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Health Care Update

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IN THIS ISSUE

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Kerri Thomas

Editor-in-chief

Partner and national lead of the Sparke Helmore Health Care team

Welcome to the tenth issue of the Health Care Update. In this issue, we focus on new trends and challenges in the cosmetic surgery industry in Australia and abroad, including cautionary lessons from overseas, the current review of Australian regulation, and some recent court decisions from around the grounds. We also take you through a number of legal developments affecting healthcare practitioners, medical clinics and organisations, and insurers nationally and offshore, including a special update from New Zealand firm Duncan Cotterill (a fellow member of our Global Insurance Legal Connect network) on the Health M&A space in New Zealand.

These recent and current developments are covered off in the following articles:

- Cosmetic procedures: influencers, trends and a snapshot of the latest developments in Australia and abroad
- The "Wild West" of doctor rating websites: a cautionary tale
- International update: *Robinson v Liverpool Hospital & Dr Mercier* – could we see a similar decision here?
- NZ update from Duncan Cotterill: medical practice check-up vital to health of investment
- National update: cosmetic surgery review
- NSW update: prominent ENT surgeon has registration cancelled for at least one year
- VIC updates:
  - The sting of beauty: laser treatment and negligence, a rising trend.
  - *Psychology Board of Australia v Wilkinson*: VCAT costs ruling in favour of Board
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- ACT update: case note on *Austen v Tran* - delayed diagnosis case.

We hope you find this issue informative and useful. If there are any topics you would like us to cover in future, please contact Kerri Thomas.

COSMETIC PROCEDURES: INFLUENCERS, TRENDS AND A SNAPSHOT OF THE LATEST DEVELOPMENTS IN AUSTRALIA AND ABROAD

Author: Partner Mark Sainsbury

Cosmetic procedures – an increasing global industry with global trends

Cosmetic procedures range from invasive surgery such as rhinoplasty or a Brazilian Butt Lift (**BBL**) to minimally invasive Botox and lip filler injections to non invasive treatment such as intense pulse light treatment.

Globally the estimated spend on cosmetic procedures in 2021 ranges up to US$50 billion, with approximately US$15 billion spent in America alone. Global spend is estimated to increase to US$60 billion by 2028. Australians recently exceeded US$1 billion spend on minimally and non invasive cosmetic procedures.

Financial figures of this magnitude make the industry very attractive for both professional medical practitioners and less qualified individuals wishing to provide non invasive treatment. This has led to rapid expansion of the industry, which has caused problems for regulators globally to keep pace with developments in the industry and to adequately monitor and regulate practitioners and the methods they apply. In short, barriers to entry for non invasive treatment and regulatory oversight have been equally low.

> *"I would describe the cosmetic treatments industry as like the wild west, but without the sheriffs." Health regulation consultant – quoted in the Four Corners episode "Cosmetic Cowboys" from 25 October 2021.*

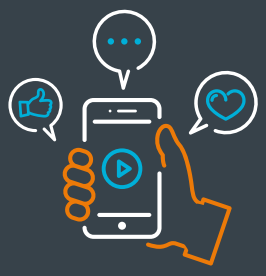
These circumstances have led to a large influx of companies and individuals wanting to obtain a share of the cosmetic procedure spend and unfortunately, this has caused problems in some jurisdictions and in respect of certain treatments.

The impact of social media and influencers on cosmetic procedures

The rapid global rise of this industry has paralleled, and been fuelled by, the equally voracious rise of social media. There are a number of studies that have demonstrated strong correlation between social media use and the desire of those users to undertake cosmetic surgery.

A study conducted by academics in the Department of Experimental Psychology at University College London and published in Current Psychology in April 2019[1] demonstrated that participants viewing images of females who have undergone cosmetic enhancements increased the desire of the young women participants for cosmetic surgery and in particular if the participants:

- spend a significant amount of time on social media
- follow multiple accounts, and
- are less satisfied with their appearance.



Given the targeted algorithms of social media applications, findings of this nature are not surprising. It is also obvious that outcomes of this type can be utilised by manufacturers, marketing companies and other entities to ensure susceptible social media users do in fact see a substantial number of images that may increase their desire for cosmetic procedures.

1 "Effects of social media use on desire for cosmetic surgery among young women" published online 30 April 2019 and in Current Psychology (2021) 40:3355-3364 by Candice E. Walker et al

A study published in January 2020 in the Journal of Clinical and Aesthetic Dermatology[2] reviewed Google Trends Data relating to interest in cosmetic procedures via online searching over Google and several social media platforms. The study showed that certain procedure related terms, specific procedures and brand names (such as facelift, Botox, Juvederm and Kybella) had an increased rate of popularity with respect to searching and in particular a correlation was shown between the Google searches and users of Instagram and Facebook that led to even greater searching from those individuals active on the social media apps.

More broadly, social media is having a variety of impacts. The recent rise of social media platforms such as TikTok and apps that allow filtering of images have been anecdotally related to particular cosmetic procedure trends, with a notable example occurring in China where a single social media influencer created a nationwide desire for cosmetic surgery to produce "pixie ears". Also in China:

- apps with filters have popularised "oversized eyes" as seen in anime characters leading to intense interest in cosmetic procedures that might produce such a result, and
- a hugely popular app analyses a user's face to identify flaws and then prescribes various cosmetic treatments to rectify those flaws.

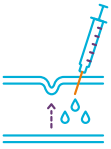
Conversely, a recent TikTok trend of celebrating unaltered noses of different types and ethnicities is said to have led to a decrease in interest in rhinoplasty procedures. Another notable and early example of social media influence may be connected to the Kardashians and the rise in popularity of the BBL procedure to enhance the size and shape of the buttocks. Social media is also said to have caused a significant increase in males undergoing cosmetic procedures.

There are also anecdotal discussions around the impact of COVID and the need to communicate via video conferencing leading to a dramatic increase in people having minimally or non invasive facial cosmetic procedures, due to the scrutiny they now receive when speaking to colleagues on close-up cameras.

Cosmetic procedures: the highs and the lows

However, the seemingly endless rise in popularity of cosmetic procedures has met some opposition of late with some of the less pleasant impacts of cosmetic procedures being discussed more broadly in the mainstream media, on social media and via research papers. This has included:

Acknowledgement of the mental illness of body dysmorphia disorder and the potential for cosmetic procedures to potentially worsen the condition.



The high death rate associated with BBL procedures that is reported to have been as high as 1:3,000, which results from arterial puncture when fat is being injected into the buttock region. An early study published in 2017[3] explained in detail the risks associated with the procedure and demonstrated safer techniques to avoid tearing in the gluteal vein and the entry of fat into the blood stream. The study also highlighted the significant number of complications and deaths that had arisen from the procedure.

More recently it was reported that the Florida Board of Medicine implemented emergency regulations to prevent plastic surgeons from performing more than three BBL surgeries per day so as to avoid fatigue and the complications that could arise from that.

There has also been a significant number of adverse consequences from what is termed "mega liposuction" procedures, where 10 litres or more of fat can be removed from a patient.

2 "Influence of Social Media on Cosmetic Procedure Interest" published January 2020 Vol 13 number 1 in Journal of Clinical and Aesthetic Dermatology by Zachary H. Hopkins et al

3 "Report on Mortality from Gluteal Fat Grafting: Recommendations from the ASERF Task Force" published online on 21 March 2017 in Aesthetic Surgery Journal 2017 Vol 37(7) 796-806 by Dr Mark Mofid et al

In addition to some of the research and social media commentary, the mainstream media in Australia has recently targeted the cosmetic surgery industry and, in particular, practitioners in that industry who have developed large social media profiles. These stories include:

Four Corners episode aired on 25 October 2021 entitled "Cosmetic Cowboys" relating to the rise of cosmetic procedures and focusing on certain cosmetic surgeons described as "social media stars".

