Complexities in proving delayed diagnosis of cancer cases

Coote v Dr Kelly [2012] NSWSC 219

By Greg Walsh and Anna Walsh

This case, involving the liability of a general practitioner for an alleged failure to diagnose and treat a melanoma, was recently heard by Schmidt J in the Supreme Court of NSW. The plaintiff was ultimately unsuccessful, as he was unable to prove causation, although her Honour held that the defendant had breached his duty of care and could not rely on a defence under s5O of the *Civil Liability Act* 2002 (NSW). The case highlights the need for parties to ensure that their expert opinion evidence satisfies the common law requirement that the expert clearly set out the basis for their opinions, and is a reminder that evidence that the defendant's acts or omissions have increased the risk of harm occurring is not enough to prove causation.

FACTS

The plaintiff, Mr Malcolm Coote, sued his former general practitioner, Dr Steven Kelly, claiming that in September 2009 Dr Kelly failed to correctly diagnose and treat a melanoma on Mr Coote's foot and instead provided medical treatment appropriate for a person suffering from a plantar wart. The correct diagnosis was not made until March 2011 and by that time the melanoma had metastasised with fatal consequences for Mr Coote. After a detailed consideration of the expert evidence, Schmidt J resolved a number of factual disputes between the parties, finding that the plaintiff had both a plantar wart and a melanoma in 2009, and that there was a small black spot in the middle of the lesion when Dr Kelly examined the plaintiff in September 2009.

EXPERT EVIDENCE

The plaintiff qualified an oncologist, Professor Levi, to opine on causation. Professor Levi reached a number of conclusions in his evidence, including that the plaintiff had an expected subsequent five-year survival rate of 60 - 70 per cent as at September 2009. The defendant challenged the admissibility of the report on the basis that it failed to comply with section 79(1) of the *Evidence Act* 1995 (NSW) which allows opinion evidence where it is wholly or substantially derived from a person's specialised knowledge based on their training, study or experience. The defendant argued that Professor Levi's report did not adequately expose the facts and reasoning on which his opinion was based, and so did not comply with the requirements of s79(1). The defendant further argued that Professor Levi's expert evidence should not be admitted, as he breached a similar requirement under rule 31.23 of the *Uniform Civil Procedure Rules*.

In considering whether to admit the evidence, Schmidt J referred extensively to the recent High Court decision of *Dasreef Pty Ltd v Hawchar* [2011] HCA 21 and emphasised the following points regarding the admission of expert opinion evidence in a medico-legal context:

- Expert opinion is inadmissible unless the expert states in chief the facts and the reasoning on which their opinions are based.
- A judge can admit expert opinion even if s/he considers the reasoning to be incorrect, so long as the expert has indicated their reasoning.
- In situations where the facts clearly fall within the area of expertise of the relevant expert, little additional articulation will be required by the expert other than a statement of the relevant facts and an overview of the expert's qualifications and experience in order to satisfy the requirements of s79(1).
- If s79(1) is satisfied, then a general practitioner's expert evidence can be admitted, even if there is already evidence from a relevant specialist medical practitioner on a particular issue. It may be that, in most cases, a specialist's evidence will be preferred to that of a general practitioner, but the availability of specialist medical evidence does not make a general practitioner's evidence inadmissible.

In light of these principles, Schmidt J held that some of Professor Levi's opinions on the likely prognosis of the plaintiff's disease were inadmissible as they were based solely on unidentified and unexplained medical literature and epidemiological studies. For example, Professor Levi's opinion that the plaintiff had an expected five-year survival rate of 60 - 70 per cent as at September 2009 was held to be inadmissible. Professor Levi had indicated only that this opinion was supported by medical literature that he did not identify, when what was required was an explanation by Professor Levi of the reasoning he had used in supporting his opinion on the basis of the literature.

The expert opinion of the GP, Dr Lynch, concerning the

plaintiff's prognosis was also challenged on the basis that it relied on the inappropriate use of a scientific calculator for the staging and prognosis of the disease. Schmidt J held that Dr Lynch's opinion on the plaintiff's prognosis could not be admitted, referring to the terms and conditions of use of the calculator where it was made clear that the calculator could not be used for commercial use or for providing medical advice; that no representation had been made by the provider of the calculator regarding its accuracy; that Dr Lynch had made no attempt to understand the assumptions underpinning the calculator; and that the data on which the calculator relied made it unsuitable for providing a prognosis in the plaintiff's case.

LIABILITY

Schmidt J held that Dr Kelly had breached his duty of care by failing to observe a small black mark on the plaintiff's foot, which should have led Dr Kelly to refer the plaintiff for a biopsy, which would have resulted in the diagnosis of the melanoma. However, her Honour held that the plaintiff could not be successful in the case as he had not been able to prove that it was probable that the melanoma had not already metastasised in September 2009.

In relation to the plaintiff's argument that the defendant's breach may have caused an increase in the likelihood of injury to the plaintiff, especially the delay in treatment and the adverse impact of the wart treatment on the melanoma, her Honour referred to the decision of *Amaca Pty Ltd v Booth*,[1] where French CJ stated that "[c]ausation in tort is not established merely because the allegedly tortious act or omission increased a risk of injury. The risk of an occurrence and the cause of the occurrence are quite different things." Consequently, her Honour held that the plaintiff failed to establish that it was probable that the failure to diagnose and treat the melanoma caused or materially contributed to the melanoma metastasising.

Schmidt J emphasised the caution that should be exercised in the use of epidemiological studies in cases such as these. Her Honour referred to the views of Spigelman CJ in *Seltsam Pty Ltd v McGuiness*[2] as authority for the proposition that, as epidemiological studies are concerned with the study of disease in human populations and are not directed to the circumstances of individual cases, epidemiological studies can provide evidence only of possibility rather than probability on the issue of causation. However, epidemiological studies can be a relevant factor, in addition to other factors, that a judge can rely on in finding that a plaintiff has established that it is probable that a defendant's conduct has caused the harm alleged by the plaintiff.

As her Honour held that causation had not been satisfied, she considered that it was not necessary to deal with the defence under s5O of the *Civil Liability Act* 2002 (NSW). However, she considered that if causation had been satisfied, then Dr Kelly would not have been able to rely on a defence under s5O on the basis that that there was a black mark on the lesion when the plaintiff was first examined by Dr Kelly. As the lesion was pigmented on first examination, Dr Kelly's subsequent diagnosis and treatment would not have been widely accepted in Australia by peer professional opinion as competent professional practice.

It is imperative for practitioners bringing cases on behalf of plaintiffs for delayed diagnosis of medical conditions, especially where the condition is cancer, to spend as much, or even more time, on the issue of causation as on breach of duty of care. The outcome in this case is unfortunately typical of delayed diagnosis of cancer cases, and is a timely reminder of the need for a plaintiff to satisfy the court that the breach of duty of care materially contributed to the harm alleged, supported by expert opinion evidence from witnesses with the appropriate qualifications, and full disclosure within their written reports of the basis upon which they reach their opinion and the facts and circumstances underpinning it. ■

Notes: **1** *Amaca Pty Ltd v Booth* [2011] HCA 53 at [41].
2 *Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29 at [78] – [101].

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