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Mules v Ferguson [2015] QCA 5

Key Points

- Whether doctor's breach of duty was causative of the plaintiff's injuries.
- Whether the doctor had a peer defence – not when expert opinion is based on incomplete factual background.

Background

Nancy Mules began experiencing headaches and a sore neck in early September 2008. Ms Mules perceived the issue to be a musculo-skeletal problem and attended a chiropractor. On 12, 18, 19 and 25 September 2008, she consulted her general practitioner, Kaylene Ferguson, about her condition. Dr Ferguson recommended that Ms Mules take pain medication and continue sessions with her chiropractor. Dr Ferguson ordered a CT scan which detected irregularities with her cervical spine and confirmed that Ms Mules' symptoms were musculo-skeletal in nature.

By 25 September 2008, Ms Mules' condition had deteriorated severely and she was admitted to the Cairns Private Hospital on a referral from Dr Ferguson. There she was finally diagnosed with cryptococcal meningitis. Whilst the hospital was able to save Ms Mules' life, she was left with hearing loss, blindness, loss of balance, altered sensation and discomfort in her limbs and extremities, and developed an adjustment disorder.

Ms Mules commenced proceedings against Dr Ferguson for a claim in negligence.

At first instance, Henry J made two key findings:

- Dr Ferguson failed to act with reasonable care and skill in not physically examining Ms Mules' neck and enquiring about the progress of her previously recorded symptoms of headache and facial flushing; and
- Had Dr Ferguson referred Ms Mules to a neurologist or specialist physician on 18 or 19 September 2008, she would have attended a specialist appointment by 22 September 2008, and been diagnosed and treated by 23 September 2008. Thereby, her grievous injuries would probably have been prevented.

Nevertheless, Henry J dismissed the claim on the basis that Dr Ferguson's breach did not cause Ms Mules' injuries. He opined that the further examination and enquiries would not have detected anything to prompt Dr Ferguson, exercising reasonable care, to respond differently. In any event, his Honour found that Dr Ferguson's conduct was lawful because it came within the defence provision contained in section 22 of the *Civil Liability Act 2003* (Qld) (**Act**) (also known as the "peer defence").

Ms Mules appealed Henry J's decision.

On appeal, the majority ruled in favour of Ms Mules, with Applegarth J dissenting.

The issues that the appeal aimed to resolve were:

- Whether Dr Ferguson's breach of care was causative of Ms Mules' injuries; and

- Whether Dr Ferguson had a defence under section 22 of the Act.

The Law

Pursuant to section 22 of the Act:

(1) A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.

Conclusion

Causation

It was accepted that Ms Mules' symptoms reported to Dr Ferguson on 12, 18 and 19 September 2008 were consistent with a cervical spondylosis diagnosis. Ms Mules had a history of such injury and the CT scan of her neck on 18 September 2008 disclosed such an injury causing most of Ms Mules' symptoms. However, her facial flushing was not associated with cervical spondylosis, and her headaches and neck stiffness were also possible symptoms of cryptococcal meningitis.

Dr Ferguson gave evidence that on 18 September 2008 Ms Mules had observable neck stiffness in terms of a reduced range of head movement and her posture was different from the previous consultation. Furthermore, had Dr Ferguson physically examined Ms Mules' neck and conducted the chin to chest test of movement, it would have confirmed the symptom of neck stiffness thereby warranting further investigation by means of a specialist referral.

It was further held that if on 18 September 2008 Dr Ferguson had enquired of Ms Mules about the progress of her past reported symptoms of headache and facial flushing, then she would have ascertained that she was still experiencing headache and facial flushing associated with her neck pain. The intermittent headache was located towards the lower back of the head, and its intermittent nature was inconsistent with the type of headache associated with cryptococcal meningitis.

It followed that the facial flushing, headaches and neck stiffness would have led Dr Ferguson, acting with reasonable care and skill, to conclude that she should refer Ms Mules for urgent or specialist assessment to exclude cryptococcal meningitis.

Since Ms Mules had conscientiously attended various medical and health practitioners since 5 September, it was accepted that she would have acted upon such referral quickly and attended upon a specialist by 22 September 2008. With proper care, her cryptococcal meningitis would likely have been diagnosed and treated by 23 September 2008 thereby preventing the grievous injuries she has suffered.

Section 22 Defence

The onus rests on Dr Ferguson to satisfy the section 22 defence. Whether Dr Ferguson met that onus required a consideration of Dr Ferguson's conduct in the context of the presenting symptoms as found by the trial judge.

In finding that Dr Ferguson had a defence under section 22 of the Act, the trial judge relied on the expert opinions of Dr Kable and Dr Turnbull, both experienced general practitioners. Their opinions

were based on facts consistent with Dr Ferguson's version of events. However, the facts as found by the trial judge were not entirely consistent with Dr Ferguson's version of events. In fact, in disagreeing with Dr Ferguson, the trial judge found that Ms Mules had complained to Dr Ferguson of a headache on 18 September 2008 and that Dr Ferguson implicitly acknowledged that Ms Mules' reduced range of movement from her previous presentation signalled a decline in her condition.

Therefore, neither Dr Kable nor Dr Turnbull considered whether Dr Ferguson's care was appropriate and reasonable having regard to the additional aspects of there being an observable reduced range of movement and ongoing headaches (as found by the trial judge). Against that background, there was no evidence upon which the trial judge could be satisfied Dr Ferguson had discharged her onus under section 22 of the Act.

Lessons Learnt

This case is particularly interesting as it relates to Dr Ferguson's onus to satisfy the section 22 defence. Whilst the expert opinions of Dr Kable and Dr Turnbull were supportive of Dr Ferguson's conduct, the opinions were based on an incomplete factual background. The question then becomes whether the experts would necessarily alter their opinion having regard to the facts as found by the court.

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