Plaintiffs win first round in discretionary indemnity battle

David Hirsch

Harriton v Macquarie Pathology and Ors

David Hirsch, Sydney

On 7 July 1998 Master Joanne Harrison of the New South Wales Supreme Court delivered judgment in ***Harriton v Macquarie Pathology and Ors****. The case involved an application by the Plaintiffs for an extension of the limitation period and a motion by two of the defendants to strike out the claim on the basis of* ***plene administravit****.*

This defence turned on the proposition that since two of the defendant doctors had died and their estates had been administered there were no assets to respond to the claim hence to proceed would have been "frivolous, vexatious and an abuse of process". Those defendants were members of medical defence organisations each of whom argued unsuccessfully that since indemnity was discretionary the estates did not have any legally enforceable duty to indemnify.

The problem of discretionary indemnity in medical negligence cases has caused much consternation since MDOs began threatening to use their so-called "discretionary power" to avoid paying claims. Some plaintiffs' lawyers have abandoned cases in the face of this threat but until now there has been no legal pronouncement on the practice in Australia.

The Facts

The Harriton case involved the allegedly negligent failure to diagnose rubella early in Mrs Harriton's pregnancy. In the face of assurances that the viral illness with a rash that she had in her first trimester was not rubella she continued with the pregnancy. Alexia Harriton was born on 19 March 1981 suffereing congenital rubella syndrome. She is blind, deaf, retarded and spastic.

The Harritons sought legal advice several times between 1981 and 1995 but were advised against taking action as there was no evidence of negligence. Rubella testing was done at the time of the viral illness and proved negative. The doctors relied on the pathology tests to reassure Mrs Harriton that she did not have rubella.

Unbeknownst to the Harritons, and to Alexia's paediatrician, the original blood specimens had been retested shortly after Alexia was born and the results of those tests confirmed rubella in Mrs Harriton's blood at the time of her viral illness. For reasons that can only be described as "curious" those results did not make their way into Alexia's medical records. The retesting had been done at a reference laboratory at a different hospital.

When the Harritons approached Cashman and Partners in October 1995 the medical records were reviewed. Previous lawyers had advised against taking action without the benefit of having reviewed the records. The records led to further inquiries and eventually to expert opinion supporting the claim.

The Allegations

The evidence at the hearing supported the view that Macquarie Pathology, along with its employee Dr Martha Zoltan, who did the original blood tests, had done the wrong tests or had performed or reported the results incorrectly; Dr Max Stephens, the general practitioner who first ordered the rubella test, ordered the test too late and did not alert Macquarie that Mrs Harriton had had a rash (in which case a different test would have been done); Dr Paul Stephens (the son of Dr Max Stephens) wrongly reassured Mrs Harriton that she did not have rubella when the caveat on the Macquarie report specifically advised against such a conclusion if the patient had had a rash; and Dr Gabriel Rose, the obstetrician to whom Mrs Harriton was referred following the positive pregnancy test, ordered the wrong follow-up test despite Mrs Harriton's history of a viral illness with a rash.

In addition to expert opinions on liability the Harritons led psychiatric evidence concerning their nevous shock and evidence that a termination of pregnancy would have been both medically recommended and legal if done in the first trimester. Master Harrison was satisfied that the Harritons had "a real case to advance" against each of the defendants and had "demonstrated that there is evidence to establish that a cause of action exists and that this evidence is available to be adduced at trial".

Brisbane v Taylor

Unfortunately, both Dr Max Stephens and Dr Gabriel Rose had since died. Despite the fact that both died before the expiry of the six year limitation period in 1986 the test of prejudice is whether the defendants would be deprived of the opportunity to fairly defend themselves at the time of the trial. The clinical notes of both of the deceased doctors could not be located.

In a bizarre twist the daughter of Dr Rose, who was the sole beneficiary of his significant estate, claims to have destroyed her father's medical records just weeks before receiving notice of the Harriton's impending claim in February 1996. The medical records had been left in storage for the previous 8 years. The Harritons were concerned that the daughter, who was also a solicitor, retrieved her father's medical records just weeks after Cashman and Partners started making inquiries of those records through the late Dr Rose's former business partners in October and November 1995.

Master Harrison refused to rule on whether fraud was involved in the concealment of facts relevant to the discovery of a cause of action, or the destruction of Dr Rose's medical records, but specifically left it open to the Harritons to raise this at the trial.

In the end Master Harrison granted an extension of time for the claims against Macquarie Pathology, Dr Zoltan and Dr Paul Stephens. She declined to extend the time for the claims against Dr Max Stephens and Dr Rose on the basis that they had died and their records were missing. In so ruling she relied heavily on the High Court decision in *Brisbane South Regional Health Authority v Taylor*.

