved as soon as is practicable, then continued detention is unlawful unless his holding in custody is continued as authorised by s 137(2).

(v) What is a "reasonable period" within the meaning of s 137(2) is a question of fact and cannot be assessed other than in the circumstances of the particular case, taking into account any factor relevant, not just those enumerated by s 138. It is a measure of a period of time and is obviously not a definite and fixed period of time.

Hick v Raymond (1893) AC 22 at 35, *Australian Blue Metal Ltd v Hughes* (1963) AC 74 at 99, *Rudi's Enterprises Pty Ltd v Jay* (1987) 10 NSWLR 568 at 576, followed.

(vi) At the time held by the Trial Judge that lawful custody had ceased, the investigating officer knew that each applicant had given a version of the facts designed to incriminate the other: this complexity may well have justified a finding that the continued holding of the applicant for such reasonable time as would allow the finding of the deceased's remains, would be lawful. Further, it was anticipated that the applicant Kamm would co-oeprate further in the investigations at the scene; there was a possiblity that Heiss would, as a result of this, also assist further.

There was no error in the Trial Judge's findings of fact; he did not act on wrong principle, nor allow extraneous or irrelevant matters to guide or affect him; he did not mistake the facts, nor fail to take into account some material consideration. There was no reason for the CCA to exercise its own discretion.

Specific Findings in Relation to Kamm: (vii) The Trial Judge's finding as to the voluntariness of what was said and done by the applicant was a finding of fact, and was not shown to be wrong. It had been proved that on the balance of probabilities, the investigating officers had not said anything to the effect that they could "hold" the applicant indefinitely.

On application before the CCA, it was contended that the provisicns of s137(2) of the Act ceased to apply just after the applicant was arrested, that his continued detention thereafter was unlawful and that all confessional material obtained in this time frame should have been excluded in the exercise of the Trial Judgfe's discretion. This ground was encompassed in the overall submission that *the length of time during which the applicant was held was not a "reasonable period" within the meaning of s 137.*

It was submitted that the Trial Judge had failed to take any account of the fact that the police had charged the applicant with murder, or had a reasonable and probable cause to charge him with that, before continuing investigations and interrogation at the scene. He had erred in finding that Kamm's own anxiety to delay taking him before a Justice or court, and that it was the investigating officers' "duty" to find the deceased's remains in order to protect/preserve it.

(viii) On examination, the information given to the police by the applicant as well as other information at their disposal prior to attending the scene, did not amount to a prima facie case of murder. The fact of the applicant's arrest showed no more than that the police believed on reasonable grounds that he had committed an offence (s 123). The continued detention of the applicant for the purpose of further investigations was therefore not unlawful.

(ix) What is a "reasonable period" for the purposes of s 137(2) can only be assessed bearing in mind all of the surrounding circumstances. There is no duty upon the police to offer a person in custody, in these circumstances, an opportunity to contact any person.

(x) Despite the requirements of s 137(1), there was a need to visit the place where the killing of the deceased was believed to have been committed. What is a reasonable period for that purpose must include the time taken to arrange and undertake any necessary journey to and from that place to to carry out investigation, including the questioning of the applicant.

(xi) There is no basis for disturbing the Trial Judge's finding that there was no illegality on the part of the investigating officers (this finding was based on a previous finding of fact that the detention was for a reasonable period). Since the detention was found to be lawful, there is no need to consider the question of exclusion of the confessional material in the exercise of discretion.

Concluding Comments:

(xii) The *Police Administration Act* has no application where a person is voluntarily assisting police with enquiries without having been taken into custody, or, where a person has been taken into custody unlawfully.

(xiii) To be taken into lawful custody normally means the police will have arrested a person. If done without a warrant, then the power is exercisable when the police officer believes, on reasonable grounds, that the person has committed an offence (s 123). Such belief is not necessarily based on information admissible upon subsequent prosecution. Nevertheless, the arrested person is entitled to know why there has been an interference with his personal freedoom: *Christie v Leachimsky* (1947) AC 573, followed.

(xiv) In light of the High Court's decision of *Williams v The Queen* (1986) 161 CLR 278, there is no power in the police to question an arrested person about the offence for which he has been arrested or any other offence, unless, it seems, any such questioning takes place during the period between the time of the arrest and the time he should be brought up for consideration of bail by an authorised police officer or brought to a Justice or the court.

(xv) when an arrest has taken place, the arrested person should be cautioned in the usual terms as to his right to remain silent and the consequences should he say anything. A second and similar caution should also be given where he is still in police custody and enough information has been gathered to prefer a charge. [This was referred to by counsel and the Trial Judge as the stage of the investigation when a "prima facie case" had been made out.]

Sherman v Apps (1980) 72 Cr App R 266, followed.

(xvl) s 137 (2) must be read in light of its background and the common law as confirmed in *Williams* (supra). It cannot be employed artibrarily or for the purposes of enabling a fishing expedition or to entrap the detainee. It is not the intention of the legislature that a person be deprived of his liberty whilst police embark on questioning him, or carrying out investigations, in respect of any matter in the absence of a belief on reasonable grounds, that the person has committed the offence, the minimum requirement which would justify an arrest without a warrant. In every such case, consistent with the rquirements of the common law, if a person is to be questioned on a matter other than that for which he was initially taken into custody, he should be informed of the matter then under investigation.

(xvii) s 137 does not do away with any of the protections afforded by the law to persons accused of an offence during the course of an investigation, apart from enabling a delay in the release of the person from custody for the limited purposes and for a reasonable period.

(xviii) There is no requirement in the legislation that a person be informed that, instead of being given the opportunity to be released on bail custody for the purposes of s 137(2), and be given to understand that that detention will cease to be lawful once a reasonable time to enable the police to carry out their questioning or further investigations, has expired. In all fairness, a person whose right to freedom is to be further denied should know why and should be further cautioned - the fact the legislation authorises a person to be questioned doesn't mean the right to silence has been modified or abolished.

[Both applicants have applied for special leave to appeal to the High Court].

Application for leave to appeal and appeal against conviction.

R Coates, instructed by NTLAC, for the appellant Heiss; J Waters, instructed by NTLAC, for the appellant Kamm.

R Wallace, instructed by the Solicitor for the Director of Public Prosecutions, for the respondent.