CASE notes

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Court of Appeal upholds record nervous shock award

Hunter Area Health Service v Marchlewski [2000] NSWCA 294

The NSW Court of Appeal (Mason P, Stein JA, and Heydon JA) unanimously upheld a record general damages award for nervous shock in *Hunter Area Health Service v Marchlewski*.

The case (previously reported in Issue 29 of *Plaintiff*, October 1998, p.36) involved a neonatal death caused by a mismanaged shoulder dystocia delivery at John Hunter Hospital, Newcastle in October 1992. The Hunter Area Health Service, on behalf of the hospital, admitted negligence causing hypoxic brain damage which led to the death of the baby a month later and nervous shock to the parents.

At first instance Justice Dowd awarded Mr and Mrs Marchlewski general damages of $180,000 and $200,000 respectively. A further award of 20% of this was added for aggravated damages. The aggravated damages award arose in circumstances where the hospital implemented a "not for reventilation" order without the parents' consent and against their stated wishes that the baby continue to be given all available treatment.

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In addition to general damages and aggravated damages, claims were made for economic loss and the cost of treatment. The total verdict was $1,037,423.

The hospital appealed the decision claiming that, among other things, the general damages award was "manifestly excessive". Mason P, speaking for the Court, said that the award was "very substantial" but not "appealably high".

This decision should be welcomed by plaintiff lawyers who have long argued that emotional injuries, particularly those involving the death of children, have been undervalued.

One of the issues which attracted interest in the trial decision on *Marchlewski* was the recognition of the sensitivities required of health care providers in our multicultural society. The Court of Appeal also referred to this noting that "it is relevant that the wrong was done to a couple whose vulnerability was heightened by their language and cultural isolation."

The Court commented on the issue of comparative verdicts and was openly critical of the High Court's decision in *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118. That case directed trial judges and juries not to look to other cases for guidance in deciding appropriate damages awards. The Court took the view that *Planet Fisheries* hindered rather than aided judges in their quest for "the sound exercise of a sense of proportion" and consistency. The Court expressed a desire for the case to be reviewed by the High Court.

The hospital's appeal of the aggravated damages award was successful. Despite senior counsel for the hospital conceding that aggravated damages were available in negligence cases generally, the Court of Appeal doubted that this was the case. Importantly in *Marchlewski*, it was held that aggravated damages are not available in nervous shock cases at all.

The conduct of the hospital in implementing the "not for reventilation" order did cause further emotional damage but, bearing in mind that aggravated damages are meant to be compensatory, it was felt that this should be taken into consideration in arriving at the generous amount of general damages awarded in this case.

As for the "not for reventilation" order, the Court of Appeal recognised that the actions of the hospital opened the door to an examination of difficult legal, ethical and professional issues. Fortunately, having decided as a matter of law that aggravated damages are not available in nervous shock cases, these "dark waters" did not need to be entered by the Court.

The hospital's appeal on the award of economic loss for Mr Marchlewski was also allowed in part and the damages were reduced. In the result the adjusted verdict was for $750,344.

The Marchlewski's had offered to settle their claim in July 1996 for

$385,000. Justice Dowd awarded indemnity costs from that date. Even the adjusted verdict was far in excess of what the plaintiffs were prepared to accept.

The plaintiffs have taken the position that they are entitled to indemnity costs of the appeal as well, notwithstanding that the appeal was allowed, in part. Reliance is placed on the decision of *Ettingshousen v Australian Consolidated Press Limited* (1995) 38 NSWLR 404. The hospital is resisting an indemnity costs order relying on *Fotheringham v Fotheringham* (No 2) [1999] NSWCA 21. This is an important legal issue, especially from the point of view of plaintiff lawyers who seek to avoid prolonged and costly litigation by making reasonable settlement offers early. I will report once again with the outcome of the ruling on costs. PL

NSWCA declines to follow Victorian decision

Tiufino v Warland (2000) NSWCA 110

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The NSW Court of Appeal has declined to follow a 1996 decision of the Victorian Court of Appeal on an issue which arises from time to time and can be highly significant in motor vehicle personal injury litigation.

There had been a collision between motor vehicles driven by Mrs Tiufino and Miss Warland at an intersection at Belrose in 1993. Proceedings were brought in the Local Court by Miss Warland for property damage. The action was defended. After a full hearing, the Magistrate found that the accident was entirely the fault of Mrs Tiufino and that Miss Warland had not been guilty of contributory negligence.

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Mrs Tiufino subsequently brought proceedings in the Supreme Court against Miss Warland for damages for personal injury. Prior to the hearing of the proceedings in the Local Court, Mrs Tiufino applied to the Supreme Court to have the actions transferred to the Supreme Court or stayed until judgment was given in the Supreme Court. Dowd J refused this application. After the decision in the Local Court, Dowd J dismissed her action on the basis of issue estoppel.

The decision of Dowd J was upheld by the Court of Appeal (Mason P, Handley and Powell JJA). Handley JS, in the principal judgment, concluded that the Court should not follow the Victorian decision of *Linsley v Petrie* [1998] 1 VR 427, notwithstanding that the Court would ordinarily follow a decision of the Court of Appeal of Victoria.

A strong Victorian bench, including Hayne JA as he then was, had held that a prior finding in property damage proceedings was not binding in a subsequent personal injury action between the same parties. The NSW Court of Appeal found that this decision ran counter to many earlier authorities and dicta in the High Court of considerable persuasive weight.

Since *Linsley*, it had been assumed that an earlier decision in property damage proceedings on liability was not binding for the purposes of a subsequent personal injury action between the same parties.

Following the decision in *Tiufino v Warland*, it must be accepted that a property damage decision does give rise to an issue estoppel for later personal injury proceedings in New South Wales. The reverse is the case in Victoria.

There is no recent authority in the Australian Capital Territory and the issue is now one which will probably have to be ultimately resolved by the High Court to achieve uniformity in the common law in Australia. PL