

# AUSTRALIAN MEDICAL LIABILITY

## TEXT UPDATER

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## CHAPTER 2

### 2.3 Informed consent – Basic Principles

- The discussion in the text regarding recognition that people have the right to decide for themselves whether or not they will undergo medical treatment was reinforced by the outcome in Hunter and New England Area Health Service v A [2009] NSWSC 761. The matter concerned refusal of medical treatment by an unconscious patient, based on an advance care directive stating the patient's desire to refuse certain treatments. The court was required to determine whether the directive was a valid indication of patient's desire, whether the patient had capacity to decide to refuse treatment when directive made and confirmed the patient's right of self-determination even where withdrawal of treatment would have life threatening consequences.
- Following shortly after Hunter and New England Area Health Service v A [2009] NSWSC 761 referred to above, the matter of Brightwater Care Group (Inc) v Rossiter [2009] WASC 229 addressed similar issues when considering the legal obligations of a medical service provider with responsibility for the care of a mentally competent quadriplegic patient who directed the medical service provider to discontinue provision of nutrition and general hydration. The court's reasons were consistent with the principle of patient autonomy or self-determination as to whether or not the patient will continue to receive medical treatment. See also Australian Capital Territory v JT [2009] ACTSC 105 which addressed consent to medical treatment in the context of the patient's wishes based on a delusional set of assumptions; and H Limited v J [2010] SASC 176.
- Advanced Arbor Services Pty Limited v Phung [2009] NSWSC 1331 is an unusual case focusing on issues going beyond medical treatment. It is included here as it included liability for misrepresentation under the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1987* (NSW).
- Hammond v Heath [2010] WASC 6 considers the extent of the duty to warn, in particular regarding the removal of materials (in this case, mesh) used during the course of surgery.
- Application of Justice Heath; re a Patient [2011] NSWSC 432. Proposal to withhold aggressive therapy which has the effect of prolonging the patient's life; consent of incompetent patient to such treatment not required. Distinguishable from cases where invasive treatment otherwise constituting an assault is proposed. Note at [6]: *No patient has a right to insist on being given any particular treatment. The patient's right is that the medical practitioner use reasonable professional care in the interests of the patient's health and wellbeing. A patient is not entitled to insist on being prescribed particular drugs or receiving particular treatment but to that treatment, which the medical practitioner, using reasonable care, judges is best for the patient in the circumstances.*

### 2.6 The court as the ultimate arbiter

- The discussion in the text regarding Rogers v Whitaker notes that the standard of care is not to be determined solely, or even primarily, by reference to the practice followed or supported by a responsible body of opinion in the profession. Marko v Falk [2008] NSWCA 293 at [76] – [79] briefly addressed the circumstances in which a court may substitute its own opinion in the following terms: *‘Mr Neil submitted that Rogers v Whitaker supported the proposition that if all members of a particular profession were doing something that was not in accordance with what the Court considered to be careful practice, then the Court should say so. That submission was pitched at such a high level of generality as to be meaningless. It fails to recognise the careful distinction all members of the High Court drew in Rogers v Whitaker between diagnosis and treatment, and warning of risks. Mr Neil did not suggest any sensible route by which the Court could impose a view as to careful practice contrary to the medical opinions called on both parties’ behalves. Mr Neil could not refer the Court to any case since (or before) Rogers v Whitaker in which the court had taken the course he propounded in a case which involved clinical judgment in an operational context.....In my view this was a case where the plurality view in Rogers v Whitaker as to the often decisive role professional opinion may play has strong resonance.’*

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## CHAPTER 3

### 3.9 Duty under statute

- In the context of possible claims against medical practitioners under the Trade Practices Act 1974 (Cth), see Kowalczyk v Accom Finance [2008] NSWCA 343. The court followed Shahid v Australian College of Dermatologists [2008] FCAFC 72; (2008) 168 FCR 46.

### 3.24 Qualifications and experience

- Imbree v McNeilly [2008] HCA 4. Consideration of aspects of Cook v Cook; Duty of care in the context of special relationship between plaintiff and defendant. Note the passing reference to the implications of this decision in at Le Brun v Joseph [No 2] [2010] WASCA 52 at [183].

### 3.32 Rural v city locations

- Richards & Ors v Rahilly & Anor [2005] NSWSC 352 at [145]: Rural practice may be a relevant circumstance in determining adequate care, in that access to sophisticated equipment is not as readily available as it would be in the city.

### Medico legal examinations

- Basha v Vocational Capacity Centre Pty Ltd [2009] NSWCA 409: Aggravation of shoulder injuries during vocational assessment; content of duty.
- Kilvington v Grigg & Ors [2010] QDC 496: Medical practitioner – duties to patient – certificate for application to superannuation fund – whether duty to provide – whether damages suffered.

### Drug rehabilitation

- Swanson v Kedesh Rehabilitation Services Ltd [2010] NSWCA 25: Drug rehabilitation program. No duty to ensure a particular result (the taking of medication before leaving facility); only to take reasonable care for the safety of its residents (at [43]).

## Medical Centres

- CS v Biedrzycka & Ors [2010] NSWSC xx: Medical Centre. Duty exists on the part of medical centre, in respect of the maintenance of accurate medical records capable of ensuring ready contact with a patient (at [41], [49]).

## Evidence on breach of duty & the like

- KF By Her Tutor RF v Royal Alexandra Hospital for Children known as the Children's Hospital Westmead and Anor [2011] NSWSC 399. More in the nature of a procedural ruling, the court made an order pursuant to Rule 31.24(2)(c) Uniform Civil Procedure Rules 2005, that a facilitator attend a reconvened breach of duty experts' conference.