A follow up Four Corners episode that aired on 18 July 2022 entitled "Facing Beauty: China's plastic surgery addiction", which showed the phenomenal rise of cosmetic surgery procedures both invasive and non invasive in China and the massive influence that social media has.

A 60 Minutes episode aired in June 2022 entitled "A Bad Look" and exposed the shameful social media antics of several plastic surgeons and focused on poor patient outcomes.

A follow-up 60 Minutes episode aired on 20 August 2022 cleverly titled "A ~~Bad~~ Worse Look", which presented further allegations against various practitioners and depicted a "billion dollar industry that is out of control".

Australian independent review of the cosmetic surgery sector

Given the adverse media reports and the huge number of patients undergoing cosmetic procedures, it is reasonable to conclude that a corresponding large number of complaints and claims have arisen from these treatments. Accordingly, it was not surprising that in November 2021 the Australian Health Practitioner Regulation Agency (**Ahpra**) and the Medical Board of Australia announced an independent review of the cosmetic surgery sector. The review commenced in January 2022 and has included a public consultation period that we understand has received a substantial number of submissions.

The intention of the review is to:

- Examine patient safety issues and how to strengthen risk based regulation of practitioners in the sector.
- Ensure the regulatory approach of Ahpra and the Medical Board of Australia keeps pace with changes in the sector.
- Make recommendations about actions that will better protect the public.

On 2 September 2022, it was announced by the Australian Health Minister, Mark Butler, that both he and his state counterparts have agreed to make legislative changes focusing on who can call themselves a cosmetic surgeon to ensure they are appropriately qualified, limiting surgery to proper accredited facilities and introducing new hygiene and safety standards. This follows the release on 1 September 2022 by Ahpra of the first review into patient safety which acknowledged that a profit driven culture in cosmetic surgery had led to dangerous practices. Mark Butler and the state health ministers have agreed to adopt all 16 recommendations from the review and have tasked the Australian Commission on Safety and Quality in Healthcare to create specific safety and hygiene standards for cosmetic surgery practices and limit surgery to properly accredited facilities. The ministers have also banned doctors using patient testimonials for cosmetic surgery including on social media. The Medical Board of Australia will act better to credentialise cosmetic surgery, limit use of testimonials and social media and report back to the ministers in two months.

We have reported on the review in previous articles and will provide a further update once the changes announced above have been implemented.

Key takeaways: what is the future of cosmetic surgery?

With respect to predicting the future of the cosmetic procedure industry, it is at least foreseeable in the short term that, in our opinion, the following is likely to occur.

- There will be increased regulation of entry to the industry, the participants performing treatments and the treatment methods and equipment.
- Plaintiff law firms will continue to pursue personal injury claims and, where possible, class actions for those persons adversely impacted by cosmetic procedures. This type of litigation will put pressure on practitioners, industry bodies, insurers, governments and regulators, and should drive change for the better and assist with reducing risk and removing those individuals from the industry that represent an uninsurable risk.
- Social media will continue to play a huge role in both promoting and increasing the desire for any amount of cosmetic procedures. However, it has also been shown to adversely impact the industry where trends move away from cosmetic procedures and/or social media users turn against a particular product or treatment provider and effectively act to "cancel" them.
- The monetary spend is predicted to continue rising and the minimally or non invasive procedure providers will continue to grow and no doubt create further treatment options that are perhaps less risky and/or have less side effects and therefore are more attractive to clients.
- The insurance industry will continue to play a vital role in providing insurance to treatment providers who qualify and therefore underpin the viability of the business by protecting those providers when accidents do occur and claims are made and ensuring those innocent claimants are able to access compensation.
- The cosmetic procedure industry has developed at an incredibly rapid pace and is a multi-billion-dollar industry globally. However, it has encountered some difficulties of late and will need to take steps to alleviate regulator and customer concerns to ensure that its strong growth and viable practice methods (underpinned by insurers) can continue.

THE 'WILD WEST' OF DOCTOR RATING WEBSITES: A CAUTIONARY TALE

Author: Partner Jehan Mata
Acknowledgment: Georgie Aidonopoulos

Nowadays, everyone has an online footprint. For a majority of the time, the internet is helpful to our day-to-day lives.

There is also the dark side of the internet where we have little control over what is posted about us online and even less control in getting the comments taken down. This is a serious issue for practitioners as it allows any previous patient, or even competitors, to publicly rate their experience with that practitioner. Nowadays, comments are mostly anonymous and there is a false sense of security that what you post cannot catch up to you. However, the recent case of *Colagrande v Kim* [2022] FCA 409 illustrates that not every anonymous comment will remain so.

Background

The judgment in *Colagrande v Kim* was handed down by the Federal Court of Australia on 21 April 2022. The Applicant, Dr Cesidio Colagrande, is a cosmetic surgeon located in the Gold Coast. He sought damages for defamation and an order restraining the Respondents from publishing further defamatory material along with costs and interest. The defamatory comment was made on the website RateMDs.

In order to contextualise the defamatory comment, it is important to understand that Dr Colagrande was previously convicted of indecent assault of a patient in February 2017 and that the conviction was quashed in June 2018. In December 2018, an anonymous comment was posted on Dr Colagrande's RateMDs profile stating:

> *"After what he did to me, I can't believe he is still practising".*

The comment linked to an article about Dr Colagrande's conviction, which had been quashed at this time.

RateMD is a website that allows patients to review and rate their experience with doctors. Importantly, a practitioner does not have a choice as to whether a RateMD page is created about them. **Patients can create a page for any practitioners** that they have seen and leave a review. Even if a practitioner does not want a RateMD profile, they cannot have the page removed unless it isn't a valid listing.

Prior to the defamatory comment being made, Dr Colagrande was "in control of his emotions and trying to get his life back on track" following the criminal proceedings. However, after reading the defamatory comment, he was "worried about the negative articles still published about him that misrepresented [him] as a sexual predator". Eventually on 2 June 2019, Dr Colagrande was diagnosed with post-traumatic stress disorder.

Following inquiries to ascertain who made the anonymous comment, the IP address was linked to Mr Min Sik Kim (First Respondent) and Mrs Anna Min (Second Respondent).

The Respondents were not the patient who previously accused Dr Colagrande of indecent assault, but another cosmetic surgeon who works in the Gold Coast. A cyber security expert gave evidence at the hearing that the Respondents were responsible for the comment. However, the Respondents denied being behind the defamatory comment during the trial.

The Court accepted that the Respondents were behind the defamatory comment and that the First Respondent "wished to harm the reputation of Dr Colagrande" and the Second Respondent "wished to assist the first respondent to achieve that malicious purpose".

Outcome

The Court found in favour of Dr Colagrande for general damages of $420,000, special damages for $31,511.29, costs and interests and a permanent injunction against the Respondents.

In order for defamation to be found, the comment must convey a defamatory meaning or imputation, the comment must identify the person and the writer of the comment must have published the material. The comment also needs to lower the reputation of the person in the eyes of others. Usually, it is difficult to quantify the loss of a defamatory comment. However, luckily for Dr Colagrande, he was able to satisfy the requirements.

The reason for the judgment was that Dr Colagrande was "profoundly hurt and distressed, indeed re-traumatised by the false review" and there was no dispute that the comment was defamatory.

The Respondents also continuously denied that they were the ones who posted the comment, which was viewed as an aggravating factor.

The damages awarded to Dr Colagrande are rather unusual as this is one of the rare defamation cases where the loss was able to be quantified. It was accepted that Dr Colagrande lost patients after they read the defamatory comment. Further, the damages acknowledged Dr Colagrande's compounded mental health issues.

Takeaways

This case has a rather narrow applicability as it involves a defamatory comment made by a competitor with the intention to generate more business for themselves. Therefore, the case will likely be applied in the future in relation to defamatory comments made by professionals in the same field as opposed to defamatory comments made by former patients.

