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Recent Cases Update
Medical Negligence & Health Law

Welcome to our first edition for 2016.

Please click on the article titles below to be taken to a more detailed discussion of the facts and findings of each case on our website.

As always, we would love to hear your feedback, and would appreciate any suggestions that you may have of cases to be included in the next update.

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Medical Practitioners and Voluntary Euthanasia

Nitschke v Medical Board of Australia [2015] NTSC 39

Dr Philip Nitschke was a director of Exit International (a voluntary euthanasia organisation) and a registered medical practitioner. Nigel Brayley informed Dr Nitschke that he was 45 years old, that he was not terminally ill, that he had been suffering for about nine months, that he intended to take his own life in within two weeks, and that he will cc Dr Nitschke into his “final statement”. Dr Nitschke replied stating, "Thank you very much for your information, and I will be interested in your final statement". As planned, Mr Brayley committed suicide by consuming the lethal substance called Nembutal. Shortly after this story was publicised on national television, Dr Nitschke’s registration was suspended pursuant to section 156 of the *Health Practitioner Regulation National Law*. He appealed unsuccessfully to the Health Professional Review Tribunal (**the Tribunal**) and then to the Supreme Court of the Northern Territory.

Dr Nitschke’s appeal to the Supreme Court succeeded on the basis that:

- The Tribunal misconstrued the Code of Conduct for Doctors in Australia (**the Code**) in holding that it imposed an obligation on Dr Nitschke to promote or protect the health of Mr Brayley and to assess, treat or refer Mr Brayley in circumstances where Mr Brayley was not a patient of Dr Nitschke;

- In making the decision the Tribunal denied Dr Nitschke procedural fairness by expanding the conduct the subject of the application without giving Dr Nitschke a reasonable opportunity to respond in circumstances where the Board had deliberately confined its case; and

- The Tribunal erred in the construction of the Code by holding that advocacy regarding suicide and providing information to persons who might choose to end their own life was in breach of the Code.

Consent after Death

Ping Yuan v Da Yong Chen [2015] NSWSC 932

In *Ping Yuan v Da Yong Chen*, Da Yong Chen suddenly fell ill and required emergency surgery. Prior to going into surgery, he told his wife, Ping Yuan, that he wanted to have another child with her. Unfortunately, he did not regain consciousness after the surgery. The present case concerns Ms Yuan's ex-parte application seeking a declaration that Ms Yuan be able to consent on Mr Chen's behalf to the extraction and storage of his sperm. The preliminary issue was whether the extraction and storage constituted "treatment" pursuant to the *Guardianship Act 1987 (*NSW). Due to the urgent circumstances, the court granted the application. However, upon Mr Chen's death, new difficulties presented themselves in that the fertility clinic could not inseminate Ms Yuan with Mr Chen's sperm unless he had consented to its use after his death. This latter issue was set for determination at a later date. Watch this space…

Consent and Firmly Held Religious Beliefs

Hospital v T [2015] QSC 185

J was a seven and a half year old boy who suffered from liver disease and needed a liver transplant. J's condition was such that the transplant would likely cure him, whereas doing nothing would inevitably lead to his death. J's parents would not consent to a blood transfusion during the transplant on the basis that they were Jehovah's Witnesses. J's treating hospital made an application for a declaration that it be authorised to administer J blood during the liver transplant.

The court emphasised that its primary concern is the interests of the child. The court had to balance different considerations, including religious beliefs, in making its decision. However, in this case, the sanctity of a child's life was the more powerful consideration and therefore the hospital's application for a declaration that it be authorised to administer J blood during the liver transplant was granted.

Patients' Right to Plan their Reproductive Future

Waller v James [2015] NSWCA 232

Keeden Waller was conceived through in vitro fertilisation (IVF) to parents Deborah and Lawrence Waller, the appellants. Keeden was born with the anti-thrombin deficiency (ATD) gene which he inherited from his father. Whilst Mr and Mrs Waller were aware that Mr Waller suffered from ATD, they were unaware that it could be genetically inherited. Coincidentally, four days after his birth, Keeden suffered a cerebral sinovenous thrombosis (CSVT) (a type of stroke). The CSVT left Keeden severely disabled.

