

By Greg Walsh and Anna Walsh

MEDICAL PRACTITIONERS' DUTY to RESCUE

Clarification is needed of the law relating to the obligation imposed on medical practitioners to render assistance to persons who are injured or at risk of injury. Although a legal duty has been found to exist, the relevant law requires clarification in a number of areas, especially in relation to determining who actually owes a duty to assist, the precise nature of the duty of care owed, and what steps medical practitioners must take to effectively discharge their duty to assist.

Photo © Dreamstime.com

GENERAL LEGAL POSITION

As a general rule, the law does not impose liability on individuals for failing to assist a person in need or to take steps to prevent a person from sustaining an injury or loss.¹ As Gummow J stated: 'whatever its scope, a duty of care imposes an obligation to exercise reasonable care; it does not impose a duty to prevent potentially harmful conduct'.² One of the clearest judicial statements concerning the law's reluctance to require individuals to assist others in need was made in *Stovin v Wise*,³ by Lord Nicholls, who stated that: 'The classic example of the absence of a legal duty to take positive action is where a grown person stands by while a young child drowns in a shallow pool. Another instance is where a person watches a nearby pedestrian stroll into the path of an oncoming vehicle. In both instances, the callous bystander can foresee serious injury if he does nothing. ... All that would be called for is the simplest exertion or a warning shout. Despite this, the recognised legal position is that the bystander does not owe the drowning child or the heedless pedestrian a duty to take steps to save him. Something more is required than being a bystander. There must be some additional reason why it is fair and reasonable that one person should be regarded as his brother's keeper and have legal obligations in that regard.'⁴

Although, as a general rule, an individual is not legally obligated to assist a person in need, the courts have been

willing to impose a duty upon a defendant to take positive steps to help the plaintiff when some additional factor is present to justify such an imposition. This additional factor might be satisfied by the defendant actually inflicting on the plaintiff an injury that has put them in a situation of peril. Alternatively, the defendant might control the land on which the plaintiff was injured, or there might be a pre-existing relationship between the plaintiff and the defendant that makes it appropriate to impose an obligation to assist the defendant (for example, employer-employee, teacher-pupil, etc).

DUTY OF MEDICAL PRACTITIONERS TO RESCUE

Another exception to the general common law position that a person is not obliged to assist others was made in relation to medical practitioners in the case of *Woods v Lowns*.⁵ The case involved a mother finding her 11-year-old son, Patrick Woods, suffering from an epileptic fit. She sent the plaintiff's brother to summon an ambulance from the nearby station, and his sister to a local general practitioner to ask the doctor to attend to help her brother. The daughter ran to the surgery of Dr Peter Lowns, which was approximately 300 metres away, told him that her brother was having an epileptic fit and asked the doctor to attend to provide assistance. Although there was a factual dispute about whether the request was made, the court held that the doctor had been advised of the plaintiff's situation, >>

Medibank Compensation Enquiries

Is your firm pursuing a claim for compensation and damages on behalf of a past or current Medibank Private member, who requires a Statement of Benefits Paid for compensation matters?

Then please forward requests for a Statement of Benefits Paid, together *with a signed member authority for the release of information* quoting reference **MPL1927** to:

Mr Paul Clarke
Compensation Manager
Benefits Risk Management
GPO Box 641, Collins St West
Melbourne Vic 8007

Or alternatively fax your request to 1300 657 287.

Medibank Private Benefit Risk Management Department also provides assistance and advice on issues such as Medibank Private members':

- Provisional Payment requests
- Membership enquiries
- Claims enquiries

For assistance or further information
please e-mail brm@medibank.com.au
Quote reference **MPL1927**

medibank
P R I V A T E

Medibank Private Limited ABN 47 080 890 259 is a registered health benefits organisation.

had refused to attend the house to provide assistance, and had told the plaintiff's sister to bring the plaintiff to his surgery. The epileptic fit prevented the plaintiff from obtaining sufficient oxygen which caused major brain damage that left him permanently and totally disabled.

The court held that the doctor did have a duty of care to help the plaintiff and that it was likely that the plaintiff would not have suffered the serious consequences that he did if the doctor had attended to provide assistance. The court was willing to impose such a duty despite recognising that there was no Australian case that had previously imposed liability on a doctor for failing to attend upon and treat someone who was not already a patient. The decision to impose a duty of care on the doctor despite there being no pre-existing doctor-patient relationship was affirmed on appeal by a majority judgment in the Court of Appeal.⁶

A factor that was relevant in the decision to impose a duty to assist on the doctor, and which is also of significance in itself in terms of a doctor's legal obligations, is the fact that the Act regulating medical professionals imposes an obligation on doctors to assist. Section 36(1)(l) of the *Medical Practice Act 1992* (NSW) states that unsatisfactory professional conduct includes:

'[r]efusing or failing, without reasonable cause, to attend (within a reasonable time after being requested to do so) on a person for the purpose of rendering professional services in the capacity of a registered medical practitioner in any case where the practitioner has reasonable cause to believe that the person is in need of urgent attention by a registered medical practitioner, unless the practitioner has taken all reasonable steps to ensure that another registered medical practitioner attends instead within a reasonable time.'