Furthermore, it is also a case where quantifiable loss was able to be shown. This was on account of the evidence provided by multiple prospective patients who, following reading the comment, decided not to proceed with booking an appointment with Dr Colagrande. Usually, it is difficult to quantify the loss of a defamatory comment, especially a comment made online. However, this case illustrates that measurable loss may be shown through testimonies of prospective patients who decided not to see a certain practitioner due to defamatory online comments.

Overall, the internet enables practitioners to be the subject of good and bad reviews. It is also not possible to remove oneself from the internet in order to prevent possible bad reviews.

As a result, the internet appears to be a necessary evil and it is usually extremely difficult to get a comment taken down once it is posted, even if a practitioner believes it to be defamatory.

In order to tame the 'Wild West' of the internet and doctor rating websites, there would likely need to be new legislation that would hold the 'middlemen' (i.e. the social media platforms such as RateMD) accountable. However, until this occurs, practitioners need to be cognisant that their entire practice is open to online scrutiny.

INTERNATIONAL UPDATE

ROBINSON v LIVERPOOL HOSPITAL & DR MERCIER – COULD WE SEE A SIMILAR DECISION HERE?

Author: Partner Kerri Thomas
Acknowledgment: Georgia Mineo

Stick to your knitting: expert witnesses and their duty to assist on matters within their expertise

In the recent UK decision of *R v Liverpool v Mercier*, the Liverpool County Court ordered a third-party costs order against an "expert" witness, Dr Chris Mercier, totalling almost AUS$100,000. The Plaintiff's (**Ms Robinson**) claim for dental negligence brought against the Defendant Hospital Trust (the **Trust**) for dental treatment received at Aintree Hospital, rested solely on the expert evidence of Dr Mercier. Despite Dr Mercier believing that he was well suited to comment on the case and that he acted properly and consistently with the duty he owed the Court it was found that he was not an appropriate witness and should not have given evidence.

Ms Robinson's claim related to three decayed molars identified in 2015 by her general dental practitioner. By way of emergency surgery, Ms Robinson had one molar removed that same year, however the three troublesome molars remained untouched. A referral was written for the extraction of her lower molars. It was incorrectly noted that Ms Robinson's UL7 molar had been removed.

On 8 November 2016, Ms Robinson attended for the removal of those two lower molars. The Oral and Maxillofacial Surgeon, Mr Bajwa, erroneously had before him, and relied upon the 2015 referral instead of the 2016 referral. Mr Bajwa removed the lower molars and left UL7. He opined that it was restorable and that the description of it in his paperwork did not match the appearance in situ.

The key issues in dispute that required expert opinion were whether a reasonable *dental surgeon* would have concluded UL7 was restorable, and whether pre-operation screening was adequate.

The duties imposed on expert witnesses in the United Kingdom are very similar to Australia in that it is clear that the duty of experts is to assist the Court on matters **within their expertise**. This was the fundamental issue (and problem) with Dr Mercier's evidence. The Trust asserted that as a General Dental Practitioner, Dr Mercier should not have been expressing an expert opinion on the standard of care afforded to Ms Robinson by an Oral and Maxillofacial Surgeon. Significantly, Dr Mercier:

- admitted to having no experience since 2000 in the surgical removal of teeth under General Anaesthetic
- admitted to having no experience in approximately 20 years in consenting patients for the extraction of teeth under General Anaesthetic, and
- conceded that Mr Keith Webster, a Maxillofacial Surgeon working in a hospital, was "better placed" than he was to give expert evidence in this case.

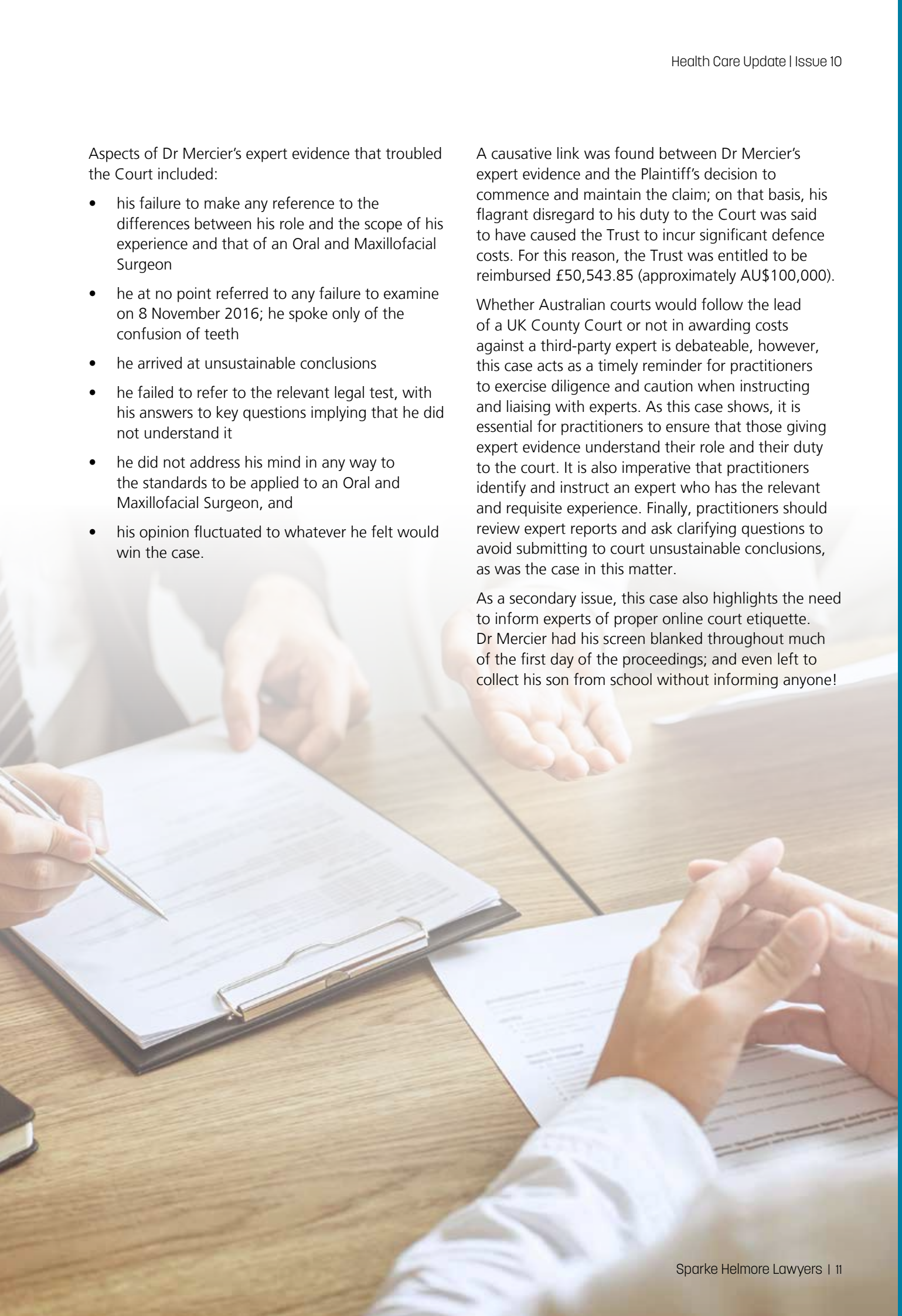
Aspects of Dr Mercier's expert evidence that troubled the Court included:

- his failure to make any reference to the differences between his role and the scope of his experience and that of an Oral and Maxillofacial Surgeon
- he at no point referred to any failure to examine on 8 November 2016; he spoke only of the confusion of teeth
- he arrived at unsustainable conclusions
- he failed to refer to the relevant legal test, with his answers to key questions implying that he did not understand it
- he did not address his mind in any way to the standards to be applied to an Oral and Maxillofacial Surgeon, and
- his opinion fluctuated to whatever he felt would win the case.