In the present case, Mr and Mrs Waller alleged that the doctor who coordinated the IVF, Dr Christopher James, deprived them of their 'right to plan their family and reproductive future'. As a result, they suffered loss and damage including the cost of raising Keeden.

The case was dismissed on the basis that Mr and Mrs Waller were willing to accept the general risks of pregnancy which included a small risk of CSVT or some other form of abnormality. Having been well established that Keeden's ATD was not causally related to his CSVT, and that it was his

CSVT that caused his severe disabilities, the court found that Mr and Mrs Waller failed to prove legal causation.

When Human Error Causes the Death of Not-for-Resuscitation Patients

Inquest into the death of Maria Dolores Coleiro

Maria Dolores Coleiro died on 22 September 2011 at Western Hospital in Victoria due to an inadvertent administration of ciprofloxacin intravenously rather than orally. A Not for Resuscitation (**NFR**) order was in place at the time of Ms Coleiro's death. The coroner assessed the circumstances surrounding Ms Coleiro's death and found that the intravenous administration of the oral drug was a simple human error which, in a hospital setting, is called an iatrogenic event. The case considered the status of an NFR order when there is an intervening iatrogenic event. Here, the iatrogenic event was not immediately recognised as the cause of Ms Coleiro's sudden deterioration. It was only realised after Ms Coleiro died. Further, the iatrogenic event could not be amended or treated, and was irreversible. Therefore, the NFR order remained valid and resuscitation would not have changed the fatal outcome for Ms Coleiro. Nevertheless, the case outlined the importance of caveating NFR orders properly, particularly the procedure to follow in iatrogenic events.

Tribunal's Discretion on Costs

Chaudhry v Medical Board of Australia [2015] QCAT 414

The Medical Board of Australia imposed conditions on Dr Muhammad Tahir Bashir Chaudhry's registration following notification that Dr Chaudhry had failed to check the 1,350 pathology reports in his holding file (an electronic file containing incoming mail) and that he thus placed patients in danger. Dr Chaudhry applied to the Queensland Civil and Administrative Tribunal (the equivalent of the State Administrative Tribunal in Western Australia) to set aside the Medical Board of Australia's decision to impose conditions on his registration. He was successful with his application. Dr Chaudhry then sought an order that the Board pay his costs of and incidental to the application.

It was found that the Medical Board of Australia failed to conduct an investigation of the matter in a timely and diligent manner. On that basis, and on the basis that Dr Chaudhry was successful on the review, the Tribunal found that Dr Chaudhry was entitled to an award of costs.

The Importance of Good Communication

Eastbury v Genea Limited (Formerly Known As Sydney Ivf Limited) [2015] NSWSC 1834

Mrs Eastbury gave birth to two boys both of whom were diagnosed with Fragile X Syndrome, a disease that resulted in both children suffering from significant speech and language delays, behavioural and language difficulties, and neuro-developmental and physical features of the syndrome. Mrs Eastbury had a family history of Fragile X Syndrome and her general practitioner, Dr Curtotti, referred her for genetic testing prior to falling pregnant. The tests were carried out by Genea Limited. However, due to a mistyping of Dr Curtotti's referral, Genea carried out the incorrect test – one which was incapable of determining whether Mrs Eastbury was a Fragile X carrier. Genea conveyed to Dr Curtotti that the results of the test were negative, without providing further

information. Dr Curtotti conveyed that information to Mrs Eastbury who, on reliance on the test results, decided to start a family.

Mr and Mrs Eastbury commenced legal proceedings against Genea which in turn sought indemnity and contribution from Dr Curtotti. In the present interlocutory proceedings, Mr and Mrs Eastbury sought the following orders:

- an order for leave to join Dr Curtotti as a second defendant to the proceedings;
- an order pursuant to section 60G(2) of the *Limitation Act 1969* (NSW) that the limitation period be extended to enable Mr and Mrs Eastbury to join Dr Curtotti to the legal proceedings;
- an order pursuant to section 82 of the *Civil Procedure Act 2005* (NSW) that Genea pay Mr and Mrs Eastbury damages sought to be recovered in the proceedings.

Mr and Mrs Eastbury were successful in their application on the basis that Dr Curtotti did not suffer any prejudice in being joined as a second defendant, and that the evidence indicated that Genea was negligent and that Mrs and Mrs Eastbury would probably recover substantial damages against Genea at trial.