Kirby P stated, in relation to this legislative obligation imposed on doctors such as Dr Lowns, that '[t]his is a high standard. It goes beyond what is expected, and imposed by the law, in the case of other professions. It goes far beyond what may be expected and demanded of an ordinary citizen. But in the noble profession of medicine, it is the rule which Parliament has expressed; which the organised medical profession has accepted.'⁷ It should also be noted that there can be serious consequences for a medical practitioner who is found to have engaged in unsatisfactory professional conduct including a reprimand, a fine, suspension or even deregistration.⁸

DUTY OF MEDICAL PRACTITIONERS TO A PERSON NOT YET A PATIENT

Another example where the court has extended the circumstances where a doctor owes a duty of care to a person is that of *Alexander v Heise*.⁹ Here, the plaintiff consulted a doctor's receptionist seeking an appointment for her husband who had suffered a severe headache the night before. The doctor's receptionist scheduled the appointment for the following week. The headache was in fact a warning leak and the plaintiff's husband suffered a berry aneurysm five days later and subsequently died. In

determining whether the doctor owed a duty of care in the circumstances, the defendants sought to distinguish *Woods v Lowns* by arguing that whereas *Lowns* was an emergency situation, here the plaintiff did not express any sense of urgency with regards to her husband's symptoms. Additionally, they argued that a doctor cannot be under a duty of care vicariously by means of any information of which his administrative staff became aware during the course of their employment.

The court took a number of policy considerations into account in determining whether a duty of care should be imposed in the circumstances. A key factor was that the plaintiff was not in a position to realise the significance of a severe headache, whereas the doctor had a superior ability to accurately appreciate the gravity of this particular medical complaint and the risk that it posed to the health of the plaintiff's husband. This significant difference between the ability of the doctor and the plaintiff to appreciate the gravity of the risk was considered to be a key justification in favour of imposing a duty of care. Additionally, the court accepted the experts' views that when a patient presents by proxy, it is the equivalent of the patient presenting themselves. Once the deceased's symptoms were described to the receptionist through his wife and an appointment was made, the deceased became a patient of the practice and a duty of care was owed to him by the doctor.

PROTECTION PROVIDED TO MEDICAL PRACTITIONERS WHO AIM TO FULFIL THEIR DUTY

Medical practitioners can thus be obliged under common law and legislation to render assistance to a person in need, at least in those situations where a person has specifically requested the medical practitioner's assistance, or where the request has been made through another person. However, medical practitioners who do render assistance to those in need are provided with some protection from legal liability.

A key source of protection to medical practitioners is the immunity from civil liability provided by the 'good Samaritan' provisions that exist in all the Civil Liability Acts.¹⁰ Although there are significant differences in the exact nature of the protection given to good Samaritans, the essence of the legislative provisions is that a person (not just a medical practitioner) does not incur civil liability who, without expectation of payment or any other consideration, attempts to assist a person who is injured or at risk of being injured.

A further source of protection will often be provided to medical practitioners through their medical insurance. For example, s19 of the *Health Care Liability Act 2001* (NSW) requires all medical practitioners wishing to practise to carry approved medical insurance, unless they are employed by a public health organisation.¹¹ The medical insurance will often provide medical practitioners with cover for any injury or loss they cause a person to suffer while fulfilling their obligation to provide medical assistance during or outside of their working hours.

Further protection is provided by legislation that protects doctors who treat a patient who is unable to consent,

due to various reasons such as being unconscious or so significantly impaired by the injury that they are incapable of consenting to the medical treatment. For example, s37(1) of the *Guardianship Act 1987* (NSW) allows a medical practitioner to carry out treatment on a person if they are unable to consent if the medical practitioner considers the treatment to be necessary as a matter of urgency to save the patient's life, to prevent serious damage to the patient's health, or to prevent the patient from suffering or continuing to suffer significant pain or distress (except in the case of special medical procedures, such as sterilisation).

