

Dekker v Medical Board of Australia [2014] WASCA 216

Background

The appellant, Leila Dekker, was a medical practitioner. On the evening of 27 April 2002, the appellant was involved in a 'near miss' motor vehicle accident, in which her car narrowly escaped damage, but the other car swerved into a ditch and its occupants sustaining injury (**accident**). The appellant drove off to a nearby police station to report the accident and left the scene of the accident without assessing the condition of the occupants of the damaged motor vehicle or rendering medical assistance to its occupants.

Following the accident, the appellant was brought before the State Administrative Tribunal (**Tribunal**) by the Medical Board of Australia (WA) (**respondent**) for improper conduct in a professional respect, pursuant to section 13(1)(a) of the *Medical Act 1894* (WA) (**Act**) by reason of leaving the scene of the accident to notify police without stopping to make an assessment or render assistance to the occupants of the other vehicle.

Findings of the Tribunal

Over the course of the Tribunal proceedings, it was revealed that, at the time of the accident, the appellant lacked a torch, medical equipment and a mobile phone. It was also revealed that immediately following the accident the appellant entered a state of shock. Nevertheless, the Tribunal found that she was aware that the other vehicle was involved in an accident, that its occupants would have been seriously injured and that she could have used her car headlights to assist her in assessing the condition of the occupants. The Tribunal, made a finding of improper conduct on the part of the appellant.

The Tribunal held that the test for improper conduct under the Act could reasonably be regarded as improper by professional colleagues of good repute and competency. It must be conduct in pursuit of the practitioner's profession. This includes conduct that does not necessarily occur in the carrying out of a medical practice, provided there is a sufficiently close nexus between the impugned conduct and the profession of medicine.

The Tribunal concluded that the Act of failing to make an assessment of the occupants' condition or rendering medical assistance amounted to improper conduct in breach of section 13(1)(a) of the Act. The Tribunal reasoned that saving human lives and healing sick or injured individuals were the core purposes and ethics of the medical profession and because only they have the necessary skills and knowledge to do so.

As such, the failure by a medical practitioner to make an assessment and render assistance when she is aware that a motor vehicle accident has occurred and that its occupants were likely injured, would reasonably be regarded as improper by medical practitioners of good repute and competency, and that there is a sufficiently proximate link with the profession of medicine. Any delay in providing first aid after a traumatic injury such as the motor vehicle accident, even a delay of a short period, could result in death. Although the appellant went to seek help from the nearby police station, the Tribunal observed that it was necessary for her to determine the number of persons who were injured, to assess their injuries and needs to the greatest extent possible, in order for appropriate emergency services to have been

despatched. Her professional duty required her to overcome or put aside her shock and to attend to the scene.

Appeal

The appellant appealed the Tribunal's finding of improper conduct pursuant to section 13(1)(a) of the Act by reason of the following grounds:

1. The Tribunal erred in finding a duty of care was owed by the appellant to assess or assist the occupants of the other motor vehicle following the accident.
2. The Tribunal erred in finding the appellant could have used her car's headlights to assist her in assessing the condition of the occupants of the other vehicle.
3. The Tribunal erred in finding the appellant's conduct was conduct in pursuit of her profession as a medical practitioner.
4. The Tribunal erred in finding that the failure to assess and assist the occupants amounted to improper conduct.

4A The Tribunal erred in relying on the expertise of its medical members.

5. The Tribunal erred in finding that the appellant's state of shock was irrelevant to its finding of improper conduct.

Court of Appeal

In relation to the first ground of appeal, the Court of Appeal found that the non-medical members of the Tribunal had relied on the opinions of the medical members in finding a duty of care existed between the appellant and the occupants of the other vehicle. However, for a professional duty to be alleged, the duty needs to be one which is generally accepted within the medical profession. The Tribunal had not expressly found that such a duty was generally accepted by members of the medical profession and did so in the absence of any evidence to that effect.

Ultimately, the Court of Appeal held that the Tribunal had no evidence to find such a duty. The rules of natural justice precluded the Tribunal from simply drawing on its own knowledge and experience in finding a specific professional duty. To that end, ground 2 and 4A were also upheld by the Court of Appeal.

The Court of Appeal deemed it unnecessary to consider grounds 3, 4 and 5. However, on the fifth ground, the Court of Appeal noted that insofar as the Tribunal found the appellant's shock involved a physiological reaction to the accident, a finding of improper conduct would have depended on a finding that the appellant was physically capable of rendering assistance. To that end, it was likely the appeal would have been upheld on the fifth ground too.

Observation

This case illustrates that in determining whether a duty of care is owed by a medical professional in the context of “improper conduct”, Courts or Tribunals must look to whether the alleged duty is an obligation which is generally held by members of the profession. In doing so, a Tribunal is precluded from drawing on its own knowledge. The case also illustrates that there remains a lack of guidance on circumstances in which an “off duty” medical practitioner will be found to owe a duty of care to a member of the public.

For more information on this article, please contact:

Mark Birbeck
Partner
Email: mark.birbeck@hbalegal.com
Direct Line: (08) 9265 6002

Shannon Mony
Associate
Email: shannon.mony@hbalegal.com
Direct Line: (08) 9265 6016

Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.