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# CHAPTER 4

## 4.1 Duties to third parties

- Glennie v Glennie [2009] NSWSC 154. As noted in the text, in *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562 the High Court considered whether medical practitioners, social workers and departmental officers involved in investigating and reporting upon allegations of child sexual abuse owed a duty of care to suspects. The court concluded that no such duty existed. *Glennie v Glennie* is an interlocutory decision addressing only a limitation period extension, but it foreshadows a claim against a medical practitioner by a sexual assault victim. It is alleged that the medical practitioner failed in his statutory duty to report sexual abuse of which he was aware, thereby allowing it to continue such that the victim suffered further damage.
- Chahoud v Koleda [2008] NSWSC 1060; (2007-2008) 72 NSWLR 740. A medical practitioner has no duty to a beneficiary of the will of a deceased patient in relation to advice to a court regarding the deceased's capacity and has the benefit of witness immunity for the contents of letters provided to a court or legal practitioner on the capacity of a deceased patient to execute a will.
- Privacy & Disclosure: Concerns about tensions between patient privacy and legal or ethical obligations to disclose to third parties who may be harmed have been addressed in the area of genetic information. The National Health and Medical Research Council (NHMRC), in cooperation with the Office of the Privacy Commissioner (OPC), have released new guidelines to assist health practitioners in making decisions about disclosing genetic information to their patient's genetic relatives. The new guidelines permit medical practitioners to disclose information to a genetic relative of the patient without the patient's consent, but only in situations where they reasonably believe that disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of the patient's relative. The use and disclosure of genetic information to a patient's genetic relative under Section 95AA of the Privacy Act 1988 (Cth) – Guidelines for health practitioners in the private sector' are available for download at:

<http://www.nhmrc.gov.au/publications/synopses/e96syn.htm>

## 4.8 Psychiatric patients causing loss or injury to others

- Gray v Thames Trains & Ors [2009] UKHL 33. Man, suffering post traumatic stress disorder from earlier incident, not able to recover compensation for consequences of his later knife killing of a drunken pedestrian. Illegality defence.
- Simon and Anor v Hunter and New England Area Health Service [2009] NSWSC 758 is an interlocutory decision only (regarding the availability of a

jury trial) but arises from a claim in that a psychiatric patient was released from hospital into care of friend for road journey from Taree to Victoria and the patient killed the friend during the journey. The claim will be one by relatives of the deceased for damages against Area Health Service.

- The Quadriplegic Centre Board of Management v McMurtrie [2009] WASCA 173. A decision considering the duty of an institution to warn staff of the risk of injury from a patient with a history of violence. The claim failed on causation grounds.

#### 4.20 Normative causation

- Adams by her next friend O'Grady v State of New South Wales [2008] NSWSC 1257. Alleged breach of duty by State in providing plaintiff with access to knife with which she stabbed and killed a teacher. As to causation see [113]ff.

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# CHAPTER 5

## 5.19 Ethical framework

- For an interesting discussion on the possible clinical benefit to the patient of an early disclosure of an adverse event, see A Allan & D McKillop, *The health implications of apologizing after an adverse event*, International Journal for Quality in Health Care 5 February 2010.
- Similar ethical obligations are reflected in 6.3.4 and 6.3.5 of Good Medical Practice: A Code of Conduct for Doctors in Australia adopted by the Medical Board of Australia

[www.medicalboard.gov.au/documents/default.aspx?record=WD10%2F1277&dbid=AP&chksum=eNjZ0Z%2FajN7oxjvHX...](http://www.medicalboard.gov.au/documents/default.aspx?record=WD10%2F1277&dbid=AP&chksum=eNjZ0Z%2FajN7oxjvHX...)

- The Council of Australian Governments (COAG), at its meeting of 26 March 2008, signed an Intergovernmental Agreement on the health workforce. This agreement led to the creation of a single national registration and accreditation system for ten health professions: medical practitioners; nurses and midwives; pharmacists; physiotherapists; psychologists; osteopaths; chiropractors; optometrists; podiatrists and dentists (including dental hygienists, dental prosthetists and dental therapists). The scheme commenced on 1 July 2010. Section 141 of the *Health Practitioner Regulation National Law 2009 (Act B)* requires a registered health practitioner who reasonably believes that another registered health practitioner has behaved in a way that constitutes notifiable conduct, report that conduct to the relevant National Agency. In addition, a registered health practitioner who reasonably believes that a student has an impairment that, in the course of the student undertaking clinical training, may place the public at substantial risk of harm must report that conduct to the relevant National Agency. As to the width of notifiable conduct, the Bill settled on the following definition (s 140):

notifiable conduct, in relation to a registered health practitioner, means the practitioner has:

(a) practised the practitioner's profession while intoxicated by alcohol or drugs; or

(b) engaged in sexual misconduct in connection with the practice of the practitioner's profession; or

(c) placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; or

(d) placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.

Registered health practitioners excepted from making a mandatory notification include those employed or engaged by the insurer of the second health practitioner and those who formed the belief that notifiable conduct has occurred in the course of providing legal advice to one or other of the practitioners involved (s 141).

For more information see [www.ahpra.gov.au](http://www.ahpra.gov.au)

## 5.24 Apologies

Queensland: The *Civil Liability Act 2003* (Qld) was amended in September 2010, inserting section 72A-72D. The amendments extend apology protections, including in circumstances where there is an implied admission of fault.