A causative link was found between Dr Mercier's expert evidence and the Plaintiff's decision to commence and maintain the claim; on that basis, his flagrant disregard to his duty to the Court was said to have caused the Trust to incur significant defence costs. For this reason, the Trust was entitled to be reimbursed £50,543.85 (approximately AU$100,000).

Whether Australian courts would follow the lead of a UK County Court or not in awarding costs against a third-party expert is debateable, however, this case acts as a timely reminder for practitioners to exercise diligence and caution when instructing and liaising with experts. As this case shows, it is essential for practitioners to ensure that those giving expert evidence understand their role and their duty to the court. It is also imperative that practitioners identify and instruct an expert who has the relevant and requisite experience. Finally, practitioners should review expert reports and ask clarifying questions to avoid submitting to court unsustainable conclusions, as was the case in this matter.

As a secondary issue, this case also highlights the need to inform experts of proper online court etiquette. Dr Mercier had his screen blanked throughout much of the first day of the proceedings; and even left to collect his son from school without informing anyone!



Duncan Cotterill

NEW ZEALAND

MEDICAL PRACTICE CHECK-UP VITAL TO HEALTH OF INVESTMENT

Author: Partner Ron Arieli

Despite widely-reported economic pressure on New Zealand businesses, the rapidly changing healthcare sector is still a hot space for investment.

Private equity firms, in particular, are acquiring specialist medical practices such as radiology and fertility clinics—businesses that are seen as attractive investments with strong, dependable cash flows backed by government and insurance funding.

Longer-term trends that are changing the healthcare sector include New Zealand's ageing population, a rise in chronic diseases, and the emergence of more sophisticated technology, which is digitising the delivery of healthcare services. This is increasing public demand for online consultation services and changing the way that medications are delivered to patients.

In order to keep pace with the competitive landscape and burgeoning health technologies, healthcare providers are increasingly partnering with private equity firms and corporates. This gives them greater access to capital and management expertise and also enables doctors to focus on what's most important—providing high-quality patient care.

We have identified some of the key trends we're currently seeing in the healthcare M&A space in New Zealand and what investors should consider when investing in a healthcare provider.

Finding the true value of a healthcare provider

In light of the current industry trends and defensive attributes of businesses in the medical space, valuation multiples have expanded recently. In addition, the profitability of a number of healthcare providers soared over lockdown as the need for medical services increased.

This presents challenges from a valuation perspective, as it requires profits to be adjusted to take the effects of COVID into account. The expansion in valuation multiples and "super profits" have often resulted in valuation gaps between vendors and purchasers.

For what it's worth–protect yourself

Valuation discrepancies between parties have resulted in earn-out arrangements becoming more prominent in transactions.

This has put into focus the importance of implementing clear and robust earn-out mechanisms in sale and purchase agreements. This can be achieved by setting objective and realistic earn-out targets, limiting the parties' ability to manipulate the financial performance of the business and implementing an appropriate dispute resolution mechanism.

An additional advantage of an earn-out from a purchaser's perspective is that it incentivises the vendor to remain involved in the business following completion of the deal in order to assist it to meet the agreed performance targets.

Ensuring patients stay enrolled

We're seeing a growing trend for vendor doctors to be required to remain working in the business for two to three years post-completion. This recognises the importance of ensuring continuity of care from a patient perspective. In some instances, contingency arrangements are negotiated by which a material part of the purchase price is paid to vendor doctors subject to their continuing employment with the practice post-completion.

Vendor doctors are typically subject to a broad restraint of trade to avoid the risk that patients and staff move with them if they establish, or work in, a competing practice. To avoid compromising the enforceability of restraints of trade, care must be taken when drafting them to ensure that the scope—especially in terms of geographical scope and time period—is no greater than what is reasonably required to protect the interests of the practice. They should also be supported by comprehensive confidentiality obligations to ensure that vendors can't use patient lists if they join a competing practice.

Factor in back-payments

Capitation funding increases in New Zealand haven't kept up with the rising costs faced by medical practices for a prolonged period of time.

In addition, the negotiation of the new Primary Health Care Multi-Employer Collective Agreement could see practices being required to make back-payments to affected nurses. This contingent liability should be considered as part of a purchaser's due diligence process and apportioned in the sale and purchase agreement.

A changing of the guard

Like many New Zealand businesses, healthcare providers are finding it difficult to recruit and retain staff.

This is particularly the case in the regions. With borders re-opening, junior staff are increasingly heading overseas. In response to this, we are seeing a greater appetite for medical practices to offer minority shareholdings to key staff in order to incentivise them to remain with the practice.

The current GP workforce shortages are compounded by an ageing cohort with an increasing proportion approaching or past retirement age. According to the 2020 General Practitioner Workforce Survey, half of the current GP workforce intends to retire within the next ten years. The proportion of specialist GPs intending to retire within the next two years has increased steadily year on year, rising from 4% in 2014 to 14% in 2020.

The rise of healthtech

We're seeing a marked increase in the digitalisation of the patient experience. Think virtual doctor services, patient health analytics technology, and the wide use of smart health devices.

These trends have accelerated over the last couple of years with COVID driving the implementation of technological innovations across all areas of healthcare. These rapidly changing technologies and ways of delivering health services are modernising the business models of medical practices, bringing a blended model of in-person and virtual care, which is likely here to stay.

The digital health landscape is becoming increasingly fragmented. Given the challenges of achieving scale and profitability in a crowded market, we expect to see healthtech companies combine their offerings through acquisitions and integrations. We also expect to see a significant level of private equity interest in healthtech companies given their long-term growth prospects.

Healthcare sector pressures present opportunity

New Zealand healthcare providers are currently facing the challenge of combating funding issues, increasing cost pressures and recruitment and retention issues. Despite this, we expect the healthcare sector to remain attractive from an M&A perspective by providing protection in economic downturns and access to strong growth prospects.

Disclaimer: The content of this article is general in nature and is not intended as a substitute for specific professional advice on any matter and should not be relied upon for that purpose.

NATIONAL

COSMETIC SURGERY REVIEW – AN UPDATE

Author: Partner Mark Doepel
Acknowledgment: Steven Canton

In our last edition of Health Matters, we reported that the Australian Health Practitioner Regulation Agency (**Ahpra**) and the Medical Board of Australia had commissioned a review of the regulation of health practitioners in cosmetic surgery. That independent review has now occurred and has resulted in 16 recommendations. Both Ahpra and the Medical Board have accepted all the recommendations and have begun taking steps to implement the changes.

The review

In mid-January 2022, the review formally commenced. On 14 January 2022, Ahpra published a list of 'frequently asked questions', which confirmed that the purpose of the review was to ensure the existing regulation and regulatory practices used by Ahpra and the relevant National Boards were appropriate in the context of the rapidly changing cosmetic surgery industry.

In March 2022, a consultation paper was published. The paper posed 31 questions, which focused on whether the current system and processes were adequate, or whether changes and improvements were either necessary or preferable. From 4 March 2022 to 14 April 2022, there was then a six-week public consultation process, during which 249 written responses were received as well as 595 survey responses.

The report and findings

On 1 September 2022, the final report was released to the public. The report makes 16 recommendations across four key areas being endorsement (i.e. the qualifications of practitioners), notification (i.e. complaints handling), advertising, and influencing practice (i.e. professional guidelines that mandate practice standards). Those recommendations can be summarised as follows:

1. Endorsement – establish an area of practice endorsement for cosmetic surgery, and then educate the public to understand the significance of the endorsement.
2. Notification – take steps to:
    a. improve the consumer experience when making complaints
    b. produce education materials around complaints, provide advice to consumers who have made notifications, and make clear the position regarding non-disclosure agreements

c. review materials and undertake a targeted campaign around voluntary and mandatory notifications

d. develop training and guidance material specifically about the management of cosmetic surgery notifications, and

e. map, with a view to improving, the roles, responsibilities and powers of each regulator.

