

Medical negligence and the CLA

Finch v Rogers [2004] NSWSC 39

So far as I am aware, *Finch v Rogers* is the first medical negligence decision of the NSW Supreme Court that squarely addresses the *Civil Liability Act* (CLA) régime.

Readers will recall that the NSW Court of Appeal decision of *Ruddock v Taylor*¹ had included some obiter comments by Justice Ipp regarding the causation provisions of the NSW CLA (Section 5D).²

This first instance decision of Kirby J builds upon causation comments in *Ruddock* and addresses two aspects of CLA damages.

FACTS

The plaintiffs' claim was brought against a urologist. Having been diagnosed with testicular cancer, Mr Finch underwent surgery for removal of the affected testicle. No complaint was made concerning the operation; however, it was alleged that there was a failure by the defendant to properly investigate and monitor the plaintiff thereafter, so as to ascertain whether the tumour had metastasised.

It was alleged that as a result of the delay, the plaintiff required an additional cycle of chemotherapy. That additional cycle is said to have brought with it permanent tinnitus and peripheral neuropathy, of particular significance to the plaintiff, given his musical background.

CAUSATION

The claim was subject to the provisions of the *Civil Liability Act* 2002. Section 5D was expressly considered and reference was made to the *Ruddock v Taylor* decision referred to above.

Justice Kirby held:

'(147) Here I have determined, as a matter of probability, that Associate

Professor Boyer would have treated the plaintiff. Addressing the issue of factual causation, but for the breach, and the delay which was the consequence of the breach, the following can be said:

- First, that Mr Finch would probably have been given Indiana BEP chemotherapy on Monday, 30 December 1996 or at the latest, Monday, 6 January 1997.
- Second, that on either day, he would have been regarded as a good prognosis patient.
- Third, that given his response to chemotherapy (which was good) he would have needed only three cycles, not four;
- Fourth, that he would not have suffered the disabling consequences of ototoxicity and neurotoxicity which were evident after the fourth cycle.'

Justice Kirby went on to pursue the transparent analysis of causation encouraged by the Ipp report. His approach echoes the crisp style of Ipp J noted in *Ruddock*:

'(148) In short, I consider that the defendant's negligence was a necessary condition of the harm that ensued [Section 5D(1)(a)]. I further believe that it is appropriate that the scope of the defendant's liability extend to the harm so caused [Section 5D(1)(b)]. The consequences were in each case a foreseeable result of the breach.'

ASSESSMENT OF NON-ECONOMIC LOSS

Finch v Rogers is also of interest, at least to NSW practitioners, in its consideration of the appropriate award for non-economic loss.

The plaintiff suffered nerve damage

to both ears encompassing permanent high frequency hearing loss, tinnitus and hyperacusis, peripheral neuropathy with incomplete recovery, and consequential depression.

The court noted the disabling and isolating effects of the injury upon the plaintiff, and the 'profound' transformation of his life, assessing his disabilities at 70% of the most extreme case (\$269,150).

ASSESSMENT OF DAMAGES: GRATUITOUS CARE

In considering an award for future domestic assistance, the court was required to address CLA Section 15(2)(c), which provides that no damages may be awarded for gratuitous services unless the court is satisfied that there exists a reasonable need; that has arisen solely because of the injury to which the damages relate and that services would not have been provided but for the injury.

The defendant argued that if the plaintiff were to marry or to form an enduring relationship, the services which he currently found difficult would be provided by his wife or partner as part of the normal household sharing of tasks.

The court, despite recognising the speculative nature of the exercise, agreed to discount the claim for future domestic assistance to reflect the possibility of the plaintiff forming an enduring relationship, and in circumstances where he might be able to offer 'countervailing services' as referred to in *Mortimer v Burgess*.³ 

Endnotes: 1 [2003] NSWCA 262. 2 T Cockburn, *Plaintiff*, Issue 61, p45. 3 NSW Court of Appeal, unreported, 16 May 1997.