BILL MADDEN, NSW

Evidentiary burdens, multiple causes and appeal principles

Diamond v Simpson (No. 3) [2003] NSWCA 373

This recent judgment of the New South Wales Court of Appeal provides us with a rare opportunity to examine a detailed decision in respect of a cerebral palsy medical negligence claim. The decision addresses causation issues in these most difficult cases and incorporates some helpful reminders on evidentiary burdens, multiple causes and appeal principles concerning expert evidence.

The plaintiff, Calandre Simpson, was born on 5 July 1979, her mother then coming under the care of Dr Robert Diamond for management of her labour, with the birth taking place at a hospital operated by the Trustees of Sisters of St Joseph.

Dr Diamond admitted liability at the trial, and so at first instance Whealy J was required to assess damages for the plaintiff's cerebral palsy as against the doctor, and also to consider a cross-claim for contribution by the doctor against the hospital.

In November 2001, after a trial lasting some 12 weeks, Whealy J entered a verdict against the doctor alone for some $14 million,[1] which was subsequently reduced on appeal[2] to about $11 million.

THE COURT

On this occasion, the New South Wales Court of Appeal consisted of Meagher JA, Ipp JA, and Young CJ (Equity). Young CJ wrote the sole judgment, with which the remainder of the court agreed.

Bill Madden is a Partner at Slater & Gordon in Sydney.
PHONE 02 8267 0600 **EMAIL** wmadden@slatergordon.com.au

CLAIM FOR CONTRIBUTION

At first instance, the hospital was not required to contribute to the verdict at all. Whealy J held that the hospital was negligent, but that such negligence did not cause the plaintiff's damage.

'I find that the plaintiff's injury was caused solely by Dr Diamond's negligent use of forceps. This, coupled with the fact that the instrumental attempts were made in the labour ward, induced an unremitting bradycardia[3] which continued until birth.'[4]

On appeal, the doctor argued that the cerebral palsy suffered by Ms Simpson had more than one cause. So on behalf of the doctor, a claim was made seeking from the hospital a somewhat arbitrary contribution of 50% towards the doctor's liability.

Whealy J had addressed this issue. He said that the excess dose of Syntocinon was clearly capable of producing hyper-stimulation as defined. Adopting the trial judges own words, the question for the Court of Appeal became, 'Did it?'

There was obviously the terminal bradycardia found at first instance, as a result of vagal interference caused by the use of forceps – the vagal[5] cause.

However, the doctor argued that there was an additional 'hypoxic[6] cause' arising from the hospital's negligence in administering an excessive dose of Syntocinon[7] which produced hyper-stimulation,[8] thereby using up the foetus's metabolic reserves.

'The appellant doctor says it is necessary to find another, an hypoxic cause, as well... Principally this is because he says normally a vagal interference with blood supply lasts only for a

very short period. The significance of the short period is that no lasting harm befalls the foetus as, when normal conditions are resumed, it quickly recovers. The doctor says that the hypoxic cause is the hospital's negligence in administering an excessive dose of Syntocinon which produced hyper-stimulation and so used up the foetus's metabolic reserves. The hospital denies that there is a need for a second cause in addition to the vagal cause and, further, denies that the excessive dose of Syntocinon was an additional cause of the terminal bradycardia.

'The hospital denies that it is necessary to find a second, a hypoxic cause, but further says that if one has to be found it is to be found in the occlusion of the cord by forceps. Both counsel told us that his Honour did not so find.'[9]

EXPERT EVIDENCE AND MULTIPLE CAUSES

The usual submission was put on behalf of the respondent as regards the advantageous position of the trial judge.

'In the present case, the 28 days of evidence, three days of submissions and the large number of exhibits, the oral evidence of expert witnesses occupying over 1500 pages of transcript, the learned trial judge was at a considerable advantage, and this court should not disturb his findings of fact unless they were not available on the evidence.'[10]

However, the argument went on to consider whether that doctrine applies equally to appellate consideration of expert evidence. The respondent submitted that the principle applied in the same way, however the court noted:

