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Insurance insights

CASE NOTE

The interplay between evidentiary statements and interrogatories in professional negligence cases

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The Supreme Court has considered the role of interrogatories and evidentiary statements in professional negligence proceedings, where a patient alleges that a physiotherapist needed to provide precautions and advice prior to, during and subsequent to a treatment.

Case: *Arnold v Matsias* [2017] NSW SC 173

In September 2013 Mr Simon Arnold ('plaintiff/patient') received physiotherapy treatment from Mr Chris Matsias ('defendant/physiotherapist'). The patient alleged that as a result of a treatment he suffered a left vertebral artery dissection and cerebella stroke leaving him with significant injuries and disabilities. One issue in dispute was the extent to which the physiotherapist conducted adequate investigations and/or provided adequate warnings and advice prior to performing the treatment.

The patient successfully obtained an order that the physiotherapist answer a number of interrogatories. Registrar Bradford held:

> "It is clear from the pleadings that there are differences as stated as to what occurred at the consultations and the defendant is the one who has the knowledge of these matters and they are solely in his possession and the plaintiff is unable to ascertain the same without the answers being provided."

The defendant appealed Registrar Bradford's decision. In considering the appeal, Justice Hall ordered the defendant provide answers to a number of the interrogatories and for each party to file an evidentiary statement as to liability. As a result of the exchange of the evidentiary statements some of the interrogatories were no longer pressed by the plaintiff and others were answered by the defendant.

On 17 February 2017 Associate Justice Harrison heard arguments in relation to the sufficiency of the answers to the following interrogatories in dispute.

Interrogatories 4 and 6

Interrogatories 4 and 6 are related however interrogatory 4 concerns vertebra-basilar insufficiency and 6 relates to vertebral artery compromise.

Interrogatory 4 reads:

"As at 2 September 2013, what investigations were you aware of that would be conducted and/or performed on a patient to ascertain whether there was evidence of vertebra-basilar insufficiency?

Answer: I was aware that the investigations are CT scan (computerised tomography), MRI scan (magnetic resonance imaging) or MVA scan (magnetic resonance angiography).

Had a patient presented with evidence of vertebra-basilar insufficiency I would cease the consultation and recommend urgent medical evaluation and radiological investigation and to avoid symptom provoking movements."

Interrogatory 6 reads:

"As at 2 September 2013, what investigations were you aware of that would be conducted and/or performed on a patient to ascertain whether there was evidence of vertebral artery compromise?

Answer: I was aware that the investigations are CT scan (computerized tomography), MRI scan (magnetic resonance imaging) or MVA scan (magnetic resonance angiography).

Had a patient presented with evidence of vertebral artery compromise I would cease all therapy and recommend urgent medical attention and radiological investigation and to avoid symptom provoking movements."

What was disputed between the parties is the definition of the word "investigation". The defendant submitted that the word investigation means an independent investigation that does not include physical examination and the plaintiff submitted that the defendant's interpretation was in fact too narrow. The same statement was made in relation to interrogatory 6. It was held that a medical "investigation" does not mean a physical examination. If the plaintiff had wanted to ask whether the defendant had carried out a physical examination he should have directed an interrogatory to that issue. In Her Honour's view answers 4 and 6 had been sufficiently answered.

Interrogatories 5 and 7

Similarly, interrogatories 5 and 7 concerned warnings given in relation to the two different medical conditions, vertebra-basilar insufficiency and vertebral artery compromise.

Interrogatory 5 reads:

"As at 2 September 2013, what warnings were you aware of it would be provided to a patient who had or was suspected to have evidence of vertebra-basilar insufficiency?

Answer: If a patient had or was suspected to have evidence of vertebra-basilar insufficiency I would cease the consultation immediately. I would advise the patient to seek immediate medical attention and to avoid all symptom provoking movements."

Interrogatory 7 reads:

"As at 2 September 2013, what warnings were you aware of it would be provided to a patient who had or was suspected to have evidence of vertebral artery compromise?

Answer: I would cease all therapy and recommend urgent medical attention and radiological investigation and to avoid all symptom provoking movements".

The Could held that what is meant by 'avoid symptom provoking movements' is unclear, nonetheless that is what the defendant said he would recommend. Whether this warning will be deficient will be determined by the expert physiotherapist evidence and therefore interrogatories 5 and 7 had been properly answered by the defendant.

Interrogatories 12(d)(i) and (ii), 16(f)(i) and (ii) and 20(f)(i) and (ii)

These interrogatories are directed to a risk assessment and ask the same question but each one is directed to one of the three different consultations that the plaintiff had with the defendant.

Interrogatories 11, 15 and 19 all ask a similarly worded question:

"Please look at page 1 and 2 of the document annexed and marked B (physiotherapy assessment document dated… September hereto. Was the information recorded on page 1 and 2 of that document written by the defendant? (Clinical notes) Answer – Yes.

Interrogatory 12 asks if the answer to question 11 is yes then please provide details as follows:

"(d) If that risk assessment you conducted on the plaintiff was written, partly written and partly oral then please provide:

(i) Copies of the written material relating to the risk assessment conducted and or information you provided to the plaintiff;

(ii) If the risk assessment and/or information you provided to the plaintiff were partly or totally oral then please provide the *ipsissima verba* of that conversation. If you are unable to provide the same *ipsissima verba* of that conversation then provide the substance thereof."

Interrogatory 16(f)(i) and (ii) read:

"(f) If the assessment was conducted on the plaintiff [on 5 September 2013] was written, partly written and partly oral then please provide:

(i) Copies of the written material relating to the risk assessment conducted and/or information you provided to the plaintiff;

(ii) If the risk assessment and/or information you provided to the plaintiff were partly or totally oral then please provide the ipsissima verba of that conversation. If you are unable to provide the ipsissima verba of that conversation then provide the substance thereof."

Interrogatory 20 asks please provide details of the following:

"(e) Prior to commencing physiotherapy treatment did you conduct a risk assessment of the plaintiff?

(f) If that risk assessment you conducted on the plaintiff was written, partly written and partly oral then please provide:

(i) Copies of the written material relating to the risk assessment conducted and/or information you provided to the plaintiff;

(ii) If the risk assessment and/or information you provided to the plaintiff were partly or totally oral then please provide the ipsissima verba of that conversation. If you are unable to provide the same ipsissima verba of that conversation then provide us the substance thereof."

The defendant admitted that he wrote the clinical notes for each of the three consultations and objected to answering these interrogatories on the basis that they were vexatious and oppressive and they assumed all facts not admitted. The court held that these interrogatories would call for an answer if the risk assessments were conducted partly on a written or partly oral basis. If they were not, then no answer is called for. The result is that the defendant was not required to provide further answers to interrogatories 4 to 7 nor was the defendant required to answer interrogatories 12(d)(i) and (ii), 16(f)(i) and (ii) and 20(f)(i) and (ii).

Therefore the orders made by the Registrar in relation to those outstanding interrogatories were set aside.

Conclusion

It is noteworthy that the Court ordered the service of evidentiary statements by both the plaintiff and the defendant. Justice Hall took quite a pragmatic approach to the issue of interrogatories and was of the view that if evidentiary statements were put on the issue of interrogatories would more or less take care of itself. This was true to a certain extent with a number of the interrogatories not being pressed after the provision of evidentiary statements. It may be that evidentiary statements is the way that Courts will try and move forward with respect to the issue of interrogatories.

FOR FURTHER INFORMATION ON THIS DECISION, PLEASE CONTACT HANNAH SHIEL, ASSOCIATE AT MERIDIAN LAWYERS.