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Medical Malpractice & Health Law News

May 2016

Welcome to our quarterly newsletter that brings you recent case updates and changes in health law.

HBA's specialist team, headed by partners Shannon Mony and Mark Birbeck, has been significantly bolstered since our last newsletter. We'd like to introduce you to Will Goodheart, Terri James and Phoebe Nicholls.

Will joined us after three years at DLA Piper where he gained expertise in medical negligence, professional indemnity and insurance law, working with complex claims, workers' compensation, large insurance companies and significant plaintiff claims. Will has worked with a degree of autonomy and has considerable direct exposure to clients in this challenging area of practice.

Terri brings a unique dimension to our team, having a background in nursing before working with top-tier law firms in both Perth and in London. Terri was a medical records analyst with Hogan Lovells in the UK, involved in a very large pharmaceutical, multi-product, liability claim for a couple of years. Back in Perth, Terri has worked in consultant/litigation roles with top-tier firms DLA Piper and Clayton Utz.

On the East coast, Associate Phoebe Nicholls brings six years' experience in litigation and dispute resolution, specifically four years acting exclusively in defence of medical malpractice claims and providing representation at coronial inquests.

This national team with a rare depth of experience means greater, more efficient service for clients, wherever you are. Read more about our team here.

We trust the articles below are interesting - please click on the titles for a more detailed discussion, Please give us any feedback, and do let us know of anything particular you'd like to hear about, we'll strive to include it next time.

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Application to terminate child's pregnancy approved

[Central Queensland Hospital and Health Service v Q [2016] QSC 89]

The Supreme Court of Queensland has recently approved an application in the *parens patriae* jurisdiction to authorise the termination of a 12 year old's nine week pregnancy.

Prior to the application, the child had seen a general practitioner, a social worker at the Central Queensland Hospital on several occasions, two specialist obstetricians, and a psychiatrist. All specialists involved in the child's treatment, along with her parents and the Department of Communities, Child Safety and Disability Services supported the decision to terminate the pregnancy.

The child gave evidence that she found the pregnancy "very stressful emotionally." She expressed that it caused her periods of emotional distress which caused her to run away from home, self-harm and attempt suicide on two occasions. Justice McMeekin was satisfied that the child had reached her own independent view of what she thought was the best decision to take.

Justice McMeekin balanced the risks associated with the procedures that used to terminate pregnancy (the use of medication and, if that fails, surgery). It was found that the use of medication carried very little risk of any harmful consequences. The risks associated with the surgery were found to be not insignificant but the chance of serious complications is small. Conversely, the potential mental health problems of not terminating were found to be significant and possibly lifelong.

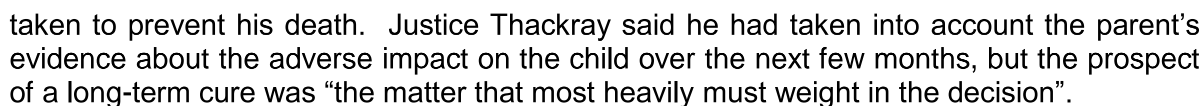
It was ultimately held that while termination of the child's pregnancy would carry some risks, those risks were far outweighed by the risks of continuing the pregnancy (including risks of self-harm and suicide as well as physical risks and the psycho-social implications of having a child at the age of 12).

Child ordered to undergo cancer treatment

[Director Clinical Services, Child and Adolescent Health Services and Kiszko & Anor [2016] FCWA 19]

The Family Court of Western Australia recently ordered that a six year old boy with a brain tumour undergo chemotherapy treatment after his parents refused to provide consent for him to do so. The treating doctor at the hospital initiated the application as he was concerned that the parents' failure to give consent for chemotherapy was not in the child's best interests. The medical evidence suggested that if combined chemotherapy and radiotherapy was given there was a 50 – 60% change the child would survive at 5 years.

The parents argued that they did not believe the chemotherapy treatment was in the child's best interests and said they had moved away from just wanting to delay the decision, to a position of actively rejecting chemotherapy. The child's mother said it was her intention to trial alternative therapies focussing on nutrition. Justice Thackray said the evidence made clear "beyond all doubt" that the child would die within a few months if measures were not



taken to prevent his death. Justice Thackray said he had taken into account the parent's evidence about the adverse impact on the child over the next few months, but the prospect of a long-term cure was "the matter that most heavily must weight in the decision".