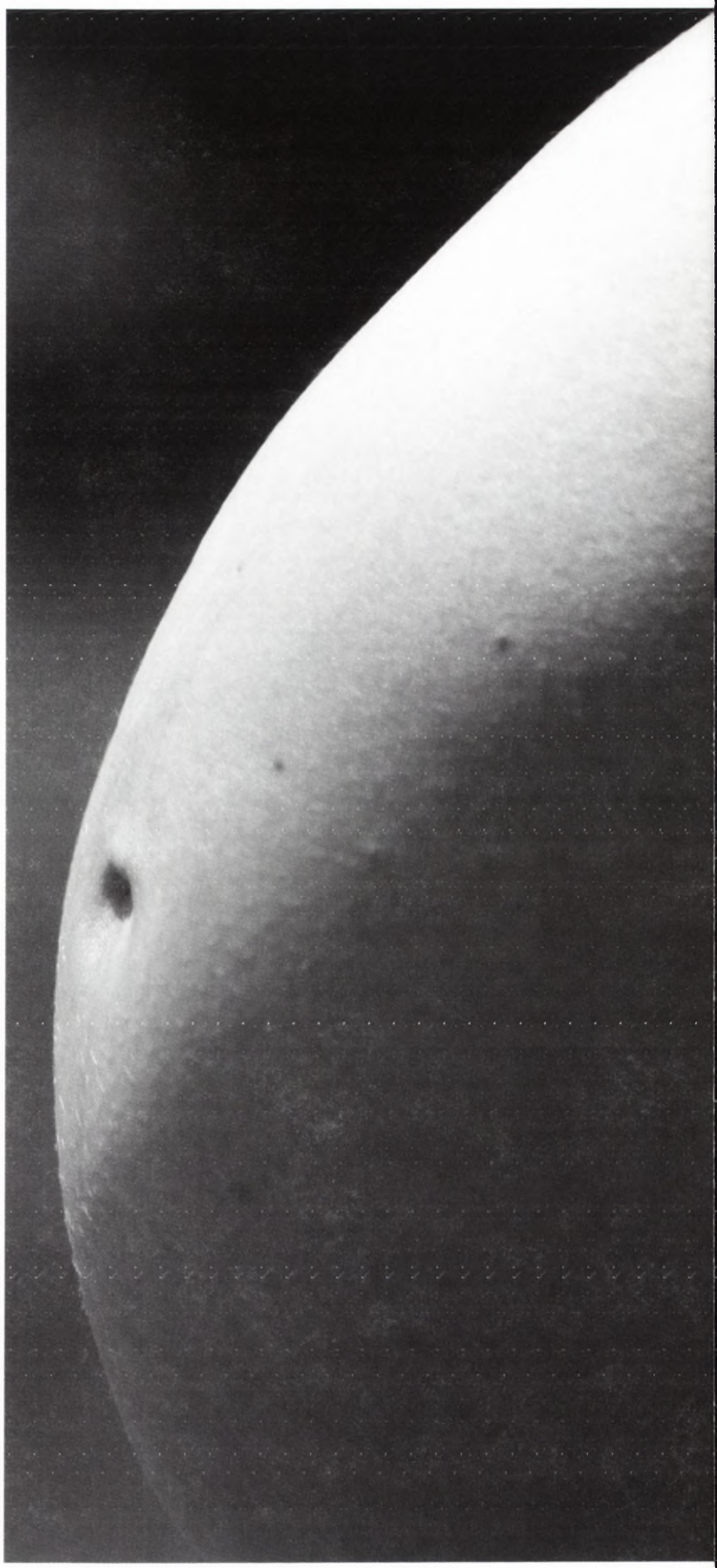
'The High Court has recently considered the matter again in *Fox v Percy*[11] and in *Shorey v P T Ltd.*[12] Kirby J, who gave the leading judgment, said it was unnecessary to consider whether "the judicial authority about disturbing evidence on the basis of assessments of credibility applies, or applies with the same strictness, in the case of expert witnesses where...the honesty of the witness is not in doubt and the issue for decision at trial is the acceptability of the witness's opinion, the extent of his or her experience in the speciality and whether one expert's conclusion is more acceptable and logical than that of another expert".'[13]

But ultimately, that unresolved question referred to by Kirby J was left unresolved in this decision. There was scope for the Court of Appeal to intervene in any event, and an apparent flaw in decision at first instance was addressed in the following important passage:

'Mr Brereton says...the error into which this court fell in Shorey's case was to search for a single cause when the case appeared to be one where there were multiple causes, because all the plaintiff had to show was that the defendant's conduct was a cause, not necessarily the cause, of her injury.

'Mr Brereton points out that in the *Earthline* case, the High Court did allow the appeal, even though the trial judge had been heavily swayed by his impression of a witness on giving evidence, by taking regard to other evidence at the trial.

'In my view, Mr Brereton's approach is correct. The court in this case has greater liberty than in many appeals to examine the facts. This is because almost all the findings made by ▶



the judge were of inferred facts. Moreover, with minor exceptions, there were no problems as to credibility.'[14]

EVIDENTIARY ONUS

Obviously, there was a great deal of evidence in this matter. The Court of Appeal recited extracts from a number of the witnesses, but perhaps that of Dr Clements best summarises the issue.