Interestingly, despite the fact that an extension of time was not granted in respect of the deceased doctors, Macquarie Pathology had lodged a crossclaim against them and this crossclaim persists. Since the claim against Macquarie remains on foot, the estates of the deceased doctors remain in the litigation at the suit of Macquarie. Master Harrison dismissed motions on behalf of the deceased doctors to dismiss Macquarie's crossclaim.

Plene Administravit

Master Harrison then considered the strike-out motions based on *plene administravit*. These motion were brought by The Medical Defence Union acting for the estate of Dr Gabriel Rose and United Medical Protection who were defending the estate of Dr Max Stephens.

The MDU's Position

The MDU argued that it was not an insurer and that indemnity was discretionary. Relying on the English case of *Medical Defence Union v Board of Trade* [1982]Ch 82 the MDU claimed that whatever rights the estate may have had as a result of Dr Rose's membership they did not amount to an enforceable right to indemnity.

The Harritons argued that the MDU had made representations to doctors, to the government and to the public saying, in effect, that part of its mission was to ensure that the victims of medical negligence received proper compensation. Letters from the Australian Medical Association and a senior doctor confirmed that doctors have been led to believe that the MDU would defend and indemnify a doctor even after the doctor died.

The MDU was urged by the plaintiffs to declare to the Court and to the world that it would not indemnify in this case if an extension of time was granted and Dr Rose was found to have been negligent. The MDU would not do so. In the end it admitted that no decision had been made to refuse indemnity and a decision would have to await the outcome of the limitation extension application. In the circumstances the Harritons argued that the plene administravit motion was premature.

Master Harrison was persuaded that there was "an arguable case" (the test in strike-out applications) that what the MDU might still indemnify the estate in this case and that the indemnity that it offered was an asset. Accordingly the MDU's plea of *plene administravit* failed.

UMP's Position

UMP took a different approach. At the time of the events in question it was an insurer (unlike the MDU) and it did have a contractual duty to indemnify the estate of Dr Max Stephens. However after receiving notice of this claim in 1996 UMP passed a resolution purporting to rely on "old article 60" of its Articles of Association authorising it it not to indemnify in this case. This was not dissimilar to the ill-fated attempt by the New South Wales Medical Defence Union (the forerunner to UMP) to avoid indemnifying the estate of the late Dr Harry Bailey in the *Chelmsford* cases.

UMP's position at the hearing was unequivocal: UMP had resolved not to pay even if an extension of time was granted to sue the estate of Dr Max Stephens. However, following the hearing but before oral and written submissions were made, the chairman of UMP, Dr Richard Tjiong, was quoted in *Australian Doctor* as saying that UMP had not made a decision not to indemnify, that it was too early to say and that UMP would await the outcome of the limitation extension application and the hearing.

The plaintiffs sought to reopen the case on the basis of Dr Tjiong's statement and were permitted to do so. Counsel for UMP, Mr David Higgs SC, advised Master Harrison that his instructions were that Dr Tjiong had been misquoted. Dr Tjiong then swore an affidavit to this effect. The plaintiffs contacted the journalist who had notes of what Dr Tjiong had told her. An affidavit was sworn by her. Dr Tjiong was required for cross-examination on his affidavit.

In a final turn in this complicated case Dr Tjiong's legal advisers withdrew his affidavit thus shielding him from cross-examination. The journalist's affidavit was read and she was not cross-examined. Master Harrison was persuaded that UMP's written resolution not to indemnify was not the end of the story and UMP's chairman should be taken at his word that UMP had not made a final decision not to indemnify. In those circumstances UMP's plea of *plene administravit* - "there is no money now and there never will be" could not be sustained.

Conclusion

In the end the Harritons have been permitted to pursue their claim against three of five defendants. The other two are still involved in the claim through the crossclaim of Macquarie Pathology.

Whilst it was strictly speaking *obiter dicta*, Master Harrison formed the view that discretionary indemnity could not be used to strike out a plaintiff's claim since there is at the very least an arguable case that membership in a medical defence union creates enforceable rights to indemnity. The fact that neither the MDU or UMP would declare to the world - and in particular to its membership - that it would not pay even if the docter was found negligent, is telling. It is good news for plaintiffs in this complex and difficult area of law and practice.

All of the defendants have appealed the decision. I will report again with the outcome. ■

David Hirsch is a Partner at Cashman and Partners,
phone 02 9261 1488, **fax** 02 9261 3318