

Assault and battery claim against dentist who allegedly performed wholly unnecessary dental treatment with no therapeutic purpose — *White v Johnston*

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This case was an appeal from the decision of the New South Wales District Court in *Johnston v Dr Jasmin White's Dental Surgery Pty Ltd*.¹ In this case, Ms White successfully appealed the primary judge's finding that she carried out treatment that was ineffective with no therapeutic purpose and which amounted to assault and battery. Ms White was also successful in challenging the awarded exemplary damages of \$150,000. The New South Wales Court of Appeal ordered a retrial.

Background

Ms Johnston, aged 78 at the time of the trial, attended Ms White's dental surgery on numerous occasions² between June and December 2009 for the purposes of receiving dental treatment. This included filling her lower canine and molar teeth, which were affected by decay.³ During the course of these treatments, Ms White also built up Ms Johnston's front bottom teeth, which caused her upper plate to crack because of the pressure from the overbuilt front bottom teeth.⁴

Ms Johnston subsequently commenced proceedings against Ms White, alleging that the dental treatment to her front bottom teeth was "unnecessary and ineffective" and known to be so by Ms White.⁵ It was also alleged that Ms White had not obtained consent from Ms Johnston to building up her front bottom teeth, and that both of these treatments amounted to trespass. In addition, Ms Johnston alleged that the dental treatment was negligent and as a result she sustained injuries, those being damage to her teeth and shock, pain and suffering.⁶

First instance decision

The primary judge found that Ms White carried out treatment "that was totally unnecessary"⁷ and that the treatment was carried out solely for the purpose of making money. The primary judge held that there was

no therapeutic purpose in performing the dental treatments and that Ms White had failed to establish that Ms Johnston had consented to the dental treatment.⁸

Compensatory damage in the sum of \$140,000 and exemplary damages in the sum of \$150,000 were awarded to Ms Johnston, with the primary judge regarding the case as comparable to *Dean v Phung*.⁹

Issues considered on appeal

Ms Johnston appealed on the bases that the evidence before the primary judge did not establish an absence of therapeutic purpose and that the exemplary damages awarded were excessive.

The first matter for the court to consider was the issue of consent.

Consent

As a starting point the court noted that "consent is vital lest medical treatment be tortious and indeed criminal"¹⁰ and that "the law distinguishes between the negligent failure to adequately warn a patient who consents to treatment, and the fraudulent procurement of consent for a non-therapeutic purpose".¹¹ However, the court did acknowledge that it is well established that "conduct may be rendered tortious depending upon whether the defendant's purpose is outside the plaintiff's permission", for the purpose of a civil claim in tort.¹² For example, consent may be vitiated where the medical practitioner's unrevealed purpose is solely non-therapeutic, with the court noting that this is coherent with the position of a trespasser to land.¹³ In addition, where treatment is presented to a patient as necessary, when in actual fact it does not constitute a therapeutic response to the patient's condition, consent will be vitiated.¹⁴ As a starting point the court noted that "consent is vital lest medical treatment be tortious and indeed criminal" and that "the law distinguishes between the negligent failure to adequately warn a patient who

consents to treatment, and the fraudulent procurement of consent for a non-therapeutic purpose”. However, the court did acknowledge that it is well established that “conduct may be rendered tortious depending upon whether the defendant’s purpose is outside the plaintiff’s permission”, for the purpose of a civil claim in tort. For example, consent may be vitiated where the medical practitioner’s unrevealed purpose is solely non-therapeutic, with the court noting that this is coherent with the position of a trespasser to land. In addition, where treatment is presented to a patient as necessary, when in actual fact it does not constitute a therapeutic response to the patient’s condition, consent will be vitiated.

However, the court ultimately held that the evidence did not support a finding that the dental work performed by Ms White was wholly unnecessary and exclusively for a non-therapeutic purpose. Relevantly, this was because:

- there was no dispute at trial that Ms White gave consent (either by words or conduct) to fillings and the build up of her lower incisors;¹⁵
- no evidence was tendered by Ms Johnston that the filling and building up of her teeth was incapable of constituting a therapeutic response to her dental condition;¹⁶
- no expert evidence was tendered that the treatments lacked clinical justification;¹⁷ and
- Ms Johnston gave evidence that some of the treatment was indeed necessary or requested by her.¹⁸

The court then went on to consider whether the primary judge’s finding could be supported by his Honour’s reliance on a reversal of the onus of proof. In considering this question the court stated that if fraud is pleaded in a consent case, the onus of proof remains with the patient unless there is clear evidence supportive of fraud in which case the burden lies with the medical practitioner.¹⁹ Turning to the facts of the case, the court held that the onus remained with Ms Johnston absent evidence that all of Ms White’s treatment was non-therapeutic.²⁰

