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McKenna v Hunter & New England Local Health District [2013] NSWCA 476 (23 December 2013)

Key Points

- A recent decision that has been handed down by the New South Wales Court of Appeal demonstrates that as well as the duty owed to their patients, medical practitioners (and the Hospitals they work at) have an additional obligation to consider the impact their patients' actions may have on third parties.

Background

Mr Pettigrove had a twenty year history of suffering from mental health illness. Amongst his diagnoses was that of chronic paranoid schizophrenia.

On 20 July 2004, Mr Pettigrove's friend, Mr Rose, became alarmed at Mr Pettigrove's deteriorating mental health and arranged for him to be transported via ambulance to Manning Base Hospital in Taree (the Hospital).

Following a medical assessment and in accordance with the relevant provisions of the Mental Health Act 1990 NSW (MHA) (as it was then), Mr Pettigrove was detained at the Hospital, administered anti-psychotic medication and was reviewed by Consultant Psychiatrist, Dr Coombs.

The certificate that was completed by the Hospital pursuant to the MHA noted that at the time of his admission, Mr Pettigrove was suffering from suicidal ideation and psychotic depression and that detention was necessary for both Mr Pettigrove's safety and the safety of other persons. The principle diagnosis made by Dr Coombs was "exacerbation of chronic paranoid schizophrenia".

Approximately 12 hours following Mr Pettigrove's admission, a meeting took place amongst the hospital staff whereby it was suggested that Mr Rose could drive Mr Pettigrove to Victoria (where his mother lived) to undergo further treatment.

Later that night Mr Pettigrove was observed to be talking loudly to himself, refusing medication and pacing up and down his room. These observations were recorded in the overnight nursing chart.

On 21 July 2004 (the following morning), Mr Pettigrove was discharged from the Hospital to the care of Mr Rose, who had agreed to drive Mr Pettigrove to Victoria so that he could be cared for by his mother.

At some time between 6:00pm and 8:30pm, the two men stopped driving on the Newell Highway (near Dubbo in NSW) and Mr Pettigrove strangled and killed Mr Rose (the incident). During a police interview, Mr Pettigrove informed police that he had acted on impulse as an act of revenge, because he believed Mr Rose had killed him in a past life. Shortly after the incident, Mr Pettigrove committed suicide.

Mr Rose's wife and sisters (the appellants) brought an action in negligence for nervous shock against the Hunter & New England Local Health District (the respondent) whom was responsible at law for the hospital and for the acts of those whom work in it.

The Law

Issues

The court was required to consider the following issues:

- Whether the respondent owed Mr Rose a duty of care to protect him from harm caused by Mr Pettigrove (it was accepted that if this duty was owed to Mr Rose, it was equally owed to the appellants as members of Mr Rose's family).

- Whether the respondent was entitled to the protection of section 5O of the *Civil Liability Act* 2002 (NSW) (**CLA**). This section provides that a professional is not liable in negligence for performing a professional service, if their conduct was widely accepted by peer professional opinion).

- Whether the respondent was entitled to the protection of ss43 or 43A of the CLA. In this regard, we note that section 43 of the CLA provides that an act or omission of a public authority does not constitute a breach of statutory duty unless the act or omission was so unreasonable that no authority having similar functions could consider the act or omission to be reasonable. Section 43A of the CLA provides that an act or omission involving the exercise (or failure to exercise) a special statutory power does not result in liability unless the act or omission was so unreasonable that no authority having the special statutory power would consider the act or omission to be reasonable.

- Whether the injuries that Mr Rose and the appellants suffered were causally related to the negligence (if any) of Dr Coombs.

Conclusion

District Court judgment

At first instance, Elkaim J held that whilst Mr Pettigrove's discharge from hospital was "prima facie inappropriate", the plaintiffs (as they were then) had nevertheless failed to establish any negligence or causal link to their injuries. In reaching his decision, his Honour placed reliance upon a joint expert report which noted the risk of Mr Pettigrove committing homicide as being merely "fanciful". In light of this evidence, his Honour concluded that the risk of Mr Pettigrove killing Mr Rose was not foreseeable and as such, no negligence could be established.

