

COMMON LAW PRACTICE UPDATE 17

Medical Negligence

In *Almario v Varipatis* (No. 2) [2012] NSWSC 1578, Campbell J extended time in which to sue and found for the plaintiff. The plaintiff is suffering from terminal liver cancer. It was argued that his general practitioner should have been more proactive in treating the early stages of liver disease by emphatically addressing the plaintiff's morbid obesity. The defendant had a particular interest in nutritional and environmental medicine, and it was argued that the GP wrongly represented to the plaintiff that his problems related to toxic exposure in the workplace.

Campbell J, quite independently of any advice from the defendant, found that the plaintiff developed the belief that many of his problems related to industrial toxin exposure. Significant parts of the plaintiff's evidence were rejected not because they were intentional falsehoods but because he was subjectively unreliable. Although the initial contact with the doctor related to toxic exposure, the relationship soon developed into the ordinary doctor/patient relationship.

When the plaintiff first saw his doctor he knew he was heavily obese with attendant complications of diabetes and hypertension. The defendant knew the plaintiff had fatty liver disease and diabetes with the possibility of cirrhosis and liver cancer. Those risks were reversible if the patient lost weight. Campbell J accepted that it was incumbent on a GP to do more than merely point out the risks and counsel weight loss. The alternatives were referral to a clinic, such as an obesity centre, or bariatric surgery. Campbell J was satisfied that a reasonable general practitioner would refer a patient in this plaintiff's position to a bariatric surgeon for consideration of surgery. It would be negligent not to do so. It was also negligent not to have referred him to a specialist in obesity management and assist in making an appropriate appointment. The plaintiff should also have been referred to a hepatologist or similarly qualified physician in relation to treatment of his liver condition.

The surgeons were in agreement that had the plaintiff successfully undergone bariatric surgery in time, it was more likely than not that he would have avoided progression to cirrhosis, liver failure and liver cancer. Campbell J was satisfied that had surgery been offered, it would have been accepted and he would then not have progressed to cirrhosis and liver cancer. However, because of the plaintiff's history of inability to maintain weight loss in the past, Campbell J thought that reference to an endocrinologist or even a specialised obesity clinic would have been unlikely to be successful. The plaintiff succeeded therefore on one ground only.

In regard to the known risk through obesity, Campbell J found contributory negligence to the extent of 20% in failing to adhere to the opportunities presented to lose weight.

Campbell J was satisfied that the plaintiff was not aware of the nature and extent of his injury, entitling him to an extension of time, given that he only received the diagnosis of liver cancer in 2011. In any event, he was unaware of the connection between his personal injury and the defendant's act or omission until he received legal advice in March 2012.

The assessment of damages was reduced both for severely diminished life expectancy and for some significant risk from the surgery which should have been undertaken. Damages of almost \$365,000 plus costs were awarded. It is understood that an appeal is likely.