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Application of foreign common law and statute by Australian court in medical negligence claim: O'Reilly v Western Sussex Hospitals NHS Trust (No 6)

Anne Howard *and* ***Claudia Hirst*** *HEALTH LEGAL*

In this case,[1] the plaintiff, Mrs O'Reilly (who is the widow of Dr O'Reilly) sued two colorectal surgeons and the hospital where they worked in negligence for failing to adequately examine her husband's left colon and subsequently failing to detect a cancerous tumour that caused (or at least contributed to) his death. Justice Garling of the Supreme Court of New South Wales (the Court) found in favour of the plaintiff, being satisfied that Dr O'Reilly died two years earlier than he otherwise would have but for the defendants' negligence and awarded the plaintiff damages in the value of the dependency of the late Dr O'Reilly.

Although this case concerns the application of English case law and statute it is nevertheless instructive as a demonstration of the Court's reasoning in determining a medical negligence claim when applying similar common law and statute to that in Australia.

Background

On 13 June 2003, Dr O'Reilly visited his usual medical practice (the Surgery) and was seen by general practitioner Dr Wood. The purpose of the visit was that Dr O'Reilly had been experiencing blood loss while using the toilet "which was heavier and of a different colour"[2] to what he was accustomed to with his haemorrhoids. At the consultation, Dr Wood undertook "a manual rectal examination"[3] of Dr O'Reilly and referred him for colorectal surgical opinion and investigation at St Richards Hospital Chichester (a hospital operated by the first defendant, Western Sussex NHS Trust) (the Hospital).

On 19 August 2003, Dr O'Reilly was seen by Mr Sen, a locum colorectal surgeon (second defendant), at the Hospital. Mr Sen formulated a plan which was to "undertake a further examination of the left colon, at least, by a flexible sigmoidoscopy"[4] to exclude a sinister cause of the rectal bleeding such as a pre-cancerous polyp or a more developed and potentially cancerous lesion. At the time of the consultation, Mr Sen intended to perform the flexible sigmoidoscopy himself, however, for personal reasons, Mr Sen left the Hospital in October 2003. Accordingly, Dr O'Reilly was seen by Mr Poushin, a consultant colorectal surgeon (third defendant), on 12 November 2003 at the Hospital. Mr Poushin performed a flexible sigmoidoscopy on Dr O'Reilly and detected no abnormality in that part of Dr O'Reilly's colon that he examined. Specifically, Mr Poushin recorded in his contemporaneous Colonoscopy Report that "at the splenic flexure, the bowel was normal" and "the rest of the visualised bowel was [also] normal".[5]

In 2006, Dr O'Reilly returned to the Surgery complaining of abdominal pain, specifically "lower colicky pain" and "excessive wind".[6] On 5 April 2006, Dr O'Reilly was seen by Dr Shaw, who concluded that the likely cause for his pain was irritable bowel syndrome. On 21 April 2006, Dr O'Reilly was seen by Dr Wood who, after noting that Dr O'Reilly's flexible sigmoidoscopy in November 2003 was normal, also concluded that he was suffering from irritable bowel syndrome.[7]

On 26 July 2006, Dr O'Reilly collapsed at home and was taken by ambulance to the Accident and Emergency Department at the Hospital where he was examined and a number of investigations were undertaken. The investigations revealed "a large bowel obstruction in the area of the splenic flexure"[8] and Dr O'Reilly was operated on later that day by an upper gastro-intestinal surgeon, who performed an extended right hemicolectomy that showed

> … small volume ascites, multiple peritoneal and omental deposits, large secondaries in the liver, tumour plaque on the right diaphragm and small bowel caught up in the primary tumour.[9]

The excised tumour was examined and it was reported on 1 August 2006 that there "existed a 4 cm diameter moderately adenocarcinoma (a cancerous tumour) which had penetrated into the adjacent small bowel".[10] A CT scan was also performed, which revealed "multiple metastases scattered throughout Dr O'Reilly's liver".[11]

Dr O'Reilly's post-operative course was complicated and his physical condition did not improve sufficiently for him to receive chemotherapy to treat the cancer.