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## CHAPTER 6

### 6.1 Vicarious Liability & Non-Delegable duties – Introduction

- NB v Sydney South West Area Health Service [2010] NSWDC 172 at [122] – [124]: Sexual assault of a patient by a ward orderly could not on any basis be regarded as a mode, proper or improper, of undertaking the authorised acts involved in fulfilling the role of a ward orderly. The conduct could be regarded only as an independent criminal act for which the defendant Area Health Service was not vicariously liable.
- Transfield Services (Australia) v Hall; Hall v QBE Insurance (Australia) [2008] NSWCA 294. A non-medical decision which in part discusses whether there is a general doctrine in Australian law that a person has a non-delegable duty to ensure reasonable care taken by an independent contractor employed to engage in an extra-hazardous or inherently dangerous activity; whether there is scope for extending concept of non-delegable duties beyond existing categories and the relevance of factors of control and vulnerability to finding of non-delegable duty.
- See also: Leighton Contractors Pty Ltd v Fox; Calliden Insurance Limited v Fox [2009] HCA 35

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# CHAPTER 7

## 7.9 Material risks

- Coombe v Katsaros [2011] SASC 93. An action in negligence, regarding a plaintiff who suffered flexion contractures of little fingers due to Dupuytren's disease. For the purpose of releasing the contractures, the defendant performed separate operations on left and right hands. Following those operations plaintiff developed pain in his hands and flexion contractures of his ring and little fingers, such that his little fingers were later amputated by another surgeon. In bringing his claim, the plaintiff alleged that the post-operative contractures were caused by Complex Regional Pain Syndrome (CPRS) and the Court was called upon to decide whether the defendant was negligent by reason of his failure to warn of the risks of CPRS, to warn of the risk of rapid contractures and also whether defendant was negligent in failing to space the two operations further apart and in failing to advise the plaintiff to space the operations further apart. The plaintiff's claim failed and the action was dismissed. The Court did not accept that the risk of CRPS was a material one, nor that such a warning would have altered the decision of the plaintiff to undergo the surgery. Nor did the Court accept that the spacing of the two operations was causative of the outcome.
- Wallace v Ramsay Health Care Ltd [2010] NSWSC 518 at [49]: *It is not the same thing to say that, if the plaintiff had been warned of the risk but would nonetheless have proceeded to have the surgery, the risk was therefore not material. In other words, the decision that a particular patient may take when warned of the risk is not necessarily coextensive with or conclusive of a determination of the materiality of that risk. A particular material risk may persuade some prospective surgical candidates to proceed to surgery and take the risk, whilst others faced with the identical risk may not be prepared to do so. The inquiry at the breach stage is informed by the question of whether or not a reasonable patient in the position of the plaintiff would attach significance to the risk, not whether a reasonable patient in the position of the plaintiff would attach significance to the fact that the risk came home.*
- Francis v Petros [2010] WADC 149. Interlocutory consideration in the context of a limitation period dispute, as to whether a cause of action based on failure to warn arises when the relevant surgery is carried out or when the risk materialises. Held at [30], actionable harm does not arise until the risk eventuates.

## 7.16 Elective procedures

- Ormsby v Stewart & Ors [2009] QSC 200. Intraocular lens replacement surgery. Breach of duty & causation not found.

## 7.20 Clinically indicated procedures

- Rooke v Minister for Health [2009] WASCA 27 on appeal from Rooke v Minister for Health [2008] WADC 6. Post-operative sensitivity - Dupuytren's contracture. Breach of duty & causation not found.
- Lentzner v Baumwol [2009] WADC 168. Hernia repair surgery; breach of duty not found.

### 7.32 Breach of duty in informed consent cases – differing risks elsewhere

- G & C v Down [2008] SADC 135. A decision concerning failure to warn of the risks of failure of a sterilisation procedure. At [140] ff the court addresses differences between a surgeon's own rate and the general published failure rate. *'[140] In my opinion, the Defendant failed to meet the standard required of him in that he did not make it clear that the numerical ratio of 1 in 2000 related to his experience. Using the standard of an ordinary skilled gynaecologist, such a practitioner would have made it clear. In my view, where the gynaecologist's personal experience is conveyed in numerical terms, it is important that it be made clear to the patient that it refers the gynaecologist's failure rate. The personal experience of the gynaecologist would be of great significance to the patient. [141] I am also of the opinion that where the numerical ratio of the gynaecologist's personal failure rate is conveyed, either in response to questioning by the patient or being volunteered by the gynaecologist, then in order to provide a proper balance for the patient, the literature failure rate should be conveyed. The picture would not be complete otherwise.'*
- On appeal as to causation see G, P A & C, P v Down [2009] SASC 217, where at [67] Anderson J did not disagree with the approach of the trial judge regarding breach of duty. An application for special leave to appeal to the High Court was refused: Gilchrist & Anor v Down [2010] HCATrans 24

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## CHAPTER 8

### 8.10 The 'widely accepted' defence

- Sydney South West Area Health Service v Stamoulis [2009] NSWCA 153. The evidence of an expert is not inadmissible merely because he or she is materially interested in the proceedings. Such matters go to weight and not admissibility. (For the retrial on this limited issue, see Stamoulis v Sydney South West Area Health Service [2010] NSWSC 585.)
- Hawes v Holley [2008] NSWDC 147. Consideration of alleged failure to treat patient by pharmacological means to avoid need for abdominal surgery, in circumstances where complications of the abdominal surgery later occurred.
- Vella v Permanent Mortgages Pty Ltd [2008] NSWSC 505. Consideration of regional variations in widely accepted practice: see [550] ff.
- Melchior and Ors v Sydney Adventist Hospital Ltd and Anor [2008] NSWSC 1282. Negligence at common law not found, but in any event 'widely accepted' defence capable of application: see [142] ff.
- MD v Sydney South West Area Health Service [2009] NSWDC 22 held that the 'widely accepted' defence must be pleaded (in NSW) for a defendant to rely on the defence at trial. Confirmed on appeal in Sydney South West Area Health Service v MD [2009] NSWCA 343.
- Kocev v Toh [2009] NSWDC 169. Chiropractic treatment. Negligence at common law not found, but in any event 'widely accepted' defence capable of application: see [80].
- Peterson v South Eastern Sydney Illawarra Area Health Service & Elliott [2010] NSWDC 114: Negligence at common law not found, but in any event 'widely accepted' defence capable of application.

