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Revisiting a doctor's duty of care to sexual partners: *PD v Harvey*

On 10 June 2003, the Supreme Court of New South Wales delivered judgment in *PD v Dr Harvey & Dr Chen*.[1] There was little dispute about the most unusual facts of the case, not all of which were reported in the press.

THE FACTS

In November 1998, the plaintiff and her boyfriend attended the second defendant's suburban medical centre and saw the first defendant who was employed on a sessional basis.

The couple saw Dr Harvey together, informed him of their intention to marry and requested tests to eliminate HIV and other sexually transmitted diseases.

Dr Harvey noted that the plaintiff's boyfriend was from Ghana. Although the doctor was aware of the higher incidence of HIV in Ghana than in Australia, he did not discuss with the couple whether they wished to receive their results together or what should happen in the event that the results were discordant.

Approximately one week later, the plaintiff's pathology results, which were negative for HIV, were received at the centre and noted by Dr Harvey.

The following day, Dr Harvey received and noted the boyfriend's results, which were positive for HIV and hepatitis B.

The plaintiff attended the medical centre where a receptionist handed her a copy of her results. She requested the boyfriend's results and was told that she could not have them because they were confidential.

In evidence she said: 'I felt if anything was wrong the doctors would have let me know.'

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Dr Harvey telephoned the boyfriend and advised him of the positive HIV result. He told him that he should attend the medical centre to collect a letter of referral that Dr Harvey had written for him and should attend an appointment that had been made for him at the specialist Royal Prince Alfred Hospital Immune Clinic.

The boyfriend attended the medical centre and saw the second defendant, Dr Chen, who told him that he had AIDS (which he did not), that it was dangerous and could kill him, and that it could be passed on to others through sex. He collected the referral letter to RPAH.

The boyfriend did not attend the appointment at the clinic. He informed the plaintiff that his results were negative and gave her a forged pathology report to that effect.

Neither Dr Harvey nor Dr Chen took any steps to ascertain whether the boyfriend had informed the plaintiff of his HIV status. When Dr Harvey spoke to the boyfriend over the phone, and when Dr Chen saw the boyfriend and gave him the referral letter, no mention was made of the plaintiff.

The plaintiff again attended the medical centre in December 1998 for advice on oral contraception, and again on 11 February 1999 for medical advice regarding a proposed trip to Ghana.

On both occasions another doctor at the practice saw her. Nothing was recorded on her treatment card to indicate her relationship with her infected boyfriend who was also a patient of the practice.

In May 1999, Dr Harvey received a routine inquiry from the health department. Upon inquiry, he learned that the boyfriend had not attended the Royal Prince Alfred Hospital Immune Clinic. By that time the plaintiff and her boyfriend were living together, but Dr Harvey contacted neither of them.

The couple married in July 1999 and the plaintiff's daughter was conceived shortly after. In September that year the

Photo by Lana Vshivkoff.

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plaintiff attended hospital complaining of a fever and a rash. Later, the symptoms were recognised as those of a seroconversion illness indicating that she had become infected with HIV, probably in August 1999.

The plaintiff became aware of her husband's infection and tests revealed that she, too, was HIV positive. The marriage broke down following the daughter's birth.

The plaintiff later met another man who was also HIV positive. They started a relationship and she subsequently gave birth to his son.

THE TRIAL

At trial, the doctors argued that they were precluded from informing the plaintiff of her boyfriend's HIV status by reason of their duty of confidentiality to their patient, the plaintiff's boyfriend, and by reason of the provisions of section 17 of the *Public Health Act* 1991 (NSW).

Cripps AJ held that the legislation prevented the defendants from disclosing the boyfriend's HIV status to the plaintiff. He also rejected the submission that the circumstances of the joint consultation with Dr Harvey gave rise to the implicit provision of consent by the boyfriend within the meaning of section 17(3)(a) of the Act. The argument that there was a contractual waiver of confidentiality was also rejected.

Nevertheless, the court upheld the plaintiff's claim in negligence. In so doing, His Honour held that the defendants had breached their duty of care to the plaintiff in a number of respects.

First, in the circumstances of the joint consultation, Dr Harvey ought to have advised the couple of the legal requirements concerning confidentiality and sought their 'instructions' as to the manner in which the test results were to be communicated, especially given the increased likelihood of a discordant result because the boyfriend was from Africa.

Second, the defendants ought to have ensured that a medical practitioner provided each of the patients with their medical results in person. All medical expert witnesses agreed that such results should always be provided by a medical practitioner and never by telephone.

By permitting the plaintiff to obtain her results from a receptionist, the defendants precluded an opportunity to ascertain whether she was likely to be informed of her boyfriend's HIV status.

In the case of the boyfriend, the provision of such drastic information by telephone was likely to provoke reactions of disbelief and/or denial, which, on the evidence, appeared to have occurred.

Third, the defendants ought to have ensured that the two patients' records were adequately cross-referenced. The defendants' notes relating to the plaintiff did not record the reason for the pathology test, nor the fact that she was intending to enter into an unprotected sexual relationship with another patient of the practice.

Had this information been recorded it would have been apparent when the plaintiff attended the medical centre in December 1998 and January 1999 that she was unaware of her boyfriend's infection.