3. Advertising – Ahrpa will obtain legal advice on the extent to which it can limit advertising of cosmetic surgery, and Ahpra and the Medical Board will:

   a. review its approach to advertising in the cosmetic surgery section

   b. revise guidelines on the standards expected, and

   c. consider the use of technology to assist in monitoring and auditing advertising in the sector.

4. Influencing Practice – the Medical Board will review its *Guidelines for medical practitioners who perform cosmetic medical and surgical procedures*, strengthen the guidelines where appropriate, take on a role in seeking to facilitate broader reform beyond its powers and responsibilities (with Ahrpa), and consider publishing periodic "lessons learnt".

Response from Ahpra and the Medical Council

In response to the report and the recommendations, both Ahpra and the Medical Council have indicated that they accept all 16 recommendations and will look to implement them. That process is expected to take 2-3 years. In addition, by way of a $4.5 million investment, Ahpra will also establish a Cosmetic Surgery Enforcement Unit to work with the Medical Council to assist in implementing the recommendations. This will include, in part, settling clearer standards, cracking down on advertising, and by tackling under-reporting.

NEW SOUTH WALES

PROMINENT ENT SURGEON HAS REGISTRATION CANCELLED FOR AT LEAST ONE YEAR

Author: Partner Mark Doepel
Acknowledgment: Steven Canton

Dr William Mooney (Dr Mooney) is an ear, nose and throat (ENT) surgeon, who was recently subject to disciplinary proceedings before the NSW Civil and Administrative Tribunal.[1] (Tribunal). The proceedings arose out of the death of two patients, a boundary violation, and associated issues with records, misleading testimony, and non-compliance with conditions.

In November 2021, there was initial "stage 1" hearing in which the Tribunal found Dr Mooney guilty of unsatisfactory professional conduct in respect of several complaints brought by the Health Care Complaints Commission. The Tribunal also decided that the findings of unsatisfactory professional conduct were serious enough, separately and all together, to also warrant a subsequent finding of professional misconduct.[2]

Having found Dr Mooney guilty in the stage 1 hearing on 29 and 31 March and 1 April 2022, there was a subsequent "stage 2" hearing in order to determine what protective orders should be imposed.

In reaching its decision, the Tribunal had regard to the events that had led to the disciplinary proceedings and to its findings of unsatisfactory professional conduct. This included:

a. An operation on patient A on 15 February 2018 to address his snoring. During the operation Dr Mooney noticed a little bleeding, which he thought he had stopped. However, two days later, patient A underwent emergency surgery for a recurrent haemorrhage, had a heart attack and later passed away.

b. An operation on patient B, during which Dr Mooney penetrated the bone below the brain and injured an artery. This caused bleeding into the right frontal lobe and patient B passed away.

c. That Dr Mooney inappropriately formed a personal relationship with patient C, had frequent telephone and text message communications with that patient over a two-year period, and also inappropriately prescribed Duromine (a weight loss medication) to patient C despite her having a long-standing eating disorder.

d. The inadequacy of records in relation to patients A, B, and C.

e. Misleading the Medical Council by downplaying the extent of his relationship with patient C.

f. Breaching a supervisory condition placed on his registration by not providing details of the proposed supervisor by a certain date.

g. Breaching conditions in relation to hair drug screening and then by misleading a Section 150 Inquiry as to why he breached those conditions.

[1] *Health Care Complaints Commission v Mooney* [2022] NSWCATOD 44
[2] *Health Care Complaints Commission v Mooney* [2021] NSWCATOD 206

The Tribunal subsequently considered a variety of evidence from Dr Mooney in relation to those complaints and how his practice had subsequently changed, before turning to legal principles and matters for consideration. The Tribunal considered:

a. the gravity of the conduct and that there were multiple departures from proper standards across a broad range of duties, over a lengthy period of time

b. that although Dr Mooney showed insight and remorse, this could not outweigh the conduct that had occurred

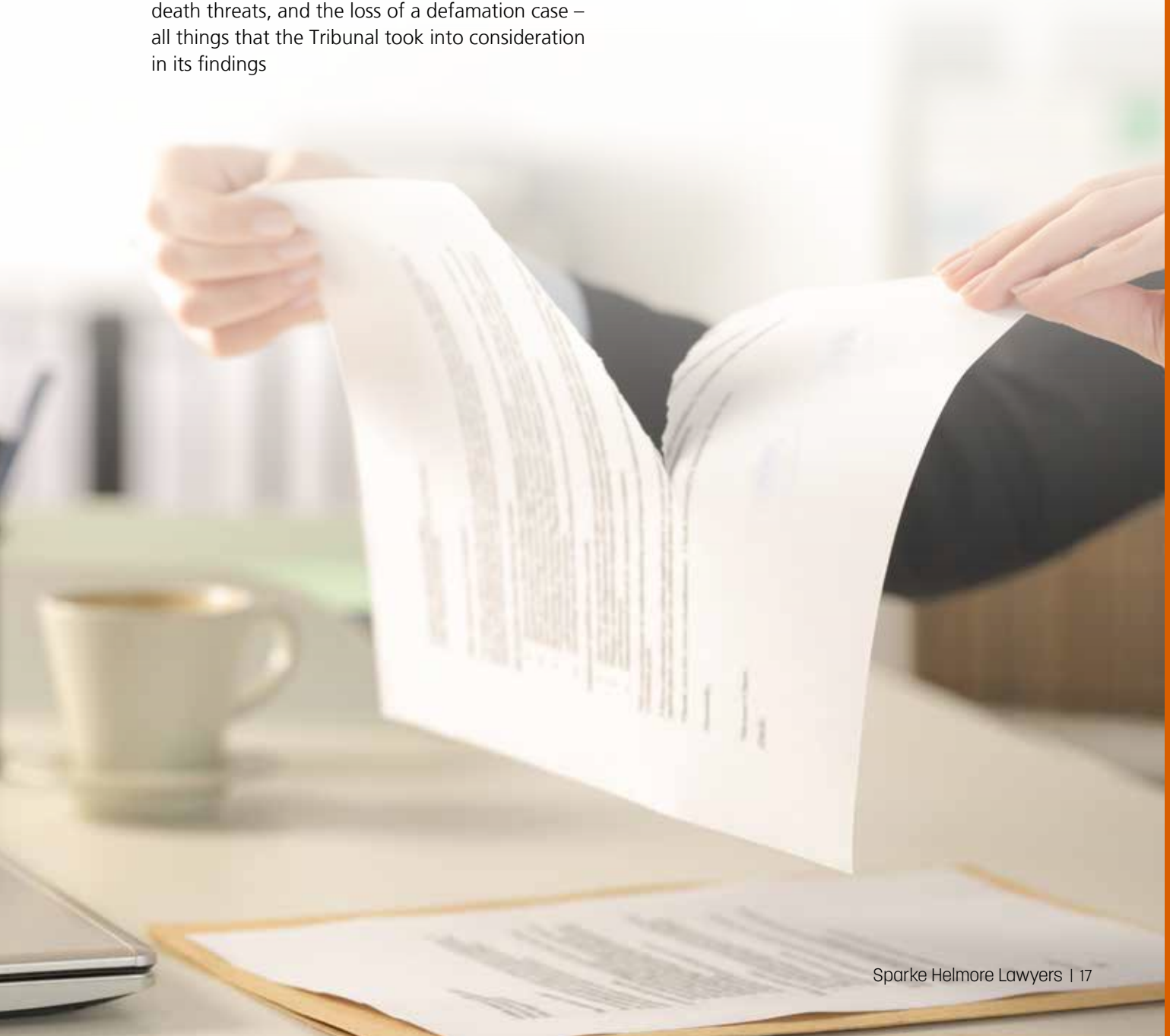
c. the stressors that Dr Mooney had been under including the separation from his wife and acrimonious Family Court proceedings, the impact of the deaths of patients A and B on him, adverse publicity and professional shaming and damage, death threats, and the loss of a defamation case – all things that the Tribunal took into consideration in its findings

d. whether the negative publicity around what had occurred was an extra curial punishment, which the Tribunal found had little weight on its determination

e. the need for deterrence against Dr Mooney's specific conduct and generally, and

f. Dr Mooney's specialist expertise, which he provided on a pro bono basis to underprivileged communities. However, the Tribunal found this was not of nature that would leave those communities without access to services.