Note: Mark Williams, DLA Phillips Fox, suggests that whilst South Australia's provision is similar to that of New South Wales, the other jurisdictions have a subtle but significant wording difference which may give rise to a different approach to that of the available defence, taken in New South Wales. See M Williams, *Proving medical negligence across Australia*, DLA Phillips Fox Health Law Bulletin May 2009.

### 8.10 The irrational and other exceptions

In the absence of a decision thus far in which a defendant has been found negligent and then has successfully called upon the widely accepted defence, it follows that the irrational exception has yet to be applied so as to overturn that defence.

- In Hope v Hunter and New England Area Health Service [2009] NSWDC 307, Levy SC DCJ, although not finding it necessary to apply the irrational exception, commented on the meaning of the exception as follows:

- *[174] The question arises as to what constitutes an irrational opinion. In this context I do not construe “irrational” to mean without reasons, although it can have that meaning. Rather, I construe it to refer to reasons that are illogical, unreasonable or based on irrelevant considerations. [175] I consider that at the forefront of a consideration of the reasoning of an opinion used to base a s 50 defence, the focus should be on the practical nature of the risk that attracted the duty of care and the consideration of patient safety concerning sources of potential intra-operative harm if reasonable precautions against the foreseeable risk of harm are not reasonably taken.*

### 8.34 Delayed diagnosis & misdiagnosis

- Mazza v Webb [2011] QSC 163. Endoscopy failing to diagnose a small bowel carcinoma. Extent of endoscopy not negligent but (at [43]) reasonable care demanded that the endoscopist alert the referring doctor that the investigation had been limited.
- McKay v McPherson [2010] VCC 585. Failure to recognise that the plaintiff was unwell with symptoms of heart failure, secondary to undiagnosed cardiomyopathy.
- Peterson v South Eastern Sydney Illawarra Area Health Service & Elliott [2010] NSWDC 114. Allegation of delayed treatment following non union or mal union of fracture. Breach of duty not proven.
- Athanssiadis v Likos [2010] SADC 85. Breach of duty not proven, regarding failure to earlier treat gallstones hence avoid effects of gall bladder cancer. Causation not proven in any event.
- Le Brun v Joseph (No 2) [2010] WASCA 53. Severe headaches and later rupture of undiagnosed arteriovenous malformation (AVM). Whether headaches caused by AVM & whether negligence in not referring for CT scan of brain or to neurologist to investigate cause of headaches.
- Thompson v Haasbroek [2010] NSWSC 111. Failure to detect and diagnose cervical radiculopathy.
- Davy -v- Minister for Health [2009] WASCA 170. Claim failed, alleging delayed arrangement for knee infection review by hospital.
- Spasovic v Sydney Adventist Hospital [2003] NSWSC 791. Claim alleging to exercise reasonable care in assessing and treating complaints made and symptoms exhibited in particular a headache, which were caused by a small cerebral haemorrhage from an arterio-venous malformation (AVM”). Discharge from hospital without the small cerebral haemorrhage or the AVM having been diagnosed.

### 8.62 ff Surgical errors

- Burton v Allen [2010] NSWDC 265. Incomplete carpal tunnel release - Anomaly in position of median nerve - Whether apparent to defendant in course of standard carpal tunnel release - Whether appropriate means of check that nerve fully decompressed adopted - Standard of post operative care provided - If inadequate whether causative of plaintiff's ongoing pain and disability.
- Hawkesbury District Health Service Limited v Chakar [2010] NSWCA 320. Claim in relation to varicose vein procedure. Rehearing ordered.
- Harris v Bellemore [2010] NSWSC 176. Leg lengthening procedures; whether cosmetic surgery. Primacy of patient autonomy in determining scope of duty warn, whether plaintiff would have chosen to undergo surgery in any event. See also the appeal decision regarding two damages issues, Harris v Bellemore [2011] NSWCA 196.
- Wells v Juengling [2008] WADC 18 was overturned on appeal (pending retrial) in Juengling v Wells [2009] WASCA 125.
- Marko v Falk [2007] NSWSC 14 has now been considered by the New South Wales Court of Appeal as Marko v Falk [2008] NSWCA 293.

#### 8.74 Failure to follow up

- Young v CAACI & Ors [2008] NTSC 47. CAACI had a responsibility to put administrative procedures in place to deal with patients who fail to attend appointments relating to potentially serious conditions, in this case being suspected ischaemic heart disease. As there was no system implemented at the time, breach of duty on the part of CAACI. See below for comment regarding contributory negligence.

#### 8.76 Mental health care

- Adams by her next friend O'Grady v State of New South Wales [2008] NSWSC 1257. Alleged breach of duty by State in providing plaintiff with access to knife with which she stabbed and killed a teacher.

#### 8.116 Birth trauma - Foetal

- Boustead v North West Strategic Health Authority [2008] EWHC B11 (QB). Claim in relation to care provided by a young mother during her pregnancy and labour and to her baby during the neonatal period. The child subsequently suffered from cerebral palsy with moderate learning disability, dysarthria and right sided hemiplegia. Experts agreed that the child suffered brain injury due to an intraventricular haemorrhage and the serious consequences which flowed from it.

