

## *White v Johnston* [2015] NSWCA 18

### Key Points

- Validity of a patient's consent if the sole purpose of treatment is non-therapeutic.
- The absence of consent as forming the gist of assault and battery.
- The onus of proving consent.

### Background

From June to December 2009, the respondent, Ruth Johnston, attended the dental surgery of the appellant, Jasmin White, to receive dental treatment. The dental treatment in question included filling her lower canine and molar teeth, and building up the front bottom teeth. Ms Johnston claimed that:

- The filling of the lower canine and molar teeth was so ineffectively performed that the teeth remained affected by decay after the treatment; and
- The building up of the front bottom teeth was negligently performed such that, after the treatment, the teeth could not fit securely beneath the dental plate above them.

The expert evidence of a dental surgeon found that Dr White did not act in accordance with peer professional standards for a variety of reasons.

Ms Johnston alleged that the treatment performed was unnecessary and ineffective and thereby constituted assault.

Dr White's previous malpractice conviction was brought into evidence to show that she had a tendency to perform work that was unnecessary and to make claims for services never rendered.

In reliance on the evidence of Dr White's previous malpractice, the trial judge found the treatment was "totally unnecessary" and had no therapeutic purpose. Rather, it was carried out "on every occasion for the purpose of extracting money from the Department of Veterans' Affairs not for the purpose of treating" Ms Johnston. Furthermore, he held that Dr White failed to prove that Ms Johnston's consent was valid and, as such, assault and battery were made out.

Dr White appealed.

The issues on appeal were:

- Whether a patient's consent is invalid if the sole purpose of treatment is non-therapeutic;
- Whether the absence of consent forms the gist of assault and battery; and
- Whether the onus of proving consent lies with the patient or the practitioner.

### The Law

#### *Non-Therapeutic Purpose and Consent*

The court held that where a medical practitioner is solely motivated by an unrevealed non-therapeutic purpose, the patient's consent is not valid and there will be an assault and battery.

The court emphasised that the sole purpose of the treatment must be non-therapeutic. That is an important qualification as, frequently, practitioners perform treatment for multiple purposes (including for the purpose of earning an income).

It became clear to the court that either by words or conduct, Ms Johnston consented to both the fillings and the building up of her lower incisors. That was the reason for her attendance upon Dr White. The next question became whether Ms Johnston's consent became invalid by virtue of the treatment being for a solely non-therapeutic purpose. The court held that some genuine therapeutic outcome was intended by Dr White to be achieved (and was achieved) through the dental treatment. In fact, there was no evidence that the filling and building up was incapable of constituting a therapeutic response to Ms Johnston's condition.

Whilst it was concerning that Dr White charged the Department of Veterans' Affairs for 102 procedures over a six month period and 28 consultations when Ms Johnston only attended on 10 or 11 occasions, the court held it Dr White "over-servicing" for her own financial gain was irrelevant to the issue of liability for assault.

It followed that the trial judge's findings that the work was wholly unnecessary, and exclusively for a non-therapeutic purpose, were not supported by the evidence. Those findings are necessary to sustain the crucial conclusion that Ms Johnston's consent was invalid.

#### *Consent as an Answer to Assault and Battery*

It was largely uncontested that performing medical treatment on a patient without valid consent will result in that the medical practitioner being civilly liable for assault and battery (and may also be criminally liable). However, the court opined that defects in obtaining consent tend to go to negligence rather than establishing assault and battery.

Nevertheless, there are circumstances in which a patient's prima facie consent will not be an answer to assault and battery. Those are, cases in which consent is fraudulently procured. The court was careful to distinguish fraudulently procured consent and the negligent failure to adequately warn a patient who consents to treatment of the risk of the treatment. The latter will not of itself vitiate consent.

## Conclusion

### *Onus*

The onus rests with the patient to establish that the medical practitioner fraudulently procured that patient's consent. In the present case, it was for Ms Johnston to prove that the treatment Dr White administered was devoid of therapeutic purpose, thereby, rendering her consent invalid.

The court rejected the notion that a defendant medical practitioner has a legal burden to disprove fraud. The burden lies with the plaintiff if the fact alleged is an essential element of his or her cause of action.

The court allowed the appeal and remitted the matter to the District Court for retrial.

## Lessons Learnt

This case serves as a reminder that whilst the law will protect patients whose consent is wrongly procured by medical practitioners, the courts will not readily assume that the practitioner was liable



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for the loss. The onus lies with the patient to prove the elements of his or her case, and not with the practitioner to disprove each and every allegation made against him or her.

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