Ultimately, having considered the nature of the complaints, and the matters outlined above, the Tribunal decided to cancel Dr Mooney's registration and prevent him from applying for a review of that cancellation for at least 12 months.



VICTORIA

THE STING OF BEAUTY: LASER TREATMENT AND NEGLIGENCE, A RISING TREND

Author: Partner Jehan Mata
Acknowledgment: Georgia Mineo

In 2022, the Victorian Court of Appeal dealt with the aftermath of a laser tattoo removal procedure gone wrong, where a woman was left with scarring on her forearms and subsequent psychiatric harm.

Burns, permanent disfigurement and skin discolouration are among the complications beginning to headline litigation trends in the area of laser treatments.

With laser treatments/technology advancing and becoming more easily accessible over the last few years—and noting that a large number of the services are not being provided by non-medical practitioners—it comes as no surprise that there has been an increase in the number of claims under negligence, breach of the Australian Consumer Laws and breach of contract.

The following case explores the legal consequences of laser treatments being performed by individuals with no formal medical training and with little to no specialist supervision. It also highlights the importance of expert testimony, client documents and the discovery process, as well as the benefits of having procedures in place for record keeping.

Facts and basis of claim

On 28 June 2017, Zeinab Daemolzekr (**Daemolzekr**) attended CDC Clinic Pty Ltd (**CDC Clinic**) to undergo laser treatment (**the treatment**) to remove tattoos from her forearms.

Daemolzekr had her initial consultation with Dr Shvetsova, however the treatment was performed by Ms Clow. Dr Shvetsova did not see Daemolzekr during or after the treatment.

Dr Shvetsova gave oral evidence about the initial consultation, recounting a general conversation about the risks involved in the procedure, including the possibility of blistering, scarring and incomplete removal of the ink. This was not entirely reflected in the doctor's clinical note.

Daemolzekr gave oral evidence, noting she informed Ms Clow during the treatment that she was in pain. Consequently, Ms Clow administered more numbing cream and at one stage allegedly told her, "we'll turn it up" to reduce the number of sessions needed.

On 1 July 2017, Daemolzekr attended the Wantirna Mall Clinic and was seen by a General Practitioner. The clinical note recorded Daemolzekr as having a "wound on her left forearm after laser removal of tattoo, which looks infected".

On 3 July 2017, Daemolzekr attended the CDC Clinic and was seen by Dr Shvetsova. It was noted that Daemolzekr complained of pain and a burn. The clinical note documented some erythema on treated areas, with no pus and minor swelling. Dr Shvetsova stated that this was nothing out of the ordinary. There was a subsequent consultation record completed by Nurse Thorn regarding the application of a new dressing.

While Nurse Thorn referred to user manuals and cheat sheets being used during the administration of treatment, no documents were ever produced.

From July to November 2017, and two occasions in 2018, Daemolzekr saw various GPs at the Wantirna Mall Clinic regarding the wounds on her forearms. The 2018 clinical notes state that there was scaring and referred to her being in a depressive state.

Although a referral was made for her to see plastic surgeon Dr Dhillon, she never attended. This was due to financial constraints and a fear of aggravating the wounds further by subsequent treatments.

In February 2019, Daemolzekr was finally assessed by a plastic surgeon, Mr Stapleton. He opined in his report that she had severe scarring as a result of the treatment and the degree of impairment was more than 5%.

While Ms Clow was not called as a witness, CDC Clinic tendered her clinical note of 28 June 2017. Importantly, this was done on day six of the trial, after the completion of other evidence.

The clinical note suggested that the machine was set at 4.2 joules per centimetres squared, which was a critical matter. If treatment was given in accordance with this setting, the experts agreed that burns would not have resulted.

However, there were discrepancies with the clinical note, namely the time of the treatment listed on the note conflicted with other evidence, suggesting it was not made contemporaneously; and a comment about the treatment being supervised was found to be misleading.

Daemolezekr relied upon the expert evidence of Dr Rish, a medical practitioner practising in cosmetic and laser medicine, with an interest in tattoo removal.

Dr Rish opined in his report that full thickness burns had been sustained as a result of inappropriately high fluence from the laser. He noted that Daemolezekr's photos showed overtreatment.

During his evidence-in-chief, Dr Rish gave evidence of what would happen with appropriate laser treatment, namely that skin should not break, it should settle within two-three days and be flat and that by one-week post treatment, the tattoo should look like it had not been treated at all.

CDC Clinic relied upon the expert evidence of Mr Holten, a plastic and reconstructive surgeon, who operates four clinics at which nurses conduct laser tattoo removals.

Unlike Dr Rish, Mr Holten opined that by day five, the burns should have been apparent, which they were not. He felt the infection had clearly caused the scarring, not the laser treatment. However, Mr Holten later refuted his initial finding, deciding the burns must have been caused by a secondary event.

Daemolezekr claimed the scarring that appeared was caused by the applicant's negligence in administering that treatment. Resolution of the case turned on what caused the scarring and whether the respondent was burnt by the treatment.

Procedural background

County Court

At first instance, his Honour preferred the expert evidence of Dr Rish to that of Mr Holten, where they were at odds. Dr Rish's evidence was found to be consistent, based upon his own experience performing laser tattoo removal, and fit well with the observations made and photographs taken following the treatment.

Of note the Court found that Mr Holten was not an impartial expert and appeared to assume it was his function to attribute legal responsibility.

His Honour found that Ms Clow's absence and having regard to the unusual circumstances in which it was found, he was not satisfied that it was contemporaneous or accurate. He also noted the lack of evidence of her training.

His Honour was not moved to draw any inference from the failure to call the GPs from the Wantirna Mall Clinic and Monash Medical Centre, noting that the clinical notes were thorough.

For these reasons, his Honour found that the scarring likely resulted from burns sustained during treatment at the CDC Clinic, during which too high a fluence was applied to the tattoos.

CDC Clinic was ordered to pay Daemolezekr damages fixed at $90,000, plus interest and indemnity costs.

Current proceedings

CDC Clinic sought leave to appeal, contending that his Honour erred in:

a. failing to draw any inference from the Daemolezekr's failure to call any medical practitioner from the clinic and hospital they attended post laser regarding the burns, and

b. in rejecting the contemporaneous note of Ms Clow.

Leave to appeal was refused. It was decided that in all the circumstances, his Honour made no error in finding that the scarring was caused by burns sustained during the laser treatment.

Key takeaways

This case demonstrates the importance of conducting a thorough investigation of documents when a claim is made.

The trial judge made mention of the lack of evidence relating to the training of staff at the clinic, the nurse's qualifications and any user manuals/guides that were used or available to be referred to when operating the machines. This emphasises the need to ensure proper training and supervision when undertaking such procedures.

For practitioners, this acts as a timely reminder of the importance of thorough record-keeping. It is imperative to make detailed, contemporaneous clinical notes; to provide (and document) a thorough overview of the risks of procedures to patients; to provide, obtain and document proper informed consent; and to keep records of the training of staff.