- Do (an infant) by his next best friend Lan Thi Hoang & Anor -v- King Edward Memorial & Princess Margaret Hospitals Board [2008] WADC 118. Claim in relation to whether the plaintiff (before birth) was adequately monitored and whether intrauterine resuscitation and/or earlier delivery ought to have occurred; causation as to whether alleged negligence lead to prolongation of hypoxic event and caused or contributed to injury in the form of cerebral palsy of infant plaintiff.

### 8.126 Birth trauma - Maternal

- McLennan v McCallum [2010] WASCA 45. Appellant born with severe encephalopathy. Whether obstetrician or nursing staff negligent; causation, turns on own facts. Appeal refused. (First instance decision discussed in the text at [8.118].)
- Hassan v The Minister for Health [No 2] [2008] WASCA 149. Claim arising from induced labour following foetal death in utero. Issues included consideration of whether informed consent was given to participate in a trial of use of a drug Misoprostal to induce labour and the adequacy of management of the induction of labour, leading to hysterectomy.
- Sernack v Leader NSW District Court unreported, 23 April 2008. 2005/5676 per McLoughlin DCJ. Claim concerning injury/laceration to the rectal mucosa, internal anal sphincter and external anal sphincter, leading to recto-vaginal fistula.

### 8.143 Dental care

- R v Pegios [2008] NSWDC 104. An unusual matter involving prosecution of a dentist for the manslaughter of a patient, arising from the administration of sedatives.

### 8.154 Burden of taking precautions

- Jefferies v Rio Tinto Limited and Anor [2010] NSWSC 1046. An example of an approach taken by the court to the burden of taking precautions analysis, where a number of trucks would require modification at a total cost in the order of \$850,000. The court noted the cost in the context of the total value of the equipment and the overall size of the defendant company. The court also noted that such a recommendation had been made in a risk assessment study..

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## CHAPTER 9

### 9.12 Wednesbury unreasonableness

- Allianz Australia Insurance Ltd v Roads and Traffic Authority of New South Wales; Kelly v Roads and Traffic Authority of New South Wales [2010] NSWCA 328. A non-medical case which in part considered section 43A Civil Liability Act 2002 NSW at [74]ff.
- Precision Products (NSW) Pty Limited v Hawkesbury City Council [2008] NSWCA 278. A non-medical case which in part considered section 43A Civil Liability Act 2002 NSW and at [175] ff: *‘A further important consideration is the content of sub-s 43A(3) and the meaning of the phrase “so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its function.” Such wording can be seen to have its source in what is often referred to as “Wednesbury unreasonableness” from Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223 at 229-230. Regard could equally be had to the formulation of cognate concepts in Avon Downs Pty Limited v Federal Commission of Taxation [1949] HCA 26; 78 CLR 353 at 360; R v Connell; ex parte Hetton Bellbird Collieries Limited [1944] HCA 42; 69 CLR 407 at 430; and Buck v Bavone [1976] HCA 24; 135 CLR 110 at 118-119. Cognate ideas are also found in the law attending the responsibility of company directors. The Court there focuses on whether decisions made by boards are made honestly in the interest of the company or are of a kind which no reasonable person could have reached: see Shuttleworth v Cox Brothers and Co (Maidenhead) Limited [1927] 2 KB 9 at 23-24; Peters’ American Delicacy Co Ltd v Heath [1939] HCA 2; 61 CLR 457 at 481; and Wayde v New South Wales Rugby League Limited [1985] HCA 68; 180 CLR 459 at 469-470. While these are different areas of human endeavour, formulations of the kind used in these cases, whether it be in public law, the law of business or the law of torts are attempts to formulate more attenuated tests for legitimate activity than by reference to a fixed standard of reasonable care. Whether it is appropriate to describe s 43A as encapsulating the blunt expression of “gross negligence” is a matter for debate. However, it is plain that the drafter of s 43A was attempting to ameliorate the rigours of the law of negligence. ....’*

### 9.18 Apologies

- Dovuro Pty Ltd v Wilkins [2003] HCA 51; 215 CLR 317. Consideration of the extent to which a court may interpret an apology or admission as determining liability or assisting in a determination of liability.

### 9.21 Duty to rescue

- See *Saving us from ourselves – The duty of care in negligence to prevent self-inflicted harm*, by M Fordham (2010) 18 Torts Law Journal 22.

- R v Natalie Burns [2009] NSWDC 232. Consideration of an unusual circumstance under the criminal law, in which a duty to rescue may exist. See at [31]:
  - ‘Notwithstanding the restraint which courts exercise in this area of the law, I am satisfied that while it is necessary for me to avoid engaging in judicial legislation by asserting a general principle analogous to section 155 of the Northern Territory Criminal Code Act, nonetheless on the facts in the present case I am satisfied that I can and should state the law of New South Wales to be as follows: “If a person voluntarily invites or permits potential recipients to attend his or her home for the purpose of a prohibited drug supply transaction where the drugs are to be consumed on the premises, and where such a recipient may be or become seriously affected by drugs to the point where his or her life may be endangered, the drug supplier has a duty to conduct himself toward the drug recipient without being grossly or criminally neglectful.” ‘