'If a court were to find that Syntocinon was continued in excessive dosage but beyond 12 noon, then I would concede that this may well have contributed to Calandre's problem in that it may have deprived her of her metabolic reserve, setting up the conditions in which a period of severe near total asphyxia would be more damaging than for a normal foetus. Only in that respect can I envisage any role for the Syntocinon in this case. I believe that if the Syntocinon alone were responsible for Calandre's damage, by several hours of hyper-stimulation her brain damage would be of a different type.'[15]

Justice Whealy had found: 'There are further reasons which support and confirm my belief that there was no hyper-stimulation in this case and no depletion of the foetal reserves consequent upon the excessive dose of Syntocinon. These are, first, the conviction that Dr Diamond's negligent acts were plainly sufficient of themselves to have occasioned Calandre's injuries without the need to resort to an additional or contributory cause...'[16]

The Court of Appeal accepted the submission of Mr Brereton that Whealy J had effectively posed the wrong question.[17] The question was not whether the negligent acts were plainly sufficient of themselves to have occasioned the plaintiff's injuries without the need to resort to an additional or contributory cause. The real question was whether the hospital's actions also had causal consequences to the plaintiff.

The appellant in the cross-claim was effectively in the same position as a plaintiff – all it had to show was that the respondent's conduct was a cause, not necessarily the cause, of the injury. The evidentiary onus then shifts to the respondent.[18]

'Mr Brereton for the appellant says that on the whole of the evidence, it is more likely than not that the plaintiff's injury was caused by two concurrent causes, one of them hypoxic, rather than by one vagal cause only.

'He further says that the trial judge erred in taking the view that he could give greater weight to the observations (or non-observations) of the clinicians than to the evidence of the scientists.'

CONCLUSION

As with many long cases, the central findings ultimately appear in a relatively short passage. Quoting from Young CJ:

'The doctor in the cross-claim for contribution stands in the position of the plaintiff. All the plaintiff has to show is that the defendant's negligence could have been the cause of the plaintiff's injury. The judge accepted that there was an excessive dose of Syntocinon. The scientists, on both sides...have said that they would expect to find a second hypoxic cause for a continuing bradycardia.

'I agree with Mr Brereton's submissions that the mere fact that the clinicians say they have not observed that in every case, or that they have observed situations where they could not see a second cause, does not seem to me to take the matter any further. Yet his Honour seemed to suggest that there was some dichotomy in the view of the scientist on the one hand, and the practical man and woman dealing with situations on the ground who are not worried so much about theoretical causes. His Honour seemed to suggest that a scientist looks for certainty, whereas the practitioner looks for clinical results and tended to look at the matter as if to say, well, applying common sense, one prefers the practice as witnessed by the practitioner to the theory of the scientist.

'However, that is not the way one looks at expert evidence at all. If there is undisputed scientific evidence that in order for a certain consequence to occur, there needs to be both a vagal and an hypoxic cause, the mere fact that a person in practice may not have observed a second cause, does not negate the scientific opinion.

'Once that is accepted, and once it is accepted that, as I have indicated earlier, the learned trial judge excluded the middle when finding that the Syntocinon theory could not have any grounds, one is left with the situation where the quasi-plaintiff has shown that the overdose of Syntocinon could well have caused the injury. The evidentiary onus then shifts to the defendant. The evidence as to the hypoxic factor being the occlusion of the cord is not sufficiently supported by the evidence.

Accordingly, the cross-claimant must succeed.'[19]

As for the apportionment: 'In *Broken Hill Pty Co Ltd v Duffy*,[20] Latham CJ, with whom Rich, Starke, McKiernan and Williams JJ agreed, said: "It was very difficult to say that either party was more responsible than the other for the accident, and, that being so, there was no reason why the rule contained in section 1 of the *Maritime Conventions Act* 1911 (Imp), that where it is impossible to assign the precise degree of fault the responsibility shall be apportioned equally should not be applied to the similar provision of the *Wrongs Act* 1936 (SA)." The present case is one where despite the great bulk of evidence presented, the responsibility for the plaintiff's injuries is in this position. Accordingly, the apportionment should be 50/50.'[21] PL

Endnotes: **1** [2001] NSWSC 925. **2** [2003] NSWCA 67. **3** A slowing of the heart rate. In 1979, a normal heart rate for a foetus was considered to be between 120 and 160 beats per minute. **4** Para 1403 at first instance. **5** The term 'vagal' refers to or concerns the vagus nerve. This is a pneugastric nerve extending from the face to near the heart. When the vagus nerve is stimulated it emits a chemical neuro-transmitter, the effect of which is to slow the heart rate. The vagal effect has a short half-life so that when the vagal stimulus is removed, the chemical dissipates and the heart rate recovers. **6** Reduction in availability of oxygen to tissue due to a decrease in the partial pressure of oxygen in the arterial blood. **7** Synthetic oxytocin, a hormone which stimulates contractions. **8** Over stimulation - five contractions or more in any 10-minute period. **9** Para 38-39. **10** Para 42. **11** (2003) 77 ALJR 989. **12** (2003) ALJR 1104. **13** Para 48. **14** Para 49-51. **15** Para 115. **16** Para 1424 at first instance. **17** Para 150. **18** Para 221. **19** Para 218-221. **20** (1943) 16 ALJ 374, 376. **21** Para 224-226.