Finally, the case reinforces the importance of appropriately briefing experts and to ensure an expert's opinion is within its scope of expertise and does not spill over opining on legal principles.

VICTORIA

PSYCHOLOGY BOARD OF AUSTRALIA V WILKINSON (COSTS) (REVIEW AND REGULATION) [2022] VCAT 597–A COSTS RULING IN FAVOUR OF THE BOARD

Author: Partner Kerri Thomas
Acknowledgment: Shashi Silva

A recent decision in the Victorian Civil and Administrative Tribunal (VCAT) has shown a distinct move away from its traditional "no costs" attitude. In December 2020, Jeffrey Wilkinson (Mr Wilkinson), a psychologist, was found guilty of professional misconduct for failing to comply with conditions imposed on him by VCAT in a hearing in 2017. The Psychology Board of Australia (the Board) sought and obtained an order for costs in its favour.

The general rule on costs in VCAT is for each party to bear its own costs of the proceeding (s 109 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**)). However, in this case, VCAT ordered Mr Wilkinson to pay a portion of the Board's costs after consideration of s 195 of the *Health Practitioner Regulation National Law (Victoria)* (**National Law**), which states VCAT may order costs in health practitioner disciplinary matters, if it is considered 'appropriate'. In making this decision, VCAT found it was not constrained by s 109 of the VCAT Act.

VCAT considered it was 'appropriate' to award the Board with costs on the basis that:

- Mr Wilkinson re-ran an argument based on the *Privacy Act* that had already been rejected as 'spurious' at the hearing in 2017. The argument was raised after a compulsory conference and after the parties had filed an agreed statement setting out the facts, characterisation of conduct and proposed determinations.
- Mr Wilkinson was unrepresented and chose not to seek legal advice until the costs hearing.
- The above factors led to a 12-month delay in the original trial date, and further preparation and hearing costs for the Board in circumstances where Mr Wilkinson was not registered as a psychologist and was no longer contributing to the Board's costs via registration fees.

VCAT accepted that a fixed sum for costs was appropriate to avoid the expenses and delay of taxation. Mr Wilkinson's financial circumstances were also to be considered. An amount of $15,000 was ultimately awarded, being a portion of costs incurred by the Board after the original trial date (taking into account the County Court scale) and about half the Board's costs of the relevant application.

This decision shows VCAT's increasing tendency to award costs in health disciplinary matters based on the National Law, where traditionally no costs are awarded under the VCAT Act. Health practitioners and their representatives should be aware of this risk and keep this in mind when considering what arguments to pursue and when they are raised.

QUEENSLAND

REMOVAL OF BANS ON TESTIMONIALS IN CONNECTION WITH ADVERTISEMENTS FOR REGULATED HEALTH SERVICES

Author: Partner Mark Sainsbury
Acknowledgment: Emma Frylink

The *Health Practitioner Regulation National Law and Other Legislation Amendment Bill 2022* (**Bill**) intends to amend the Health Practitioner Regulation National Law (**National Law**). Among other proposed amendments, this Bill will remove the ban on the use of testimonials in advertisements of regulated health services and maximum penalties for breaching advertising restrictions would be increased twelvefold (12x). Recently, the Queensland Health and Environment Committee recommended that the legislation be passed, so it is likely this legislative amendment will occur in the near future.

The use of testimonials for the purpose of advertising a regulated health service or business that provides a regulated health service are currently prohibited under National Law. The Australian Health Practitioner Regulation Agency (**Ahpra**) guidelines indicate that "testimonials" are recommendations or positive statements about the clinical aspects of a regulated health service. This means that the types of testimonials that may be used to advertise health services are therefore currently limited to non-clinical aspects of treatment such as the nature of a clinic's customer service.

A breach of advertising provisions of the National Law constitutes a criminal offence and involves a penalty of up to $5,000 for an individual or up to $10,000 for a body corporate. The proposed amendments would see an increase of the maximum penalties by 12 times the previous amounts, to $60,000 for an individual and $120,000 for a body corporate.

The Bill, if passed, will remove this ban on testimonials. The rationale for the amendment is that the rise of social media in advertising generally has meant customers expect to be able to access details reviews and testimonials of both clinical and non-clinical aspects of treatment provided by a healthcare professional, as well as share their own views when purchasing health services. The proposed amendment will mean that testimonials are treated consistently with other forms of advertising under general consumer law.

However, the above changes may be limited by the very recent release of the Ahpra review of cosmetic surgery and the resulting decision by state ministers to ban doctors using patient testimonials for cosmetic surgery including on social media. The Medical Board of Australia also intends to take action over the use of testimonials and social media in relation to cosmetic procedures and report back to the ministers in two months.

QUEENSLAND

PERSONAL INJURY CLAIMS FARMING NOW BANNED IN QUEENSLAND.

Author: Partner Mark Sainsbury
Acknowledgment: Emma Frylink

The *Personal Injuries Proceedings and Other Legislation Amendment Act 2022* (**Act**) was passed on 22 June 2022 and prohibits "claim farming" for personal injury and workers compensation claims. Claims farming refers to the practice of businesses cold-calling potential claimants to influence them to make a claim. Claims farmers may harass individuals into making a claim with the promise of quick and easy compensation and then sell the individual's information to a legal practitioner or other claims manager to assess and prosecute the claim.

Similar laws passed in 2019 to amend the *Motor Accident Insurance Act 1994* (**MAIA**) to prevent claim farming for CTP claims is said to have resulted in a reduction in people being contacted by claims farmers. However, it has also been suggested that the MAIA amendment caused claims farmers to redirect their efforts into farming personal injury claims (particularly historical abuse cases) and workers compensation claims; this has led to the most recent amending Act.

Under the *Personal Injuries Proceedings Act 2002* (**PIPA**) and *Workers' Compensation Rehabilitation Act 2003* (**WCRA**), it is now an offence to approach or contact another person to solicit or induce them into making a claim. Additionally, giving or receiving a fee or some other benefit for a claim referral is now an offence. Both offences are punishable by a fine of up to $43,125.

Law Practice Certificates (**Certificate**), introduced with the 2019 MAIA amendments, are now also required for claims made pursuant to PIPA and WCRA. A Certificate, signed by the principal of the law firm representing the claimant and verified by statutory declaration, states that the law practice has not paid consideration for the claim referral nor induced the claimant to make the claim. For PIPA claims, a Certificate must be provided with a Part 1 Notice of Claim. For WCRA claims, the Certificate should be provided with a payment direction during the statutory phase of the claim, or as soon as practicable thereafter, otherwise with delivery of a Notice of Claim for Damages. The penalty for failing to provide a Certificate within the prescribed time limit or providing a false or misleading Certificate is punishable by a fine of up to $43,125.

These 2022 amendments seek to bring personal injury, workers compensation and CTP laws into alignment and eliminate the practice of claim farming.

It remains to be seen whether such actions might led to a decrease in claim numbers overall or, alternatively, perhaps innovative claims farmers may work to circumnavigate the new laws.

ACT

CASE NOTE: AUSTEN v TRAN - DELAYED DIAGNOSIS CASE

Author: Partner Kerri Thomas
Acknowledgment: Jeanine Wong

The Facts

The Plaintiff attended the Defendant's GP practice in October 2016 and July 2017. After a later consultation with a different GP, further medical investigations were requested and the Plaintiff was subsequently diagnosed with terminal non-Hodgkin's lymphoma in September 2017.

The Plaintiff brought a claim against the Defendant on the basis that a failure to take diagnostic steps prevented an earlier diagnosis and therefore an improved prognosis and life expectancy.

McWilliam AJ of the ACT Supreme Court heard the matter and was asked to consider whether:

a. on either consultation the Defendant breached the duty of care owed to the Plaintiff, and

b. any breach of duty caused the injuries and disabilities alleged and, if so, the quantum of damages as a result of the breach.