Dr O'Reilly subsequently passed away on 2 November 2006 and no post-mortem examination was carried out to determine the exact cause of his death.

The plaintiff's case

After Dr O'Reilly's death, Mrs O'Reilly moved to Australia with one of her children, Shane, who was severely disabled. In 2010, Mrs O'Reilly commenced proceedings in the Court on her own behalf and on behalf of her children.

In earlier proceedings,[12] the defendants' application to have the proceedings stayed was dismissed, with the Court rejecting the defendants' argument that the Court was a clearly inappropriate forum for the proceedings. Significant to the Court's decision was the fact that Mrs O'Reilly had insufficient funds to commence her proceedings in the United Kingdom where the alleged tortuous conduct took place and that she had to care for Shane, which meant that it was not feasible for her to return to the United Kingdom to commence and run the proceedings.[13] Accordingly, at the beginning of these proceedings, the parties agreed that the relevant law of negligence to be applied was the common law of England and Wales, which requires a plaintiff to prove the following elements:

(a) the defendants owed to the plaintiff a duty of care to avoid reasonably foreseeable injury;
(b) the defendants were in breach of that duty of care; and
(c) proof on the balance of probabilities that the breach of duty of care was a cause in law of the adverse consequences complained of by the plaintiff.[14]

The parties also agreed that s 1 of the Fatal Accidents Act 1976 (UK) (the Act) was the applicable legislation, which section states that:

> if death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action in damages, notwithstanding the death of the person injured.[15]

The plaintiff's case was that the three defendants were negligent, in short, because:

1. Mr Sen failed to order a colonoscopy instead of a flexible sigmoidoscopy to examine Dr O'Reilly's left colon;
2. Mr Poushin did not adequately examine the whole of Dr O'Reilly's left colon when he performed the flexible sigmoidoscopy; and
3. as a result of Mr Sen's and Mr Poushin's negligence, the tumour that was present at the splenic flexure at the time of the procedure was not located and subsequently caused or at least contributed to Dr O'Reilly's death.

There was no dispute that the first defendant, the Hospital, was the legal entity responsible for the second and third defendants in their treatment of Dr O'Reilly. The damages claimed by Mrs O'Reilly included compensation of relatives' damages under the Act and nervous shock damages. In response, the defendants denied they were in breach of their duty of care.

Analysis by the Court

The matter was heard before His Honour Justice Garling. To assist Garling J in determining the matters in dispute, expert evidence was provided to the Court by way of reports and a joint conclave.

There was no disagreement as to whether the defendants owed Dr O'Reilly a duty of care. The defendants admitted that the scope of their duty was to provide Dr O'Reilly with:

> … a standard of care that would be supposed as reasonable by a responsible body of peers practising in the United Kingdom in 2003.[16]

However, the defendants denied being in breach of this duty of care. Therefore, the first issue for Garling J to consider was whether the defendants had breached their duty of care as claimed by Mrs O'Reilly.

Breach of duty of care

Mr Sen

The plaintiff's case was that Mr Sen was negligent by not ordering a colonoscopy in light of his subjective intention to investigate the whole of Dr O'Reilly's left colon. This was because the plaintiff submitted that such an investigation could only be adequately performed by undertaking a colonoscopy and not a flexible sigmoidoscopy. In other words, the fact that Mr Sen did not order a colonoscopy was argued to give rise to a breach of his duty of care.

The Court accepted Mr Sen's evidence that his intention was to "examine the left colon, at the very least with the help of a flexible sigmoidoscopy"[17] that was to take place in a way that "exposed to the investigator the whole of the left colon, up to and including the visualisation of the splenic flexure".[18] Mr Sen's evidence in respect to why he ordered a flexible sigmoidoscopy (rather than a colonoscopy) was that in his experience, when doing flexible sigmoidoscopies, he reached "the splenic flexure all the time".[19] However, after considering expert evidence on the matter, Garling J found that, despite Mr Sen's confidence in his ability to perform the procedure, a flexible sigmoidoscopy "could not be a sure

enough way to achieve the end result which he wished"[20] because the procedure of flexible sigmoidoscopy "is not intended to examine the whole of the colon".[21]