Finally, His Honour found that the defendants breached their duty to the plaintiff by failing to follow up the boyfriend and ensure that he had attended the appointment that had been made for him at the specialist clinic.

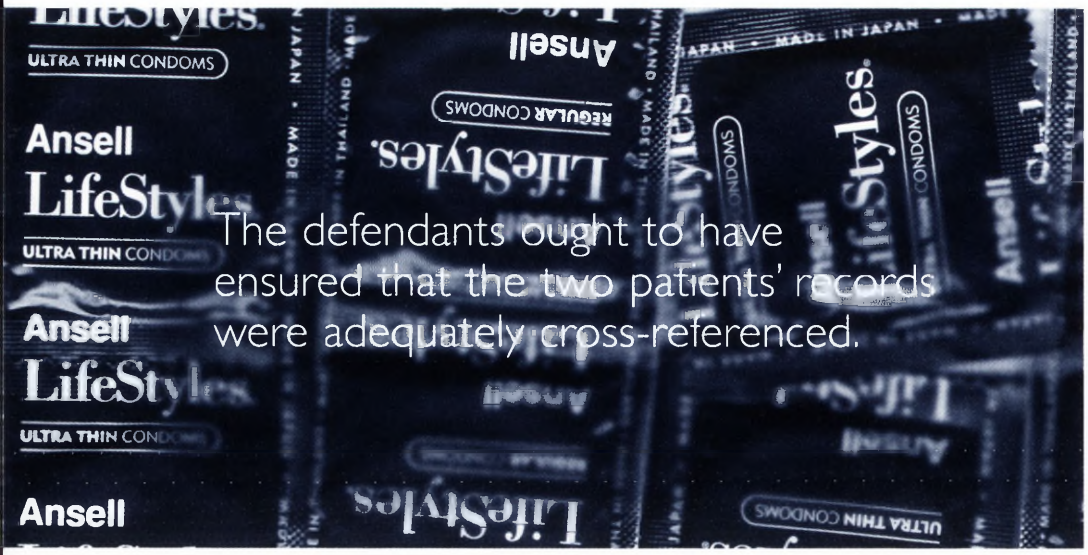
THE JUDGEMENT

The judgment provides guidance to members of both the legal and medical professions regarding some important matters.

His Honour found that in failing to adequately advise and treat the boyfriend in relation to the provision of pre- and post-test counselling and the follow-up specialist treatment, the defendants breached a duty of care owed to the plaintiff.

The court had reached a similar conclusion in *BT v Oei*.[2] In that case, the court found that the medical practitioner defendant owed a duty of care to a patient's sexual partner who was not herself a patient of the defendant's practice.

A medical practitioner may be liable in negligence for failing to follow up a patient who has been advised to consult another health professional. This proposition is not novel. It was upheld by the unanimous decision of the NSW Court of Appeal in *Tai v Hatzistavrou*.[3]



The content of the duty owed to a patient by a medical centre is identical to that owed by an individual practitioner. His Honour said:

'The obligation to look after [the plaintiff's] interests, insofar that could be lawfully done, continued while she was a patient of the practice, that is until at least the end of February 1999. I have already referred to the fact that she returned to the practice for further consultations concerning a prescription for the oral contraceptive pill and vaccinations before travelling to Ghana. It may be argued that it has not been established that the doctor who vaccinated her for the trip to Ghana or the doctor who prescribed contraceptive pills were aware of [the boyfriend's] positive result and that he was the person she was proposing to marry. But the... medical centre had that information and I do not think the duty owed to the patient can be avoided by what appears to be an inadequate cross-referencing of patients' cards.'[4]

With the increasing corporatisation of medical practice, it is important that the law recognises that the standard of care a patient is entitled to expect from a medical centre is no less than that expected of a single general practitioner.

The fact that the boyfriend had not disclosed his HIV status to the plaintiff would have been apparent had the plaintiff attended a single doctor from November 1997 to January 1998. Patient records kept by medical centres must be sufficient to adequately inform any particular treating doctor of the patient's medical history.

Finally, medical practitioners should be aware of their obligations to obtain clear instructions when treating related patients in circumstances of potential conflict of interest and duty. In this case, the defendants owed concurrent and conflicting duties to properly care for the plaintiff on the one hand, and to protect her boyfriend's right of confidentiality on the other.

That such obligations are imposed upon members of the legal profession is not a novel proposition.[5] The fact that they are also owed by medical practitioners might not be widely understood.

The medical profession can take some comfort in this decision insofar as it underscores the importance of maintaining doctor/patient confidentiality. At the same time, it endorses the view that when faced with the difficult situation presented to the defendant doctors, there are ways to protect the interests of those at risk of HIV infection without breaching confidentiality.

It was not the plaintiff's case that the doctors should have breached confidentiality, but instead that they failed to take proper steps to protect her in circumstances where they knew of the boyfriend's HIV infection, she did not, and she was a patient of their practice.

The doctors sought to justify their inaction by asserting there was nothing they could have done other than breach confidentiality. This assertion was comprehensively rejected. PL

Endnotes: **1** [2003] NSWSC 487. **2** [1999] NSWSC 1082. **3** Unreported, NSWCA 306, 25 August 1999. **4** supra 1, para 82. **5** See for example *Spector v Ageda* [1973] Ch 30; *Waimond Pty Limited v Byrne* (1989) 18 NSWLR 642.