The first consultation

The first consultation took place on 16 October 2017 when the Plaintiff presented with leg pain that had persisted for eight days. The Defendant recorded that the pain was located in the Plaintiff's right leg and that the examination revealed no swelling, tenderness, redness, or back pain. He prescribed a moderate pain killer and referred her for blood tests. The blood test returned normal results, and the Defendant relied on the Plaintiff to return if her pain persisted.

Each of the parties obtained expert evidence as to the reasonableness of the Defendant's actions at this first consultation. Neither the Plaintiff nor the Defendant's experts thought that a GP would or should have reasonably contemplated non-Hodgkin's lymphoma as a potential diagnosis at that early stage, even with a more thorough examination. The experts didn't consider blood tests to be an inappropriate first step, and there was also evidence before the Court that suggested leg pain could subside over time and without treatment.

Both experts were however critical of the Defendant's record-keeping. It lacked detail, although ultimately this did not affect the outcome of the consultation. The Court therefore did not consider the significance of the poor record-keeping to be such that the Defendant had breached his duty of care.

Whilst there was no breach of duty, the Court found that the Defendant did not follow best practice. McWilliam AJ found that the GP had not sufficiently ensured the Plaintiff understood:

a. the blood tests were being ordered to rule out possible causes of pain

b. time was being used as a diagnostic tool

c. the Defendant expected to see improvement in the Plaintiff's symptom in a certain period of time, and

d. the Plaintiff was to return for further investigations if the pain did not improve.

After the first consultation, the Plaintiff was left without a diagnosis and a plan, and without a clear understanding that if her pain persisted, the Defendant would rely on the blood test results for additional investigation.

The second consultation

The second consultation took place nine months later in July 2017. The Court considered the second consultation to be a continuation of the Defendant's first consultation as well as another doctor's investigations in June 2017, which included requests for pathology.

The Plaintiff served a report from a specialist oncologist, who supported the contention that the Defendant breached his duty of care in relation to the second consultation by failing to urgently refer the Plaintiff to a specialist following the receipt of her pathology results. Opposing that view, the expert GP retained by the Defendant concluded that the results did not necessitate an urgent referral.

McWilliam AJ noted that the Plaintiff's expert had assessed the Defendant's conduct with hindsight, in seeking an opinion from a specialist oncologist. The Defendant was required only to be judged against the standard of a reasonably skilled GP, not a specialist oncologist.

The fact that a different doctor referred the Plaintiff for an MRI and to a specialist, shortly after the Defendant's second consultation, did not mean the Defendant's conduct failed to comply with reasonably competent practice. Her Honour accepted that the investigations first performed by the Defendant at the second consultation may have resulted in the MRI and specialist referral subsequently made by the second doctor, given the first set of investigations were no longer required. The Court accepted that the Defendant's second consultation in July 2017 was merely a step in the process and not a concluded investigation.

Accordingly, whilst the Court accepted that the Defendant did not investigate the Plaintiff's symptoms and complaints to the greatest possible extent, it concluded there was no breach of duty in either consultation by the doctor.

Although a breach of duty could not be established in relation to either consultation, the Court went on to consider the harm caused by the Defendant's conduct, had a breach been established. If a breach had been established in relation to the first consultation, the delay would have been from 17 October 2016 to 21 August 2017 (the date of the consultation with the second doctor at the Practice). If the breach was only established in relation to the second consultation, the delay would have been from 15 July 2017 (date of the second consultation) to 21 August 2017.

The Plaintiff's expert evidence suggested that her symptoms started shortly before the first consultation and continued to develop until her diagnosis. In the expert's view, it was likely that she had low grade lymphoma that transformed to high grade lymphoma by the time of the second consultation and that the cancer had most likely been progressing for 12 months. The Plaintiff's expert thought that if an earlier diagnosis had been made, it would have led to 'complete remission and therefore a long disease-free [period] or potentially cure'.

On the other hand, the Defendant's expert was of the view that the Plaintiff's symptoms related to the lymphoma were only likely to have been present for some weeks before the diagnosis, probably around the time of the second consultation, but more likely at the time of the consultation with the other doctor on 21 August 2017.

Had the Court accepted the Defendant's expert evidence and there had been a breach of duty at either consultation, there would have been no material consequence.

However, there was additional evidence including the records of four different specialists and three lay witnesses, which supported the Plaintiff's oral evidence that she had consistently complained of leg pain for over a year by the time of the second consultation. Her Honour therefore preferred the Plaintiff's expert evidence to the Defendant's and accepted that the Plaintiff had low grade lymphoma from at least October 2016, the time of the first consultation. Nonetheless, the Court did not think it was likely that she would have been referred to a specialist and obtained a PET scan earlier than June/July 2017 when the disease escalated, noting GPs could not order a PET scan and only a PET scan could have detected the low-grade lymphoma at that early stage.

Therefore, any breach by the Defendant at the first consultation would not have caused a delay in a diagnosis at the time, because the disease was in such an early stage that reasonable testing would not have been likely to identify it.

Her Honour's assessment of damages arising from any breach as a result of the second consultation assumed that, but for the Defendant's breach, the Plaintiff would have been referred for an MRI of the lumbar spine at the second consultation, and that MRI would have reported the same results as the MRI carried out on 1 September 2017.

On that basis, her Honour accepted that if a breach of duty could have been established at the second consultation, the Plaintiff would have gained a chance of a better outcome in terms of a longer period of remission. Her Honour accepted that a better outcome of an extra 12 months remission would have materialised, having considered the expert evidence before the Court.

The take aways

The case shows the importance of evaluating the evidence holistically, without a particular focus on any one individual expert or piece of evidence. The Court considered all of the parties' evidence in the context of all the contemporaneous notes and lay evidence before it.

The Court's analysis of causation also emphasised the need to look at the course of treatment provided by the Defendant; in order for the Plaintiff to succeed, she was required to establish a breach arising out of the second consultation, not only the first.

Pleading contributory negligence in medical negligence cases is always a vexed decision. Notably, in this case, the Court did emphasise the need for the Plaintiff to go back and seek further treatment if her symptoms did not resolve. Whilst it may seem a harsh burden for plaintiffs, only they are in a position to know if their pain remains, and this burden therefore needs to be balanced against what can reasonably be required of GPs who could see up to 40 to 45 patients per day and cannot be expected to follow up each and every patient they see.

As for the take-away for doctors, the importance of detailed and extensive notes was again driven home. However, in situations where this is not always possible, it would be good practice to have processes in place to minimise misunderstandings, such as confirming with patients as a matter of routine that they should return if their symptoms persist.

Why Sparke Helmore?

Our Sparke Helmore health care team is led by Partner Kerri Thomas and made up of other partners and senior lawyers who have extensive experience in both health and insurance law. With one of the largest insurance teams in Australia, we combine national scale with strong local insurance knowledge and expertise in each of our nine offices.

In the medical malpractice and health care facilities space, we advise a variety of domestic and international insureds, insurers, underwriting agencies and cover holders, including the London Market and Lloyd's syndicates. We have extensive experience advising medical defence organisations acting for hospitals, clinics, registered health practitioners and other medical service providers such as aesthetic clinics, radiology and pathology practices, medical practitioners, allied health professionals (psychologists, counsellors, beauty therapists, physiotherapists) clinical researchers and alternative therapists. We understand the often-complex relationships and issues that emerge between the practice and the medical providers.

Our team understands Australian Health Practitioner Regulation Agency (Ahpra) requirements, including on a state by state basis, and can assist your insureds with medical malpractice complaints, investigations, defamation and coronial inquires. In addition to defending litigated actions in courts and tribunals, our experience extends to representing health professionals and health facilities in regulatory and disciplinary hearings and coronial investigations.

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