JUSTIFICATIONS FOR IMPOSING A DUTY ON MEDICAL PRACTITIONERS TO ASSIST

The key argument in favour of imposing a duty on medical practitioners to assist is that it will most likely result in saving the lives of some individuals and preventing others from suffering more serious injuries. Although many medical practitioners would assist in an emergency situation regardless of the position of the law, a clear legal duty is likely to increase the number of medical practitioners assisting in emergency situations. Furthermore, many would argue that an obligation to assist should be part of a doctor's professional duties, due to the substantial government support they receive while training and during their professional careers, and the leadership role that they play in relation to the provision of health services in the community.

In response to those who are critical of such a duty, it should be noted that the extent of the legal obligation imposed would be limited by various factors such as whether the medical practitioner was requested to assist and whether it was reasonable for the medical practitioner to assist in the circumstances. This limitation of being required to assist only when it is reasonable to do so would allow a doctor to avoid rendering assistance on a variety of grounds, including that they were not qualified to provide the particular type of medical treatment required in the circumstances, that they were not in a suitable condition to provide medical treatment (for example, intoxicated, fatigued, etc), or that they had other serious obligations to their patients or dependants that overrode their obligation to assist the person requiring assistance.

A further criticism that is often made about the obligation to assist imposed on medical practitioners is that a similar obligation should be imposed upon others in the community with the capacity to assist those in emergency situations. For example, it could be argued that a lawyer in court observing a self-represented litigant in dire need of legal representation should also be under an obligation to assist considering the serious consequences that an adverse court decision could have on a litigant. Although there is substance to this criticism, a separate category for medical practitioners can be justified due to both the gravity of the consequences involved in failing to render medical assistance and the unexpected urgency of an emergency situation involving a threat to a person's life or health.

RECOMMENDATIONS

Although the general common law position is that a person is not under an obligation to assist a person in need, there is a clear exception in relation to medical practitioners, found in both common law and legislation. However, the exact nature of the obligation is far from clear. The many issues needing clarification include:

- whether doctors are obliged to assist only when they are directly asked for assistance, or whether they must also assist in other situations;
- whether the obligation to assist applies to other health professionals (for example, nurses, medical students, retired doctors, etc); and
- what level of assistance medical practitioners must provide in order to effectively discharge their obligation.

One solution would be for Parliament to legislate in this area to confirm a proactive duty of doctors to render assistance to persons in need. Arguably Parliament would be the preferable body to take the lead in this area of law reform due to the complexity of the issues involved and the need to consult widely with health professionals, their representative bodies, insurance companies and other relevant parties to ensure that the law appropriately meets the varied interests of these different groups. However, if Parliament fails to enact legislation, then health professionals, lawyers and other interested parties will need to wait for suitable cases to be heard by the courts so as to determine the exact nature of the legal obligation imposed on health professionals to assist persons in need. ■

Notes: **1** In some jurisdictions, the common law has been specifically altered by the legislature to impose a general duty to rescue. For example, in the Northern Territory, any person 'who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so is guilty of a crime and is liable to imprisonment for seven years': *Criminal Code (NT)* s155. **2** *Roads and Traffic Authority of New South Wales v Dederer* (2007) 238 ALR 761 at 767. **3** [1996] AC 923 at 931. **4** See also *Stuart v Kirkland-Veenstra* [2009] HCA 15 for a recent confirmation by the High Court of the common law position that individuals are not under a general duty to assist persons in need. **5** (1995) 36 NSWLR 344 SC(NSW). **6** See *Lowns v Woods* (1996) Aust Torts Reps ¶ 81-376 CA(NSW) (BC9600091). **7** *Ibid* at 4. **8** See *Medical Practitioners Act 1938* (NSW) ss60 – 65. **9** [2001] NSWSC 69. **10** *Civil Law (Wrongs) Act 2002* (ACT) s5, *Civil Liability Act 2002* (NSW) ss55-58, *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s8, *Civil Liability Act 1936* (SA) s74, *Civil Liability Act 2002* (WA) ss5AB – 5AE, *Civil Liability Act 2003* (Qld) ss25-26, *Wrongs Act 1958* (Vic) ss31A-31D, *Civil Liability Act 2002* (Tas) ss35A-35C. **11** *Health Care Liability Act 2001* (NSW) s19(4)(a).

Anna Walsh is a Principal in the Medical Law Department of Maurice Blackburn Lawyers. **PHONE** (02) 8267 0934

EMAIL AWalsh@mauriceblackburn.com.au.

Greg Walsh is a lecturer in the School of Law at the University of Notre Dame Australia and a solicitor in the Medical Law Department at Maurice Blackburn Lawyers.

PHONE (02) 8204 4304 **EMAIL** gwalsh1@nd.edu.au