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## CHAPTER 10

### 10.15 Cases regarding the exclusion of the plaintiff's evidence

- Neal v Ambulance Service of New South Wales [2008] NSWCA 346: See discussion at [40] – [42] regarding the practical effect of the exclusion: *“Whatever the real purpose of the provision, the issue for determination is how a court is now to identify what course the plaintiff would have taken, absent negligence. That assessment might include evidence of the following: (a) conduct of the plaintiff at or about the relevant time; (b) evidence of the plaintiff as to how he or she might have felt about particular matters; (c) evidence of others in a position to assess the conduct of the plaintiff and his or her apparent feelings or motivations, and (d) other matters which might have influenced the plaintiff.... Properly understood, the prohibition on evidence from the plaintiff about what he or she would have done is of quite limited scope. Thus, the plaintiff cannot say, “If I had been taken to hospital I would have agreed to medical assessment and treatment”. Indeed, as the Negligence Review recognised, such evidence would be largely worthless. However, the plaintiff might have explained such evidence along the following lines: “I recall on the trip to the police station that I began to feel less well; my state of inebriation was also diminishing; I began to worry about the pain in my head ....”.... That evidence (entirely hypothetical in the present case) would not be inadmissible. If accepted, it might provide a powerful reason for discounting any inference as to future conduct drawn from the past refusal of treatment. It would constitute evidence as to the plaintiff's position, beliefs and fears. Because an inference would need to be drawn from that evidence, no doubt the court would take into account the likely response of a reasonable person in such circumstances. That is consistent with the Act requiring that the matter be determined “subjectively in the light of all relevant circumstances”.*

### 10.20 Other case examples

- Papa v Sullivan Nicolaidis Pty Limited [2010] QSC 364. The defendant firm of medical pathologists monitored the INR levels of the plaintiff but did not tell her that her Warfarin levels were above the target range. The plaintiff went on to have a stroke. The plaintiff succeeded in her claim that the pathologists should have notified the plaintiff and her general practitioner, and on causation.
- Wallace v Ramsay Health Care Ltd [2010] NSWSC 518. Spinal surgery. Failure to warn of a material risk proven, however causation not proven as referable damage did not arise and plaintiff would not have refused the surgery in any event.
- Hookey v Paterno [2009] VSCA 48: Orthognathic surgery for correction of Class II malocclusion in 49 year old female smoker. Duty to warn of risk of adverse effect of proposed surgery & causation issue – whether patient would have undergone surgery if warned of risk.

- Kerr v Minister for Health [2007] WADC 61 has now been considered by the Western Australian Court of Appeal as Kerr v Minister for Health [2009] WASCA 32 ; appeal dismissed.
- Watson v Kailis [2008] WADC 95. Alleged failure to warn of risk of cosmetic procedures and post-operative complications. Trichloroacetic acid peel of the face ("TCA peel").
- Hansen v Babich [2006] WADC 189. Scarring to back. Whether necessary to warn of increased risk of scarring in the event of infection.
- Marko v Falk [2007] NSWSC 14 has now been considered by the New South Wales Court of Appeal as Marko v Falk [2008] NSWCA 293.

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# CHAPTER 11

- Amaca Pty Ltd v Ellis; The State of South Australia v Ellis; Millennium Inorganic Chemicals Ltd v Ellis [2010] HCA 5. Analysing epidemiological evidence, the High Court held that no inference of causation could be drawn that the exposure to asbestos was a probable cause of lung cancer when the plaintiff was also a smoker. Observing that a small percentage of cancer cases were probably caused by asbestos exposure to asbestos did not permit identification of whether an individual is one of that group. Given the small size of the statistical percentage, the observation did not, without more, support the drawing of an inference in this case. The decision may be contrasted with Workers Compensation (Dust Diseases) Bord of NSW v Smith Munro and Seymour [2010] NSWCA 19.
- Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem [2009] HCA 48 at [55]: 'At once it must be recognised that the legal concept of causation differs from philosophical and scientific notions of causation. It must also be recognised that before the Civil Liability Act and equivalent provisions were enacted, it had been recognised that the "but for" test was not always a sufficient test of causation. But as s 5D(1) shows, the "but for" test is now to be (and has hitherto been seen to be) a necessary test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2).' {Footnotes omitted}
- Woolworths Limited v Strong & Anor [2010] NSWCA 282. Note at [48] the obiter consideration as to the effect of section 5D(1) Civil Liability Act 2002 (NSW) on the concept of material contribution: '[48] Now, apart from the "exceptional case" that section 5D(2) recognises, section 5D(1) sets out what must be established to conclude that negligence caused particular harm. That emerges from the words "comprises the following elements" in the chapeau to section 5D(1). "Material contribution", and notions of increase in risk, have no role to play in section 5D(1). It well may be that many actions or omissions that the common law would have recognised as making a material contribution to the harm that a plaintiff suffered will fall within section 5D(1), but that does not alter the fact that the concepts of material contribution and increase in risk have no role to play in deciding whether section 5D(1) is satisfied in any particular case.' See however the disagreement of Garling J in Peter Steven Benic v State of New South Wales [2010] NSWSC 1039 at [516].

## 11.10 Causation principle legislation

- Hirst v Sydney South West Area Health Service [2011] NSWSC 664. *Civil Liability Act 2002* (NSW) - whether s 5E (plaintiff always bears the onus of proof) is confined to legal onus - whether principle in Watts v Rake operative to claims under *Civil Liability Act*.
- Hollier v Sutcliffe [2010] NSWSC 279. Implanon insertion claim, causation issue as to chronic pain syndrome. *Civil Liability Act 2002* (NSW) section 5D(1) necessary condition test not met: see [212] - [213].

- Den Elzen v Harris [2008] WADC 106. Claim concerning management of hydrocephalus and whether outcome would have differed in any event. Note at [203]: “*However, this is in my view a case where the damage would be the very sort of thing that would be likely to occur in the event of breach, so that an evidentiary onus would fall on the defendant to show an absence of causation.*”
- Queen Elizabeth Hospital v Curtis [2008] SASC 344. Although not expressly addressing the provisions which provide that in determining liability for negligence the plaintiff always bears the onus of proving on the balance of probabilities, any fact relevant to the issue of causation, see detailed discussion of causation after the observations of Gaudron J in Bennett v Minister of Community Welfare.