The defendants also sought to rely on the Association of Coloproctology of Great Britain and Ireland Guidelines 2001 (the Guidelines) to demonstrate that Mr Sen had not breached his duty of care because ordering a flexible sigmoidoscopy in a patient with Dr O'Reilly's symptoms accorded with the Guidelines. The Guidelines state that "the majority of cancers in patients presenting with rectal bleeding or a change in bowel habit….can be diagnosed by flexible sigmoidoscopy".[22] However, Garling J found that the defendants' reliance on the Guidelines to justify the ordering of a flexible sigmoidoscopy was erroneous because of Mr Sen's intention to examine the whole of the left colon. Garling J's reasoning for this finding was that, if Mr Sen had only intended to examine such parts of the colon that could be reliably examined by a flexible sigmoidoscopy, then acting in accordance with the Guidelines, would have been reasonable. However, because Mr Sen had determined something more was necessary (ie, an examination of the whole left colon), he could not rely on the Guidelines because the approach set out in them could not achieve his intention. Accordingly, Garling J found that Mr Sen had breached his duty of care to Dr O'Reilly by not ordering a colonoscopy.[23]

Mr Poushin

The plaintiff's case was that Mr Poushin breached his duty of care to Dr O'Reilly because:

(a) he did not perform the flexible sigmoidoscopy with due care and skill and therefore failed to visualise Dr O'Reilly's splenic flexure; and

(b) that having failed to do so, Mr Poushin negligently failed to appreciate that his investigation was incomplete and thereby failed to refer Dr O'Reilly on for further investigation, namely a colonoscopy.[24]

Accordingly, the issue in dispute before Garling J was what part of the left colon Mr Poushin actually examined.

Garling J noted at the outset that His Honour found Mr Poushin's evidence to be "largely unreliable",[25] with His Honour unwilling to accept any of Mr Poushin's evidence unless it was corroborated or was against his own interest, noting that Mr Poushin was "an unsatisfactory witness".[26] Mr Poushin also gave evidence that his description of the procedure he performed was based on his usual practice at the Hospital as he could not remember the specific procedure. However, Garling J noted that there was an inconsistency with this statement because Mr Poushin had only commenced his position as a locum consultant colorectal surgeon at the Hospital two days before he performed Dr O'Reilly's procedure.

In his defence, Mr Poushin initially asserted that he examined Dr O'Reilly's left colon right up to the splenic flexure, relying on his contemporaneous Colonoscopy Report, which indicated his satisfaction that he had reached or else visualised the splenic flexure. However, the expert opinion considered that had Mr Poushin examined the whole colon, it was negligent of him to miss a 1 cm sized tumour[27] which was accepted by all parties to be present in November 2003.[28] Taking this expert opinion into account, the defendants, in final submissions, submitted that Garling J ought not reach this conclusion because in fact Mr Poushin had not reached the splenic flexure.

After considering the facts and the expert evidence, on the probabilities Garling J concluded that Mr Poushin had assumed that he had reached the splenic flexure when he had not.[29] Accordingly, Garling J found Mr Poushin was in breach of his duty of care because he should have examined the whole of Dr O'Reilly's left colon.[30] In other words, Mr Poushin should have realised that he had not reached the splenic flexure when he undertook the procedure and had he done so, he would have discovered the lesion that was present in Dr O'Reilly's bowel in November 2003.

Causation

Having found the defendants to be in breach of their duty of care to Dr O'Reilly, Garling J considered whether the defendants' breach caused Dr O'Reilly's death on 2 November 2006.

It was agreed by the parties that at the time when the flexible sigmoidoscopy was performed in November 2003, there was a lesion which was in the order of 0.7 mm to 1 cm in size in Dr O'Reilly's colon, at about the splenic flexure.[31] However, the defendants denied a causal connection between any act or omission of the defendants and Dr O'Reilly's death on the basis that he already had incurable cancer in June 2003 when he visited Dr Wood. The defendants further submitted that, even if the tumour was diagnosed in 2003 and Dr O'Reilly was treated with systematic chemotherapy, the probability was that Dr O'Reilly's "survival would have been substantially the same as it was".[32]

In order to establish causation, Garling J noted that the following questions needed to be resolved: the stage of the tumour in 2003, what treatment would have been offered to Dr O'Reilly and the likely outcome of that treatment.

