WHEN MAY DOCTORS

BY SIMON MOGLIA, MELBOURNE

Simon Moglia is a law student at the University of Melbourne and works part-time as a Research Assistant at Slater & Gordon Solicitors, PO Box 2071, RMH Vic 3050, **PHONE** 04 1175 3028, **EMAIL** essem@netspace.net.au

Australian courts have been reticent to establish positive duties in negligence. The NSW Court of Appeal in *Tai v Hatzistavrou*, however, has consolidated initiatives in this area with respect to a doctor's duty to follow up patients.

The court does not disagree with the test set down by the High Court in *Rogers v Whitaker*. There is but a single comprehensive duty to exercise reasonable care and skill, according to the facts of each case. *Tai* does, however, indicate the scope of that duty - when it is reasonable for a doctor to do nothing - in a situation where further treatment or testing has been recommended.

In finding for the plaintiff, the Court relied on a systemic model of care. It affirms that patients are not to bear the burden of failures in oft-invisible systems of medical treatment.

The Facts

Mrs Hatzistavrou had been a patient of Dr Tai, a specialist gynaecologist, since 1980. During this time she had consulted him frequently, and expressed to him her fear about the prevalence of cancer in her family.

DO NOTHING?

TAI V HATZISTAVROU [1999] NSWCA 306 (25 August 1999)

In 1983 and 1989 she underwent a diagnostic Dilatation and Curettage of the Uterus (D&C) on Dr Tai's advice. No sign of cancer was found on either occasion.

Late in 1992 Mrs Hatzistavrou consulted Dr Tai again, who recommended a D&C. The plaintiff submitted the recommendation for admission form to the hospital at which the procedure was to be performed by the defendant.

The defendant recorded in his notes that the D&C had been recommended. For undetermined reasons, Mrs Hatzistavrou was not actually scheduled for the procedure. The plaintiff next consulted the defendant in August 1993. He again recommended a D&C, which led to the discovery of ovarian and uterine cancer. Another surgeon, Professor Wong, took over the plaintiff's care, removed her ovaries and uterus, and inserted a colostomy (which was later removed).

The court awarded damages against Dr Tai in respect of the colostomy. It found that the radical hysterectomy would have been necessary even if the cancer were detected earlier in 1993, whereas the colostomy would not.

> "While this case is not authoritative outside NSW, it is worth reading. It will be of assistance to plaintiffs who have fallen through the gaps that inevitably open up, following a consultation, in the myriad of (sometimes ad hoc) health care systems."

Systematic and not unreasonably onerous

Priestley and Powell JJA gave separate concurring opinions with both of which Handley JA agreed. In doing so, the court acknowledged the sparsity of previous authority in this area. The Court upheld the decision of Acting District Court Judge Williams, rejecting both main submissions of the defendant.

Firstly, the defendant claimed that a duty to follow-up was inconsistent with a patient's right to elect or refuse to undergo a procedure. Such patient rights, supported by *Rogers* and the Court of Appeal in *O'Brien v Wheeler*, should not thus be interfered with. Priestley JA, however, distinguished both as 'duty to warn' cases, finding instead that the legal duty to remind the plaintiff of advice given 'in no way cut across the patient's autonomy'.

His Honour did, however, indicate a limit to the duty by reference to the US decision in *Forman v Pillsbury*. There, Harris J found against a plaintiff whose claim sought what would have amounted to a duty to compel patient compliance. Priestley JA agreed that this would be "an impossible Standard".

His Honour held that if there is a 'serious health problem' and further treatment is recommended, 'even if only for prudential reasons', 'the doctor has a duty to keep the doctor's opinion and advice before the attention of the patient so that the patient can decide'. In keeping with the *Rogers* standard, this will depend on the precise facts of the relationship.

Powell JA construed the case as one of failure to obtain test results. He likened it to *Kite v Malycha* in SA, and *Thomsen v Davison* in Qld, where defendants performed tests but failed to obtain or communicate the results. His Honour concluded, however, in more general terms. Dr Tai, 'by reason of what appears to have been inadequacies in his own system, failed to ensure that the procedure which he considered necessary in the Respondent's interests was carried out'. The patient is entitled, as it were, to have the examination completed.