### 11.10 Causation – common law principles

- In the text at 11.11, the authors said it may be sufficient to establish causation that a defendant’s breaches of duty materially increased the risk of injury to the plaintiff, and that risk materialised: see Flounders v Millar [2007] NSWCA 238, but contrast the remarks of Kieffel J in Roads and Traffic Authority v Royal [2008] HCA 19 at [144]. In Sydney South West Area Health Service v Stamoulis [2009] NSWCA 153 per Ipp JA (Beazley and Giles JJA agreeing) the court held that a mere material increase in the risk of injury followed by the eventuation of the risk in question is insufficient to establish causation. The plaintiff must establish that it was probable that the risk created by the tortfeasor came home.
- Workers Compensation (Dust Diseases) Board of NSW v Smith, Munro & Seymour [2010] NSWCA 19. One factor can contribute to an outcome even though, relative to another factor, it has a minor effect. All that is required is that the effect be "material". Any assessment of this materiality is an evaluative judgment, and it was open upon the evidence to conclude that the exposure to asbestos was such a material factor: [72]. An ultimate finding of causation may be based on a number of inferences drawn from primary facts, which may cumulatively allow the ultimate finding to be made. It depends on the circumstances as to whether these inferences are available through the application of logic and commonsense, technical inquiry, or expert assessment. In circumstances where epidemiological studies cannot provide scientific certainty as to the probability of a material contribution, and further uncertainty surrounds the precise experience undergone by the individual to whom the probability relates, a logically reasoned inference of material contribution based upon the available expert evidence betrays no error: [124]–[134].

### 11.21 Causation – Medical liability case examples

- Sarian v Elton [2011] NSWCA 123. General practitioner administering cortisone injection, followed by development of abscess.
- KF By Her Tutor RF v Royal Alexandra Hospital for Children known as the Children’s Hospital Westmead and Anor [2010] NSWSC 891. Application for medical examination of plaintiff, in the context of a claim for damages against a hospital and paediatrician for alleged negligence in failing to diagnose and treat hypoglycaemia and hyperinsulinism in infant causing disabilities including developmental delay and verbal expressive disorder. The paediatrician sought and obtained an order that plaintiff undergo genetic testing to determine whether developmental delay and verbal expressive disorder had a genetic cause and were not the result of delayed diagnosis. By way of contrast see Dikschei v Epworth Foundation [2010] VSC 435, in which the suggested procedure (transoesophageal echocardiogram) was more invasive.
- WA Country Health Service v Wright (No 2) [2010] WASCA 120. Claim for negligent failure to diagnose pneumonia. Breach of duty proven but nature of sepsis (pneumonia) not proven hence probable differing outcome not proven.
- Clothier v Dr Fenn & Greater Southern Area Health Service [2010] NSWDC 96. Claim concerning onset of post-traumatic stress disorder following allegedly incorrect treatment of hypernatremia. Causation not found.
- Den Elzen v Harris [2008] WADC 106. Claim concerning management of hydrocephalus and whether outcome would have differed in any event. Note at [203]: *“However, this is in my view a case where the damage would be the very sort of thing that would be likely to occur in the event of breach, so that an evidentiary onus would fall on the defendant to show an absence of causation.”*
- Christou v Minister for Health [2008] WASCA 214. Appeal from decision concerning intestinal perforation during course of total abdominal hysterectomy surgery.

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# CHAPTER 12

## Chapter 12 Loss of chance

- Tabet v Gett [2010] HCA 12, a judgment of the High Court of Australia, rejected the availability of compensation for loss of the chance of a better outcome in medical negligence cases falling short of proof on the balance of probabilities. The High Court decision in effect confirmed Gett v Tabet [2009] NSWCA 76, a judgment of the New South Wales Court of Appeal delivered 9 April 2009, which had rejected the doctrine of loss of chance of a better outcome in medical negligence cases. The court refused to follow Rufo v Hosking [2004] NSWCA 391; (2004) 61 NSWLR 678 and Gavalas v Singh [2001] VSCA 23; (2001) 3 VR 404.
- O'Gorman v Sydney South West Area Health Service [2008] NSWSC 1127. Consideration of content of duty of care owed by breast screening organisation to plaintiff; evidence supported the application of the causation principle stated by McHugh J in Chappel v Hart. This was not a case where metastatisation was likely in any event and the plaintiff had merely lost the chance of a better outcome. The events which occurred, i.e. the development of tumours in the plaintiff's lungs and brain, occurred within the very area of risk which had been increased by the delay in diagnosis. No scope for the application of the principle in Rufo v Hosking. See [150] – [151]. On appeal as Sydney South West Area Health Service v Stamoulis [2009] NSWCA 153, the matter was sent for retrial only on the issue of breach of duty, by reason of the trial judge's exclusion of certain evidence. For the retrial on this limited issue see Stamoulis v Sydney South West Area Health Service [2010] NSWSC 585.

[Reference to the following notes should be qualified by consideration of Tabet v Gett [2010] HCA 12 above.]

- State of New South Wales v Burton [2008] NSWCA 319. Difficulties of assessment of loss of chance, chance of some better outcome highly speculative. At [110], although the onus is on the plaintiff to identify the value of the lost chance, in accordance with the authorities referred to above, it is reasonable to err on the side of generosity, to avoid the negligent defendant obtaining too great a benefit of the doubt from uncertainty as to the causes and treatment of psychiatric conditions.

