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El-Masri v Molloy [2015] SASCFC 63

Key Points

- Undiagnosed pregnancy in a 48 year old woman – child born with Trisomy 21.
- Assessment of the inadequacies of the trial judge's reasoning.

Background

Therese Molloy consulted Dr Randa El-Masri, a general practitioner, on 13 December 2005 regarding her asthma (**the consultation**). Towards the end of the consultation, Mrs Molloy raised the topic of menopause. She said she experienced irregular menstrual bleeding and wore panty liners most of the time. At the time of the consultation, Mrs Molloy was 48 years old. Dr El-Masri advised that it could be a gynaecological problem, provided Mrs Molloy with a pamphlet, and instructed her to make a further appointment with Dr El-Masri. Unbeknown to both Mrs Molloy and Dr El-Masri at the time, Mrs Molloy was 13 weeks pregnant. By the time Mrs Molloy discovered she was pregnant in April 2006, it was too late to terminate the pregnancy. In June 2006, she gave birth to a child with Trisomy 21 (also known as Down syndrome).

Mr and Mrs Molloy commenced proceedings against Dr El-Masri alleging that she was negligent in not diagnosing Mrs Molloy's pregnancy at the consultation. The trial judge found in favour of Mr and Mrs Molloy on the basis that:

- He preferred the evidence of Mrs Molloy to Dr El-Masri about what was said during the consultation. In particular, he considered that Mrs Molloy was a "careful and truthful witness" to whom the consultation was very personal, whereas Dr El-Masri's notes did not support her version of events and Mrs Molloy was just one of Dr El-Masri's many patients. Crucially, the trial judge held that Dr El-Masri did not advise Mrs Molloy to return in one month, but to return in six months if her symptoms persisted; and
- He preferred Mrs Molloy's expert evidence to Dr El-Masri's expert evidence (despite stating that his decision was based on the expert evidence "as a whole"). In particular, he found that, based on Mrs Molloy's symptoms,[1] Dr El-Masri should have investigated, examined and diagnosed Mrs Molloy at the consultation. If time did not permit investigation at the consultation, then Dr El-Masri had a duty to arrange a follow up appointment within one month and ensure that Mrs Molloy attended the appointment; and
- Dr El-Masri did not have a defence under section 41 of the *Civil Liability Act 1936* (SA) (**the peer defence**).

Dr El-Masri appealed.

The Law

The applicable provision considered in this case was section 41 of the *Civil Liability Act 1936* (SA).

[1] The trial judge misunderstood what symptoms Mrs Molloy presented with at the consultation. His view was formed based on answers Dr El-Masri's expert witness gave in cross-examination, specifically as to what steps Dr El-Masri should have taken if Mrs Molloy presented at the consultation with specified additional symptoms. That is, the expert's answers were based on a hypothetical scenario and, therefore, the trial judge erred in relying on the expert's answers.

Section 41 is the South Australian version of the “peer defence”. In essence, a person who provides a professional service incurs no liability in negligence arising from the service if it is established that the provider acted in a manner that (at the time the service was provided) was widely accepted in Australia by members of the same profession as competent professional practice. The legislation recognises that there are differing professional opinions widely accepted in Australia by members of the same profession. Therefore, the professional opinion does not have to be universally accepted to be considered widely accepted.

Conclusion

The appellate court made a number of criticisms of the trial judge’s judgment, including that he:

- Did not properly and fairly analyse Mrs Molloy’s and Dr El-Masri’s lay evidence. He merely favoured Mrs Molloy’s evidence and rejected Dr El-Masri’s without explanation;
- Failed to sufficiently explain how he resolved the conflict between the contending expert evidence;
- Failed to make findings of fact as to what happened during the consultation necessary to support the conclusion that Dr El-Masri breached her duty of care; and
- Failed to give adequate reasons for ruling that section 41 did not afford Dr El-Masri a peer defence.

Lay witness evidence

Dr El-Masri stated that Mrs Molloy asked her about menopause generally at the end of the consultation. Dr El-Masri’s evidence was that she told Mrs Molloy that it may not be menopause and could be something else which requires investigation. Dr El-Masri stated that her conversation with Mrs Molloy during the consultation directed her mind towards a gynaecological reason and not an obstetric reason for the symptoms. As such, De El-Masri advised Mrs Molloy that if her irregular bleeding persists, she should make an appointment to see Dr El-Masri in about a month as she may need further investigation and referral to a gynaecologist. She also arranged for Mrs Molloy to receive a pamphlet on menopause. Dr El-Masri gave evidence that it is her usual practice to advise patients presenting with gynaecological problems to return in one month (or, 28 days) to see whether problem continues in the next menstrual cycle or whether it corrects itself. Because this was her usual practice, she did not write it down in her notes. Dr El-Masri stated that she would never advise a patient with irregular menstrual bleeding to return in six months and she herself considered that to be negligent.