There was considerable discussion between the experts as to whether or not the tumour had metastasized in November 2003, with the plaintiff submitting that it had

not and was benign and the defendants submitting, on the other hand, that it had metastasised and was malignant. After considering the expert evidence, Garling J was satisfied that in November 2003, at the time of the procedure, the tumour had metastasised, noting the agreed expert's opinion that "on the balance of probabilities in November 2003, there was a cancer which was incurable"[33] because it was malignant.

There was also disagreement between the parties as to the area in which the tumour had metastasised, however, the unanimous expert evidence was that in 2003, "there was likely to have been metastatic spread beyond the immediate region of the tumour".[34] Accordingly, Garling J was satisfied that, on the balance of probabilities, the likelihood was that the tumour had metastasised in November 2003 and had done so beyond the immediate region of the tumour.

In considering what treatment would have been offered to Dr O'Reilly and the likely outcome of that treatment, Garling J was satisfied that, had the tumour been detected in 2003, Dr O'Reilly would have had it removed along with parts of his lymph node system. In addition, Garling J was satisfied that such surgery planned in a non-emergency setting would, on the probabilities, have been uncomplicated and successful and that Dr O'Reilly would have completely recovered from the surgery in contrast to the unplanned emergency surgery that was performed on 26 July 2006, which Garling J noted "set in motion the decline on his health and wellbeing which was … a continuous progression downwards until his death".[35] Garling J also accepted that Dr O'Reilly would have agreed to and would have been treated with chemotherapy. However, the experts all agreed that, regardless of the surgery and chemotherapy, Dr O'Reilly would have eventually died as a consequence of his cancer.[36] Once again there was considerable debate as to how much longer Dr O'Reilly would have lived, with Garling J ultimately accepting that, on the balance of probabilities, Dr O'Reilly would probably have lived to the end of November 2008 (an additional two years).[37]

Accordingly, Garling J concluded that, had the defendants not been in breach of their duty of care and Dr O'Reilly had undergone surgery and appropriate treatment for his cancer, he would have had a longer period of life.[38] For this reason, Garling J found that the plaintiff had proved that the breaches of duty of the defendants had caused her a loss and she was entitled to recover damages for that loss.

Assessment of damages

Compensation of relatives

The plaintiff claimed compensation of relative damages under the Act, calculated on the basis of Dr O'Reilly having an ordinary life expectancy. However, because Garling J accepted that the tumour was already present and had metastasised in November 2003 and having found, on the balance of probabilities, that Dr O'Reilly would have lived for only another two years, His Honour was only prepared to award damages for this period. Garling J ordered that the parties were to calculate the relevant sum for the loss of dependency claim for the following heads of losses to be filed and served at a later date:

(a) loss of financial support in relation to Dr O'Reilly's capacity to earn income;
(b) loss of services provided to Shane, with Garling J noting that Dr O'Reilly was Shane's primary caregiver;
(c) loss of services provided to the family generally; and
(d) damages for bereavement in accordance with s 1A of the Act ($19,972).[39]

Psychiatric injury by way of nervous shock

Garling J found in favour of the defendants in relation to the plaintiff's claim for damages for personal injury by way of psychiatric injury. The primary reason for this was that the plaintiff's claim was statute barred under s 11 of the Limitation Act 1980 (UK) because the plaintiff's commencement of the proceedings was three years from the cause of action. While the plaintiff claimed that she suffered nervous shock in July 2006 when Dr O'Reilly collapsed at home, in all the circumstances presented during the proceedings, Garling J was not prepared to accept on the evidence before the Court that the plaintiff's date of knowledge of her cause of action was after 7 June 2008 (the date for which the proceedings needed to commence in order to not be statute barred).[40]