The defendant secondly claimed that any duty to follow up patients would be unduly impractical and costly. But Priestley JA rejected this argument 'in the absence of any facts or reasons (other than simple assertion) being advanced why [a follow-up system] should be unreasonably onerous'.

Both Priestley and Powell JJA ▶

adopted a systemic understanding of health care, requiring that the patient be protected by a practice or system that is not defective. Priestley JA agreed with Perry J in *Kite* who required doctors to 'have a follow-up system'. Powell JA spoke of system inadequacies that resulted in the doctor failing the duty. Perry J acknowledged that the system may need only be simple, and Priestley JA that it could be operated by the receptionist. The trial judge, whose decision was upheld, characterised the required system as one that would not create 'enormous practical or administrative difficulties for a doctor or be prohibitively expensive.' More is required of doctors than follow-up on an ad hoc basis.

Refusal to co-operate and contributory negligence

While the court found it unreasonable that a doctor's follow-up system should simply rely on 'the patient taking the next step', there might be some 'shared responsibility'. Citing Giesen on International Medical Malpractice Law, it was noted that a 'physician may expect his [sic] patient to cooperate'. This normally amounts to reasonable behaviour in attending appointments and heeding warnings. But it may not justify reliance on patients to follow every instruction, certainly not where they are difficult and dangerous procedures are to be tried Powell JA indicated that in some cases, using Giesen as a guide, 'a patient's failure to cooperate may rise no higher than contributory negligence'. In others, as in *Forman*, it may amount to a refusal of treatment and 'dictate a finding of no breach of the doctor's duty'. Priestley JA, however, held that 'the relationship between the doctor and patient, once established, cannot be ended at the mere will of the doctor but lasts until treatment is no longer required'. Consequently, the defendant's failure to diagnose the symptoms identified in October 1992, until August 1993, was negligent.

While this case is not authoritative outside NSW, it is worth reading. It will be of assistance to plaintiffs who have fallen through the gaps that inevitably open up, following a consultation, in the myriad of (sometimes ad hoc) health care systems. The court in this case has rightly held that when these gaps occur, the patient must not be left to bear the cost.

Doctors must have a follow up system, it must not be faulty, and it must take account of patients who do not always act reasonably. PL

AUSTRALIAN PLAINTIFF INVESTIGATORS

Sydney

Traci Jacobi
P.O. Box 6
Regents Park 2143
Ph: (02) 9743 7818
Fax: (02) 9738 5578

Richard McLean
P.O. Box 413
Neutral Bay 2089
Ph: (02) 9904 0733
Fax: (02) 9904 0744

Brisbane

John Wilson
P.O. Box 466
Moorooka 4105
Ph: (07) 3847 4122
Fax: (07) 3847 4133

Mark Norrish
P.O. Box 1348
Carindale 4152
Ph: (07) 3390 4643
Fax: (07) 3890 0346

Adelaide

Tony Van Rhoda
P.O. Box 91
Oakbank 5243
Ph: (08) 8172 0166
Fax: (08) 8357 9120

Gold Coast

Michael Featherstone
(Principal)
P.O. Box 61
Chevron Island 4217
Ph: (07) 5539 9740
Fax: (07) 5539 9702

Sunshine Coast

Eric Hunter
P.O. Box 4502
Petrie 4502
Ph: (07) 3886 5500
Fax: (07) 3886 5511

Perth

Larry Archondakis
P.O. Box 141
Kurrinyup 6921
Ph: (08) 9243 6668
Fax: (08) 9447 1988

AUSTRALIAN PLAINTIFF INVESTIGATORS

Deferred Cost Professional Investigation and Brief Preparation

Litigating?

Let us investigate, interview, take statements and prepare your brief of evidence.

- Personal injury and third party claim brief preparation for:
  - motor vehicle accidents
  - public liability claims
  - work injury

- General Litigation Support
- Protective Security Risk Reviews, Analysis & Evidence
- Commercial Dispute Investigation & Enforcement
- Fraud Assessment & Investigation
- Surveillance of Workplace & Cleaning Systems
- Installation of Covert Camera & Audio Recording
- Sweeping for Audio/Fax or Visual Bugs
- Competitor Intelligence Gathering

Crime • Family Law • Process Serving • Locations

Speculative costing service on all matters that Lawyers are themselves speculating.