The plaintiffs appealed to the New South Wales Court of Appeal.

Judgment of the NSWCA - Issue 1: Duty of Care

In determining whether a duty of care was owed to Mr Rose (and equally owed to the appellants), Justice McFarlane (with whom Beazley P concurred) highlighted the fact that Mr Rose, who was known to the Hospital, had only agreed to drive Mr Pettigrove "when he was well enough" to return

to Victoria. Their Honours considered that the responsibility towards Mr Rose's welfare was implicitly assumed by the Hospital and as a result, Mr Rose implicitly relied upon the Hospital's judgment.

Further, the degree of control the Hospital held over Mr Pettigrove and the vulnerability of Mr Pettigrove, in the sense of his inability to protect himself from the consequences of the Hospital's negligent conduct, was held to further point towards the existence of such a duty.

The court agreed with the primary Judge's findings that the situation was more akin, on the plaintiffs' reasoning, "to a person being asked to transport a dangerous prisoner without precautions being taken to ensure that the prisoner could not harm the person undertaking the carriage". In particular, the court relied on Dr Coombs' observations that but for Mr Rose's offer, Mr Pettigrove would not have been discharged as he was not fit to be put on a train.

The court specifically highlighted the fact that it is unnecessary that the extent or type of harm be foreseeable for a duty to exist and that this is so even if the extent of the injury is far greater than expected. Applying such reasoning, at the time of Mr Pettigrove's discharge, the court held that there was, or at the very least, should have been, a foreseeable and not insignificant risk that Mr Pettigrove may harm Mr Rose.

Judgment of the NSWCA - Issue 2: Protection of s 5O of the CLA

The respondent submitted that s 5O of the CLA applied to the decision to discharge Mr Pettigrove.

The court rejected this submission and held that the decision to discharge a mentally ill patient is one based on numerous considerations which must be assessed on a case by case basis. Further, the court considered that the fact that none of the experts could identify a "reasonable practice" in their evidence further emphasised this point. The respondent was therefore unable to be protected by this provision.

Judgment of the NSWCA - Issue 3: s43 and 43A of the CLA

In relation to the respondent's potential protection by s 43 or s43A of the CLA, both parties submitted (and the court accepted) that whilst the decision to discharge a patient did not constitute a statutory duty, it may constitute a statutory power.

The respondent argued that the special statutory power arose by virtue of its entitlement to detain Mr Pettigrove pursuant to s 35(3) of the MHA. On further consideration however, the majority rejected this argument and held that s43A could not be applied to the facts of the case. In essence, section 43A was held not to be applicable because s35(3) of the MHA was interpreted as referring to a decision made by a "medical superintendent" whereby Dr Coombs was rather making the decision as a "medical practitioner". Thus Dr Coombs did not exercise his power pursuant to s35 of the MHA and in consequence, s43A was inapplicable.

Judgment of the NSWCA - Issue 4: Causation

On the issue of causation, the court held that the attack would not have occurred "but for" the decision to discharge Mr Pettigrove and that the decision leading to Mr Pettigrove's discharge was in fact a necessary condition of the occurrence of the harm.

The court rejected the respondent's submissions that if Mr Pettigrove had not been discharged, he nevertheless may have assaulted Mr Rose in the Hospital. In reaching this conclusion, their Honours explained that the road trip enabled Mr Pettigrove to attack and strangle Mr Rose as it occurred in isolated circumstances where nobody was available to come to Mr Rose's aid.

The court ultimately held that, on the balance of probabilities, the continued detention of Mr Pettigrove would have prevented Mr Rose from being killed and, had Mr Pettigrove continued to be detained in the Hospital, he would have received medication to suppress his symptoms, medication which was otherwise unavailable throughout the duration of the road trip.

The majority found in favour of the appellants and held that a duty of care was owed to Mr Rose (and in consequence, the appellants) and that the duty had been breached.

The matter has been appealed to the High Court of Australia and a hearing date is yet to be allocated…. Watch this space!

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