The admission of “tendency evidence”

At trial, the evidence of fraud was supported in the primary judge’s view by evidence provided of Ms White charging for excessive procedures she did not perform.²¹ The primary judge admitted this evidence as “tendency evidence” as defined in the Evidence Act 1995 (NSW) on the basis it had significant probative value. However, the court found that this tendency evidence did not support the claim that Ms Johnston’s treatment was

performed for a non-therapeutic purpose; rather, it could only support a claim that work charged was not performed.²² Accordingly, the court considered this tendency evidence inadmissible.

Award of exemplary damages

The court noted that because it had decided that the primary judge’s decision should be set aside, the question of the appropriateness of the damages did not arise on appeal. However, in an excess of caution, the court went on to consider this issue.

Section 3B of the Civil Liability Act 2002 (NSW) has the effect of displacing the exclusion of exemplary damages in the Civil Liability Act (NSW) if the proceeding involves liability arising from an intentional act that is done with intent to cause injury or death. The court commented that the primary judge “appear[ed] to have proceeded on the basis that any intentional tort was sufficient”.²³ However, for the reasons set out above, the court held that the evidence did not sustain any implicit finding that Ms White intended to cause injury.

Turning to the actual award of exemplary damages, the court stated that as a well-settled point of law, it is necessary to determine compensatory damages (including aggravated damages) before deciding whether or not a further award of exemplary damages is warranted and, if so, its amount.²⁴ In this case, the primary judge determined exemplary damages before determining aggravated damages, which the court plainly stated, was wrong.²⁵ In addition the court held that the trial judge erred in his approach to the assessment of exemplary damages by relying on a purported similarity between the facts in the case and *Dean v Phung*. In *Dean v Phung* the court found that a dentist performed “an extraordinary number of treatments for no particular purpose” and awarded \$150,000 in exemplary damages.²⁶ In this case, the court noted that the expert evidence went “no higher than that Ms White was negligent and that some of the invoiced treatments had not been carried out”²⁷ and accordingly, the primary judge had made “a material error of fact in regarding *Dean v Phung* as relevantly comparable”²⁸ for the purposes of awarding exemplary damages.

Accordingly, the court held that even if the appeal had not failed, the court would have set aside the award of exemplary damages.

Orders

On the basis of the findings set out above, the court allowed the appeal and set aside the judgement. The matter was remitted to the District Court for retrial, confined to the question of negligence.²⁹ In addition, the court ordered Ms Johnston to pay Ms White’s costs of the appeal.



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Footnotes

1. *Johnston v Dr Jasmin White's Dental Surgery Pty Ltd (in liq)* [2013] NSWDC 127.
2. Evidence tendered by Ms Johnston in the form of an affidavit stated that her medical bills listed 102 dental procedures which were carried out over a six-month period, on 28 consultations. However, Ms Johnston submitted that she only saw Ms White on 10 or 11 consultations, see *White v Johnston* [2015] NSWCA 18; BC201500672 at [28].
3. Above, n 2, at [11].
4. Above, n 2, at [28].
5. Above, n 2, at [25].
6. Above, n 2, at [12].
7. Above, n 2, at [49].
8. Above, n 2, at headnote to judgment.
9. *Dean v Phung* [2012] NSWCA 223; BC201205508. In this case the court found that a dentist performed “an extraordinary number of treatments for no particular purpose” and awarded \$150,000 in exemplary damages.
10. Above, n 2, at [53], referring to statements of the ethical principle of “personal inviolability” as reiterated by the High Court of Australia in *Secretary, Department of Health and Community Services v JWB (Marion's Case)* (1992) 175 CLR 218 at 234; 106 ALR 385; 66 ALJR 300; 6 AJFL 97.
11. Above, n 2, at [62].
12. Above, n 2, at [69].
13. Above, n 2, at [72].
14. Above, n 2, at [73]. This is the test adopted by the majority in *Dean v Phung*.
15. Above, n 2, at [75].
16. Above, n 2, at [73].
17. Above, n 2, at [77].
18. Above, n 2, at [77].
19. Above, n 2, at [130].
20. Above, n 2, at [92].
21. Above, n 2, at [13]–[14].
22. Above, n 2, at [142].
23. Above, n 2, at [131].
24. Above, n 2, at [146].
25. Above, n 2, at [147].
26. Above, n 2, at [17].
27. Above, n 2, at [150].
28. Above, n 2, at [153].
29. Above, n 2, at [154].