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## CHAPTER 13

### 13.10 100% reduction for contributory negligence

- Doherty v State of New South Wales [2010] NSWSC 450. Not a medical law case, however noteworthy for the contributory negligence finding of 35% arising from a police officer's failure to disclose his symptoms to his employer.
- Adams by her next friend O'Grady v State of New South Wales [2008] NSWSC 1257. Alleged breach of duty by State in providing plaintiff with access to knife with which she stabbed and killed a teacher. As to contributory negligence: see [132] ff. *"...in assessing relative culpability and respective share in the responsibility, the Court is entitled to come to a view that the contributory negligence should be assessed at 100% of the cause of the injury. For the reasons already given as to responsibility for the stabbing, duty of care, damages and causation, I would ordinarily assess the "contributory negligence" to be at 100% of the damage..."*
- Zilio v Lane [2009] NSWDC 226 discloses a 100% reduction for contributory negligence as an alternative finding in a motor accident context, without referring to the applicable civil liability legislation provision.

### 13.18 Medical liability cases regarding contributory negligence

- G & M v Sydney Robert Armellin [2008] ACTSC 68. Claim concerning IVF procedure alleging breach of duty of care in transferring two embryos when only one embryo requested. Inherent risk of multiple birth in IVF procedure. Contributory negligence by failing to communicate, advise, or nominate to the staff at the fertility centre the number of embryos to be transferred. Notional reduction of 35% had the claim succeeded: see [121] ff.
  - Note: This decision was reversed on appeal G & M v Armellin [2009] ACTCA 6. The Court of Appeal held that the failure of the respondent to confirm the number of embryos for transfer with fertility centre staff was a breach of his duty of care to the appellants.
- Young v CAACI & Ors [2008] NTSC 47. Contribution to any loss or damage by failing to keep appointments at the clinic, failing to follow up with the doctors and failing to inform doctors of these tests at his subsequent attendances at for various unrelated ailments. Defendant's liability reduced by 50%.
- Peterson v South Eastern Sydney Illawarra Area Health Service & Elliott [2010] NSWDC 114 at [500]. Failure to stop smoking on medical advice held not to be contributory negligence, as the evidence did not go so far as to impute to the plaintiff an actual or probable awareness that continuing to smoke was likely to have an adverse impact on the process of bone healing. Further, no evidence that smoking had a material contributive causative impact on bone union. [Return to table of contents](#)

# CHAPTER 14

## 14.1 Wrongful birth claims

- G & M v Sydney Robert Armellin [2008] ACTSC 68. Claim concerning IVF procedure alleging breach of duty of care in transferring two embryos when only one embryo requested. Inherent risk of multiple birth in IVF procedure. Causation in the context of failure to terminate one pregnancy or to release child for adoption.
  - Note: This decision was reversed on appeal G & M v Armellin [2009] ACTCA 6. The Court of Appeal held that the failure of the respondent to confirm the number of embryos for transfer with fertility centre staff was a breach of his duty of care to the appellants.
- Caven & Anor v Women's and Children's Health [2007] VSC 7. Birth of child with Down syndrome after alleged failure of defendant to detect associated heart defect on ultrasound. Claim by plaintiffs for cost of care and maintenance of child. Limitations issues - whether claims are claims for pure economic loss.
- For a helpful discussion on issues in wrongful birth claims, see C Lake, *The kid and the cash: Categorising damage in wrongful birth and wrongful pregnancy*, (2009) 17 TLJ 55.

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## CHAPTER 15

### 15.19 Intentional torts in medical cases

- Dean v Phung [2011] NSWSC 653. Dental treatment case, in which Civil Liability Act 2002 (NSW) section 3B(1)(a) was argued as applying by reason of fraud in obtaining consent. Burden of proof to show fraud was not met.
- Dragica Ljubic v Sydney Robert Armellin [2009] ACTSC 21. Finding of trespass in that the defendant did not have the consent of the plaintiff to remove her ovaries in the context of a hysterectomy. Confirmed on appeal: Armellin v Ljubic [2009] ACTCA 22.
- Kent -v- Edwards [2009] WADC 5. Plaintiff alleged trespass in the context of biopsy. Trespass not found.
- Lee v Fairbrother [2009] NSWDC 192. Sexual relationship between general practitioner and patient gave rise to award of damages for breach of duty, not assault: see [42] – [43]. However, *Civil Liability Act 2002* (NSW) did not apply by reason of the ‘other sexual misconduct’ aspect of the exclusion in section 3B(1)(a).

### 15.21 Intentional torts in medical cases

- Atgazis v Health Administration Corporation [2010] NSWCA 271. Application for leave to appeal in relation to an intentional tort claim brought against ambulance officers. The applicant's case was put on the basis that a finding of reckless indifference to the risk of injury would satisfy the element of intention in. The Court of Appeal held that it was not necessary to express any view on that question. The Trial Judge found that the evidence did not support a finding that the conduct of the ambulance officers was so plainly calculating that damage to the applicant was a natural and probable result. (For the trial judgment see Atgazis v Health Administration Corporation. Unreported – Proceedings 3379 of 2008, District Court of New South Wales, Sydney Registry. Truss DCJ, 4 December 2009.)
- Breslin & Ors v McKenna & Ors (Omagh Bombing case) [2009] NIQB 50. Comment at [272] to the effect that where the defendant's liability is for trespass to the person, issues of remoteness of damage do not arise: *‘...Since I have concluded that the liability of the defendants is based upon trespass, an intentional tort, I do not consider that any issue of remoteness arises (see Wainwright v Home Office [2004] 2 AC 406 and Clerk and Lindsell 19th edition paragraph 2-110). I do not intend to rehearse the detail of the medical reports or the accounts given to me of the enormous difficulties a number of those involved had in coping with the consequences of this bomb. For many the effects are catastrophic and their lives will never be the same.’*

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