CASE NOTE

Lowns & Anor v Woods & Ors (1996) Aust. Torts Reports 81-376, 63,151

Traditionally, the common law has been reluctant to impose a legal duty upon bystanders to undertake Good Samaritan endeavours and assist a person in peril where the bystander has not created the peril. This principle equally applied to doctors who failed to render aid or treatment to persons in need of medical assistance but who were not and never were in a professional relationship with the doctor: *Hurley v Eddingfield;*[1] *Childers v Frye;*[2] *Findlay v Board of Supervisors of the County of Mohave;*[3] *Agnew v Parkes;*[4] and *Hister v Randolf.*[5] Jessup JA summed up the position in Canada in *Horsley v MacLaren* when he stated: '[N]o principle is more deeply rooted in the common law than that there is no duty to take positive action in aid of another no matter how helpless or perilous his position is.'[6]

Albeit slow, there has, however, been a gradual movement by the law in Australia towards encouraging Good Samaritanism. In the recent NSW Court of Appeal decision in *Lowns & Anor v Woods & Ors*, the law of negligence has extended its bounds by creating a new basis for duty of care thereby effectively abolishing the common law rule, at least with regard to physicians.

The case involved an 11-year-old-boy, Patrick Woods, who has suffered from epileptic seizures since he was two years old. The appropriate emergency treatment in the event of such a seizure was found by the trial judge to be treatment with diazepam (Valium) administered preferably intravenously by a doctor or, when that was not an option, rectally. Should an attack occur, the child was liable to suffer brain damage and possibly quadriplegia if not treated promptly.

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1 (1901) 59 NE 1058.
2 (1931) 158 SE 744.
3 (1951) 230 P 2d 526.
4 (1959) 343 P 2d 118.
5 (1986) 17 P 2d 774.
6 (1970) 11 DLR 277, 289.

On 20 January 1987, Patrick's mother went for an early morning walk leaving her son at home for approximately 25 minutes. Upon her return, she found Patrick fitting. She immediately sent her son, Harry, to summon an ambulance and her 14-year-old daughter, Joanna, to call a doctor; both places were situated nearby. Upon arriving at Dr Lowns' surgery, Joanna asked the doctor to come with her as her brother was having 'a bad fit'. The doctor asked the girl to bring her brother to the surgery, but the girl said they could not do so. Upon being informed that an ambulance was already summoned, the doctor refused to follow the girl.

Notwithstanding that this case involved separate actions for medical negligence against two doctors, one against Dr Lowns, a general practitioner, and the other against Dr Procopis, a paediatric specialist and Patrick's treating doctor, the focus of the following discussion rests on the decision against Dr Lowns. At first instance, both doctors were found liable for medical negligence.

The majority of the Court of Appeal, Kirby P and Cole JA (Mahoney JA dissenting), upheld the trial judge's finding of negligence against Dr Lowns but not against Dr Procopis. Accordingly, the court held that both Patrick and his father (Patrick's father claimed damages for nervous shock) were entitled to recover the entire judgment of over $3 million against Dr Lowns.

The question to be decided by the appellate court was whether the request for aid by Patrick's sister gave rise to a relationship of proximity sufficient to give rise to a duty of care, and if so the content of that duty.[7]

Submissions made on behalf of the appellant were to the effect that the relevant physical proximity, circumstantial proximity and causal proximity as explained by Deane J in *The Council of the Shire of Sutherland v Heyman*[8] were absent. Cole JA rejected the submission and opined:

> There was an obvious physical proximity, for Joanna had come on foot. There also existed an adequate 'circumstantial proximity' in the sense that Dr Lowns was a medical practitioner to whom a direct request for assistance was made in circumstances where, on the evidence presented, there was no reasonable impediment or circumstance diminishing his capacity or indicating significant or material inconvenience or difficulty in him responding to the request, in circumstances where he knew, as he must be deemed to have admitted once it is found the conversation occurred, that serious harm could occur to Patrick Woods if he did not respond to the request and provide treatment. Once it is found, as here, that administering Valium at the time determined by the trial judge would have brought an end to the status epilepticus before the onset of brain damage causing quadriplegia, causal proximity is also established.[9]

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[7] *Lowns & Anor v Woods & Ors* (1996) Aust. Torts Reports 81-376, 63,151 per Cole JA at 63,175.

[8] (1985) 157 CLR 424, 495.

[9] *Lowns & Anor v Woods & Ors, supra* n. 7 at 63,176.

Kirby P agreed with Cole JA's analysis and reasons for holding that a relationship of proximity was established in this case notwithstanding a lack of professional association between Dr Lowns and Patrick Woods. His Honour's only reservation rested on the question of causation which was overcome by finding that had Dr Lowns responded to the request for aid, he would have administered intravenous Valium and this would probably have obviated the risk of profound brain damage.[10]

Mahoney JA, in his dissenting judgment, adhered to the traditional common law principles relating to the duty to rescue. His Honour pointed out that although the court does have the power to impose legal obligations which did not previously exist, the obligation in this case is not one which should be imposed by judicial decision but is one best left to the legislature to deal with.

The effect of this decision is of great importance. The common law rule which protected those who chose not to offer assistance to an injured stranger has, at least with respect to physicians, been overriden. The common law, it would seem, now compels all physicians who receive emergency calls to render assistance to the injured in circumstances where it is reasonable to do so. So, to the moral delight of many critics of the old common law rule, no longer can physicians deny assistance to those in peril with impunity. The ratio of *Donoghue v Stevenson*[11] has now been extended to enlarge the class to whom a duty is owed.

One perhaps could also argue that Dr Lowns, because of his profession, has been singled out for not becoming involved in an emergency. And why should this not be the case? The physician is seldom endangered in rendering assistance because all that is required in most cases is administering first aid and calling an ambulance. There is every reason to believe that *Lowns v Woods* will attract support in future decisions. The courts in Australia are no longer prepared to disguise their moral repugnance towards inaction which sometimes leads to the peril of our 'neighbours'.

On the other hand, if community standards and values compel our physicians to render aid and assistance to the injured whenever called upon, it is submitted that in order to ensure that the equitable principles of fairness and justice are not jeapordised, the legislature should provide indemnity to Good Samaritan physicians by removing the right of litigation for imperfect acts in rescue situations. A balance must be struck, otherwise the expectations we place on the medical profession become unrealistic.

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[10] *Id.* 63,155.
[11] [1932] AC 562.