In March the Family Court ordered that the child receive chemotherapy, and he was subsequently given two cycles of the treatment. Since then, the child's cancer has shown signs of receding, however the response is considered partial and not sufficient for chemotherapy to be effective on its own. The child's parents are still opposing radiation due to the long-term side effects, including reduced cognitive ability. The Family Court is now considering whether the child should also be given radiotherapy, as desired by his medical team.

When Mental Health Services Are Broken

The Alma Street Centre Inquest (Ref No: 15/15)

The Coroner's Court of Western Australia held a three week inquest to investigate a cluster of five patient deaths at the Alma Street Centre, all of which occurred during a one year period. The deaths, all as the result of suicide, were described as both predictable and preventable. The Coroner emphasised that in mental health care there is no room for complacency where suicide is the main cause of premature death in mental health patients.

The Coroner acknowledged that in all cases there was a breakdown of communication between the mental health service and the families and carers of the patient. At the material time the Mental Health Act (1996) offered little guidance for the requirements for carer involvement and access to information. Involvement of the families and carers in discharge planning, and utilising community programs, is paramount to decreasing the incidence of suicide.

The Coroner criticised the clinical judgement of the treating clinicians, but acknowledged the inadequacies of the mental health systems supporting them, within the hospital and community.

The provision of mental health services in Western Australia has improved since 2012. The Stokes Review has already addressed many of the issues identified by the Coroner, and many changes had already been implemented at the time of the inquest. The commencement of the Mental Health Act (2014), on 30 November 2015, has made it a requirement for the mental health providers to involve carers and family members in treatment and discharge planning and decisions. This provides an exemption to the patient's right to confidentiality.

Reporting on Incidental Findings

[Jacqueline Lee Freestone v Murrumbidgee Local Health District [2016] NSWDC 53]

This New South Wales case raises some interesting factual issues regarding the practice of radiologists including the need to report on incidental findings, the importance of having detailed notes of past clinical history and utilising appropriate, non-invasive tests to diagnose and report.

The plaintiff was admitted to Wagga Wagga Base Hospital on 2 January 2004 with abdominal symptoms. The plaintiff underwent a CT scan of her abdomen which diagnosed pancreatitis, for which she was subsequently treated and discharged home. The plaintiff was 19 years old at this time and had a history of Non-Hodgkins lymphoma affecting her right tonsil which had been cured 9 years earlier.

Several years later, the plaintiff began to experience urinary tract symptoms with increasing frequency. In June 2008, following review by her GP, she was referred for ultrasound and CT investigation which demonstrated a lesion in her left kidney which was biopsied and shown to be a nephrobastoma, "Wilm's tumour". The plaintiff consequently underwent a nephrectomy (removal of the kidney), chemotherapy and radiotherapy.

The plaintiff claimed that the defendant was negligent for failing to identify and report the renal mass in the CT scan of 2004 and to note its significance. The plaintiff claimed that she suffered physical and psychiatric injuries as a result of the delayed diagnosis. The case raised 3 main issues: the duty of care of the radiologist who reported the 2004 CT scan, the extent to which any delay in diagnosis was causative of the plaintiff's claimed loss and the assessment of damage.

Ultimately, His Honour accepted that the lesion shown in the 2008 scan was the same as depicted in the 2004 scan and would have been seen by the reporting radiologist in 2004. His Honour largely accepted the view of the plaintiff's expert that the lesion, an incidental finding which was a rare finding in a person such as the plaintiff, ought to have been reported on in 2004.

Guidelines for medical practitioners performing cosmetic medical and surgical procedures

The Medical Board of Australia has issued guidelines for medical practitioners who perform cosmetic medical and surgical procedures to compliment Good Medical Practice: A code of conduct for doctors in Australia.

The guidelines will take effect on 1 October 2016 to give medical practitioners time to comply with them. The guidelines provide explicit guidance on patient assessment and informed consent, and require doctors to provide clear information to consumers about risks and possible complications.

Restrictions relating to chiropractic advertising

The Chiropractic Board of Australia has recently issued a statement emphasising that chiropractors need to ensure that their advertising complies with the requirements of the National Law or they risk disciplinary consequences. The Chiropractic Board of Australia has provided clear instructions in relation to making claims where there is insufficient scientific evidence in support of those claims.

Disclaimer: This newsletter is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.