Having found that the plaintiff's claim was statute barred, in an excess of caution, Garling J went on to consider whether the claim would succeed if it was not outside the time limitations. In doing so, Garling J concluded that the claim had to fail because the plaintiff had not made out the requisite elements for the claim, being that for a duty of care in a claim for nervous shock to a secondary victim to succeed, there needs to be proximity between the event which led to the shock and the negligence of the defendant.[41] In relation to secondary victims, the term proximity is used "to mean physical proximity in time and space to an event".[42] In this case, Garling J accepted the defendants' submissions that the plaintiff's claim sought to extend or expand the ambit of liability in respect of claims for nervous shock by secondary victims beyond the control mechanisms established by UK case law which His Honour was not prepared to do.[43] It is interesting to note

that, in considering the plaintiff's claim, Garling J distinguished UK common law with the law in Australia, noting that if the tort had arisen in Australia and Australian law had applied, the result would in "all probability have been different".[44]

Finally, Garling J assessed damages in the event that His Honour was in error in reaching his findings above and that in fact, the plaintiff had succeeded. Being satisfied on the evidence that the plaintiff is "significantly psychiatrically disabled as a consequence of post-traumatic stress disorder, and a major depressive disorder"[45] Garling J stated that she would have been entitled to compensation by way of general damages being assessed in the sum of $437,290.[46]

Conclusion

This case illustrates how an Australian Court applied English common law and statute to consider the plaintiff's claim of medical negligence. Although this case concerns the application of English law, it provides guidance as to a court's reasoning in determining a medical negligence claim in a case where, if Australian law was applied, it is likely the same outcome would be reached in terms of establishing medical negligence. Of particular interest is the difference between English law and Australian law in deciding a psychiatric injury by way of nervous shock claim. As noted by Garling J, if the case had been heard in Australia, it is likely that the plaintiff would have succeeded because proximity is not necessarily a requirement for succeeding in such a claim.[47]

Anne Howard
Solicitor
Health Legal
anne.howard@healthlegal.com.au

Claudia Hirst
Legal Counsel
Health Legal
claudia.hirst@healthlegal.com.au

Footnotes

1. *O'Reilly v Western Sussex NHS Trust (No 6)* [2014] NSWSC 1824; BC201411329.
2. Above, n 1, at [32].
3. Above, n 1, at [34].
4. Above, n 1, at [41].
5. Above, n 1, at [58].
6. Above, n 1, at [75].
7. Above, n 1, at [75].
8. Above, n 1, at [80].
9. Above, n 1, at [80].
10. Above, n 1, at [81].
11. Above, n 1, at [82].
12. *O'Reilly v Western Sussex Hospitals NHS Trust* [2010] NSWSC 909; BC201006004.
13. For a report on this previous decision see A Lu and A Murn "Foreign torts and Australian courts — the "clearly inappropriate forum" test in a medical negligence context" (2012) 19(1) *Australian Health Law Bulletin* 9.
14. Above, n 1, at [142].
15. Above, n 1, at [149].
16. Above, n 1, at [156].
17. Above, n 1, at [44].
18. Above, n 1, at [201].
19. Above, n 1, at [228].
20. Above, n 1, at [242].
21. Above, n 1, at [132].
22. Above, n 1, at [174].
23. Above, n 1, at [263].
24. Above, n 1, at [164].
25. Above, n 1, at [268].
26. Above, n 1, at [270].
27. Above, n 1, at [286]–[287].
28. Above, n 1, at [315].
29. Above, n 1, at [318].
30. Above, n 1, at [319].
31. Above, n 1, at [321].
32. Above, n 1, at [159].
33. Above, n 1, at [348].
34. Above, n 1, at [366].
35. Above, n 1, at [106].
36. Above, n 1, at [379].
37. Above, n 1, at [396].
38. Above, n 1, at [398].
39. Above, n 1, at [407].
40. Above, n 1, at [490].
41. Above, n 1, at [492].
42. Above, n 1, at [492].
43. Above, n 1, at [504].
44. Above, n 1, at [506].
45. Above, n 1, at [526].
46. Above, n 1, at [527].
47. See for example Wrongs Act 1958 (Vic) s 73 states that the plaintiff is not entitled to recover damages for pure mental harm unless: the plaintiff witnessed, at the scene, at the scene, the victim being killed, injured or put in danger *or* the plaintiff is or was in a close relationship with the victim.