Conversely, Mrs Molloy’s evidence was that she could not remember whether she used the words “irregular bleeding”, whether she told Dr El-Masri when her last period was, or when exactly Dr El-Masri advised her to come back for another appointment. The appellate court’s analysis of Mrs Molloy’s evidence indicated that she told Dr El-Masri very little other than her periods were changing and she wore panty liners most of the time. Furthermore, it seems Mrs Molloy wanted to start an ongoing conversation about menopause and did not tell Dr El-Masri anything that could have turned her mind to the fact that Mrs Molloy was pregnant.

The appellate court found that it was unfair for the trial judge to conclude that Dr El-Masri advised

Mrs Molloy to return in six months simply because Dr El-Masri's notes did not state exactly when Mrs Molloy was told to return. Given that there was no pleading that Mrs Molloy was told to return in six months, that Mrs Molloy could not recall when she was told to come back for a further appointment, and that Mrs Molloy's memory was likely affected by the traumatic experience of finding out about the pregnancy and Trisomy 21, the trial judge should not have made the finding that Dr El-Masri advised Mrs Molloy to return in six months.

Expert witness evidence

Both Mrs Molloy and Dr El-Masri called expert witnesses to opine on whether Dr El-Masri's conduct was widely accepted as competent professional practice. The trial judge described Mrs Molloy's expert witnesses as careful, thoughtful, impressive, and eminently qualified. He did not assess the credibility or reliability of Dr El-Masri's expert witnesses.

There was a significant issue with Mrs Molloy's expert evidence, that is, it was given on the assumption that Mrs Molloy complained about the irregular bleeding at the start of the consultation and on the incorrect instruction from Mrs Molloy's solicitors that Mrs Molloy told Dr El-Masri when her last regular period was. Neither of these "facts" upon which the expert evidence was based were in accordance with Mrs Molloy's evidence that she brought up the irregular bleeding at the end of the consultation and that she could not recall telling Dr El-Masri the date of her last regular period.

All experts agreed that Dr El-Masri could not have excluded all possible causes of Mrs Molloy's irregular bleeding at the consultation. De El-Masri's expert evidence confirmed that Mrs Molloy's presentation was not indicative of a pregnancy but of a gynaecological pathology, and therefore it was appropriate to advise a 48 year old such as Mrs Molloy to return in one month if bleeding persisted. Dr El-Masri's experts agreed that her management of Mrs Molloy at the consultation was in accordance with widely accepted widely accepted competent medical practice in Australia in 2005.

Nevertheless, the trial judge found that section 41 did not afford Dr El-Masri a defence but did not explain his reasoning.

Peer defence

The appellate court found that the trial judge had not properly analysed the expert evidence when forming the view that Dr El-Masri did not have a peer defence. The appellate court was critical of the trial judge relying on the expert evidence "as a whole" when, in fact, Mrs Molloy's and Dr El-Masri's experts disagreed on whether Dr El-Masri acted in a manner accepted as competent medical practice. The trial judge ought to have resolved this major conflict and other nuances in the expert evidence, and not merely favoured one expert over another without explanation.

As is evident, the trial judge drew negative conclusions about Dr El-Masri without having regard to all the evidence and, certainly in some instances, contrary to compelling inferences. He did not explain why he preferred Mrs Molloy and her experts over De El-Masri and her experts, resolved none of the conflicting evidence, and did not comment on Dr El-Masri and her expert's credibility.

Accordingly, the appellate court allowed the appeal, set aside the trial judge's finding of negligence, and remitted the matter for retrial before a different judge.

Lessons Learnt

The appellate court emphasised that the purpose of its judgment was to point out flaws in the trial judge's reasoning, and not to draw conclusions about whether Dr El-Masri was negligent (with the latter being determined at the retrial). The present case is a useful guide for defendant medical practitioners and their solicitors in determining which aspects of a trial judge's reasoning can be challenged.

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