Curtin v Holliday

In *Curtin v Holliday and others* (Supreme Court, NSW) Acting Justice Bell gave judgment for the plaintiff against the first and third defendants on 17 December 1996, in the sum of $524,377.

Background

In late 1993, the plaintiff (then 29) experienced, and reported, pain in her left breast. She claimed to have noticed a left breast lump, often tender, continuously present from early 1994. The third defendant, Dr Clifton-Bligh, a specialist endocrinologist, ordered a non-prescription remedy, evening primrose oil. He recorded on several visits a palpable tender area in the left breast under the left nipple, and informed the GP, but took no other action. In December 1993 his notes show "breasts" followed by a tick, but by March 1994 the area under the left nipple is described as "soft tender lobularity - no discrete lump." His Honour noted in his judgment that the third defendant denied he found a lump at that time, but said 'the description of a mass as "a lump" or merely "lumpiness" is quite subjective.'

In June 1994 the plaintiff claimed the lump was found in her left breast by the GP, Dr Louise Holliday (the first defendant). The plaintiff claimed Dr Holliday reassured her it was fibrous, and said, "If I was fifty, I would be going to get a mammogram as fast as my legs could carry me but I was only twenty-nine." His Honour was satisfied this remark was made. No tests were ordered. Dr Holliday's records showed a diagram of a bordered, hatched area under the left nipple. Two days later the plaintiff was reviewed by the third defendant and again a diagram shows an area under the left nipple with a notation "slightly lobular."

At a later visit (in February 1995) to Dr Holliday that doctor recorded lumpiness in the left breast. A small definite lump in the right breast was found but thought to be benign. Neither Dr Holliday, nor another GP seen by the plaintiff, re-examined either breast in several later visits in 1994 and 1995.

The lump in the left breast had grown larger by 15 January 1996, and at the suggestion of a colleague at work, a third GP was consulted. She ordered urgent tests. These showed a cancer in the left breast which had spread to the liver.

The hearing in the Supreme Court took ten days. (September 9 to 13, November 5 to 9).

Professor Martin Tattersall, a cancer specialist who had been consulted by the plaintiff, gave evidence that a mammogram if done in 1994 would have shown calcifications characteristic of malignancy and that the tumour would certainly have been diagnosable and probably have been curable at that time. He thought the medical records, even on the defendants' version, showed a persistent palpable abnormality which would have led a reasonably careful doctor to order referral or tests including a biopsy. Even accepting the defendant's view that the diagrams did not show any relevant abnormality, he still felt the persistent complaints and findings of tenderness in one area of one breast should have led to referral or a test. A biopsy would have shown cancer or a form of pre-cancer known as ductal carcinoma in situ. This would have been curable. He gave evidence that at the time of diagnosis in January 1996, the tumour was incurable. He predicted a life expectancy of around one year.

No cancer specialist was called by the defendants, although the plaintiff had been sent to see one by the defendants early in the course of the action. It was agreed that no report had been served on the plaintiff from that cancer specialist.

Professor David Gillett, a breast surgeon, and Professor Mark Harris, a professor of general practice, gave written reports and oral evidence to the effect that tests, including biopsy, would have been prudent in 1994. At the very least, a re-examination of the plaintiff was called for after the June 1994 visit to Dr Holliday.

No offers were made by the defendants at any time.

Damages

The plaintiff claimed general damages of $160,000 including an allowance of $10,000 for loss of expectation of life. The defendant put no contrary submission. The trial judge awarded $160,000. The plaintiff claimed damages for past medical expenses included a claim for travel to Germany and accommodation and treatment there. (The plaintiff gave evidence that she was told by a cancer specialist in Australia there was no real hope of cure but she could be given anti-cancer drugs on an experimental basis. Some hope was offered by a German clinic run by Dr Douwes, using methods not generally accepted in Australia.) This claim was allowed in full by Acting Justice Bell. A similar claim for the future was also allowed.

