

Coote v Kelly [2013] NSWCA 357 (28 October 2013)

Key Points

- One sentence summarising the issue that the Tribunal was required to consider
- Optional further sentence summarising the conclusion, or the key point in the case

Background

On 3 September 2009 Mr Malcolm Coote, attended upon his general practitioner, Dr. Steven Kelly, with respect to a lesion on his foot. Dr. Kelly, the respondent, diagnosed and treated the lesion as a plantar wart.

Other doctors subsequently treated Mr Coote's foot. Dr. Wall saw Mr Coote in September 2010 and diagnosed and treated the lesion as a planter wart. Dr. Hiddins treated Mr Coote from January 2011. Initially she too diagnosed the lesion as a planter wart and treated it accordingly. During the time that she treated the lesion, its appearance changed dramatically. In March 2011 she sent Mr Coote for a biopsy when the lesion began to bleed profusely when she attempted paring. The biopsy revealed Acral lentiginous melanoma (ALM).

In 2012 Mr Coote brought proceedings against the respondent claiming damages on the basis that the respondent wrongly diagnosed and treated a lesion on Mr Coote's foot as a plantar wart, when it was, in fact, ALM.

Given Mr Coote's illness, the litigation was prepared, conducted and determined within five months. In the primary decision, the New South Wales Supreme Court held that:

- It was probable that Mr Coote was suffering from both ALM and a planter wart when the respondent first saw him in September 2009;
- Mr Coote's evidence, and that of his wife Mrs Coote, could not be rejected as being unreliable, even though the presence of the small black spot which Mrs Coote described was not noted by the respondent, who candidly admitted that he could not recall the lesion and that there was a possibility that he had made an error;
- The acceptance of Mrs Coote's evidence must lead to the conclusion that the respondent erred in failing to diagnose ALM. The respondent's misdiagnosis was unlikely to be deliberate. Further, what the respondent was confronted with was extremely unusual, given that Mr Coote was suffering from both an ALM and a planter wart. On the expert evidence, the lesion was difficult to diagnose. Nevertheless, the Court was of the view that the black spot which Mrs Coote described was present when the appellant saw the respondent and

had to be investigated;

- The respondent's treatment of Mr Coote was a departure from common practice and the respondent therefore breached his duty of care to the appellant; and
- Mr Coote did not, however, succeed in establishing causation. It was not shown, on the evidence, to be probable that the lesion had not already metastasised in September 2009. It also could not be concluded that it had been shown that it was probable that, had the ALM been excised in 2009, that Mr Coote would have had a greater life expectancy, or alternatively a normal life expectancy, or that his life expectancy was significantly reduced, as the result of the respondent's negligence. Therefore causation was not established and Mr Coote's claim failed.

Mr Coote passed away from his illness two months following the trial. His wife and executrix (the appellant) subsequently appealed the primary Judge's decision challenging the finding on causation. The respondent cross-appealed the finding on breach.

On appeal it was found that the primary Judge's decision on breach ought to be set aside and a new trial was ordered.

The Law

Breach of duty - the process of fact finding miscarried

The issue relevant to breach of duty of care was whether or not the respondent's treatment of Mr Coote was a departure from common practice. In this regard, whether or not the lesion was pigmented in September 2009 when the respondent treated Mr Coote was critical.

The Court of Appeal upheld the respondent's cross-appeal. Ultimately the Court held that the primary Judge erred in the fact finding process as follows:

- The primary Judge dismissed Dr Wall and Dr Hiddins' evidence as unreliable. This included their evidence that the lesion was not pigmented when they first treated Mr Coote. However, it was not, on the evidence, possible to discount Dr Hiddins' evidence in the same way as Dr Wall's evidence. Those differences needed to be addressed in order to engage with the "real strength" of the evidence presented by the respondent. The primary Judge's findings amounted to, albeit implicitly, a wholesale rejection of the testimonial evidence of Dr Wall and Dr Hiddins. It was open, having regard to the cross-examination, for the primary Judge to make such findings, but only if the reasoning process supporting it were exposed. In this instance the reasoning process was not set out.
- It was necessary to have regard to the doctors' notes. The notes reflected three trained practitioners' observations, each of whom diagnosed and treated a plantar wart, and were

aware of the significance of a pigmented lesion. The notes did not mention pigmentation of the lesion. Every contemporaneous record of Mr Coote's left foot was inconsistent with the testimonial evidence of Mrs Coote, which the primary Judge accepted. Once again, it was open to the primary Judge to accept Mrs Coote's evidence in this respect, but only if her Honour first explained why the notes were to be discounted. This did not occur.

- The finding made by the primary Judge that there was a plantar wart was inconsistent with the evidence of the appellant, who maintained that the "piece of black tar" looked "nothing like a plantar wart". The primary Judge's reasons did not engage with, let alone resolve, the inconsistency.
- The possible unreliability of the appellant's honest recollection needed to be engaged with in light of the balance of the evidence.

The effect of the above was that the finding of breach could not stand.

Causation - the process of fact finding miscarried

The question relevant to the issue of causation was whether the failure to diagnose and investigate a melanoma in September 2009 caused metastasis of the melanoma. Metastasis had occurred prior to its excision on 26 March 2011, but just as it was not possible to say whether the melanoma was pigmented in September 2009 from its appearance in 2011, so too it was not possible to conclude whether it had metastasised by September 2009.

The Court of Appeal found that the primary Judge erred in finding that causation had not been established as follows:

- The primary Judge relied on Mr Coote's evidence that in 2009 the lesion was 1–2 mm high and the evidence that a melanoma generally extends as far below the skin as it does above. However, this was not reconciled with the appellant's evidence that it was raised by 1 mm (which the primary Judge had previously found to be the most reliable). That finding may have been available, but there was no reasoning process indicating why, in this critical respect, Mrs Coote's evidence had been discounted.
- The primary Judge stated that had the melanoma been unpared, it could have been thicker than 4.4 mm. However, the paring and pumicing could make only a very small difference (0.1 to 0.2 mm). The primary Judge found that the tumour was fast growing in 2009, and at that time probably had a Breslow thickness of 4 mm or more. Once the evidence as to the limited effects of paring and pumicing is borne in mind, it is very difficult to reconcile those findings with what was established in 2011 upon excision, namely, a Breslow thickness of 4.4 mm.

- It was at least reasonably arguable that there was some correlative relationship between the apparent depth of a melanoma and its microscopically measured Breslow thickness, and so the recollection of Mr Coote and the appellant was not incapable of supporting a finding that “more probably than not” his melanoma, had it been diagnosed and excised in September 2009, would have had a Breslow thickness of no more than, say, 2 mm.

Lessons Learnt

The Court of Appeal decision highlights the importance of Judges providing reasoning when drawing conclusions as to facts. However, more importantly the case is a timely reminder of the importance of maintaining detailed and contemporaneous medical records. As the Court of Appeal noted, memory is all too fallible.

For more information on this article, please contact:

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

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

Melissa Hurt
Solicitor
Email: melissa.hurt@hbalegal.com
Direct Line: (08) 9265 6014