For loss of income in the "lost years," Bell A/J was asked by the plaintiff to allow 50% of her future earnings (the remaining 50% being consumed by the costs of her putative maintenance) less 15% for vicissitudes. Bell A/J allowed $200 weekly, being 34.97% of her net wage at diagnosis, but only for 22 of the 32 "statistical years that lay ahead of her," less 15% for vicissitudes.

The case was notable for the speed with which the Supreme Court and the representatives of the parties dealt with the matter. From first consultation with Mr Ross Koffel, solicitor, to judgment was less than eight months. Mr Koffel chose Richard Pincus, barrister, the same day. Dr Pincus was led for part of the hearing by James Glissan QC and for part by Mr Paul Webb QC. Dr Pincus had difficulty in getting expert support from several prominent GPs and specialists. Many simply refused to help. We note there is currently a strong campaign by the medical defence organisations and some medical colleges to take away from plaintiffs in medical negligence actions the right to obtain and use expert medical reports of their own. It has been proposed that the doctor's specialist colleges would put forward a list of experts and the Court would simply select one. This would be a disaster for plaintiffs.

The conduct, progress, and result of the case must be measured against any assertions of medical defence organisations that cases in which the plaintiff seems to have merit are not fought in open court unless reasonable offers by defendants are rejected.

Medical Expert Evidence

The most difficult component of damages to quantify was the expected cost of care for the future. There seems surprisingly little collected data on quantification of the various elements of such care in NSW.

It should be noted that the Court refused to order simultaneous exchange of expert reports in this matter. This has been a feature of medical negligence matters generally. This is unfair on the plaintiff, as the defendant's experts do not have to offer general commentary on the whole of the medical matters, but usually restrict themselves to refutation of the plaintiff's expert's arguments. It is easy to refute an argument briefly set out in a medical report by a medical expert with no training in or inclination to advocacy. The Court did order reports in reply to be served and these no doubt assisted the Court.

Appeal Lodged

The unsuccessful defendants have lodged an appeal against the verdict but not in relation to damages.

Comment by Richard Pincus

The medical profession is very slow to reform its own practices, and often does so only after adverse publicity following cases against doctors. Examples include:

- the failure of the profession to give honest information to patients about treatments they offer before Rogers v Whitaker (1992) 175 CLR 479. The High Court took away from the medical profession the right to decide among themselves what information must be passed on to patients.
- the failure by the profession or the Health Departments to ensure doctors used proper sterilisation methods in their surgeries before four consecutive patients got AIDS in an Eastern Suburbs surgeon's office while having minor surgical procedures.
- the failure of the profession to reform human experimentation rules until notorious cases in New Zealand and the USA. (In New Zealand a gynaecologist deliberately left patients with pre-cancer of the cervix untreated to see if they would die. They did. In the USA physicians did the same with (black) patients suffering from syphilis.)
- the failure of the profession to reduce the very long hours hospital doctors were forced to work until the death of Sydney Zion's daughter in New York in 1984. Sydney Zion conducted a long campaign which eventually forced the State of New York to pass laws forbidding 36 hour shifts and other obviously dangerous and unsupportable practices. The State had to pass the laws because various medical commissions failed to take any effective action.

Dr. Richard Pincus, a Barrister at Wardell Chambers, Sydney, was counsel for the plaintiff in Curtin v Holliday

Editor's Note

This article refers to a campaign by some medical defence organisations and colleges to limit the capacity of plaintiffs to obtain proper independent medical opinion in medical negligence cases. APLA is aware of a growing "push" to require plaintiffs to obtain medical reports from an appointed panel. APLA will strongly oppose the adoption of recommendations of this kind which strike directly at the heart of the plaintiff's capacity to properly assess, prepare and argue a case at trial. Further, such recommendations, if implemented, detract from the capacity of the Court to be the final arbiter of proper standards of professional conduct. The examples quoted emphasise the public interest in external review of medical malpractice. APLA, through its Medical Litigation Group, will actively monitor, engage in public debate and oppose such proposals which affect the capacity of plaintiff lawyers to properly represent their clients' interests.