QUT Torts Moot Competition

August 2018

Judgement in the Supreme Court of Queensland (Moot Divison)

Citation: ***Cromwell v Holland*** **[2017] QSC 314**

Extract of relevant parts of the judgement of Morley J

Medical background: diagnosis and treatment

1. The plaintiff, Richard Cromwell, is a 50 year old man. He suffers from non-Hodgkin's lymphoma.

2. Mr Cromwell's condition initially presented as a substantial lump under his right arm. He first sought medical attention in relation to this in July 2012, although it must be said that this symptom first manifested itself at least 18 months prior to Cromwell taking the matter up with his general practitioner. He spoke about it with his wife, who encouraged him to visit a doctor.

3. In July 2012, Cromwell finally went to see the respondent, Dr Xavier Holland, who was a medical practitioner, registered as a general practitioner in Queensland. Dr Holland was what might be described as Cromwell's "regular doctor", although that should be viewed in the light of Dr Holland's records, which showed that Mr Cromwell attended only infrequently at Dr Holland's surgery.

4. When Mr Cromwell first presented to Dr Holland and asked about the lump, Dr Holland considered that it was a lipoma - that is a benign collection of fatty tissue. Having made that diagnosis, Dr Holland did not refer him to a specialist for confirmation or otherwise of his diagnosis. Six months after consulting with Dr Holland, Mr Cromwell moved from Sunnybank to Chermside, making it inconvenient to continue seeing Dr Holland. In August 2013, Mr Cromwell saw his new general practitioner (Dr Anika Patel) and raised the matter of the lump with her. Dr Patel concurred that the lump was "probably a lipoma", but out of caution referred him on a non-urgent basis to the Princess Alexandria Hospital in Brisbane (PAH) for further investigation. The referral recorded that there had been some gradual enlargement since Mr Cromwell first noticed the lump, accompanied by increasing discomfort and pain in the preceding year.

5. The consultant who examined Mr Crowell on this referral in November 2013 has some suspicions that the lump was, in fact, not benign, and arranged for a biopsy as soon as possible. The biopsy, some four days later, confirmed that the lump was, in fact, a

lymphoma. The narrowing of the diagnosis – eventually to non-Hodgkin's lymphoma – took some time.

6. A CT scan from early December 2013 did not show any signs of the disease having spread to any other organs. However, on the 26 January 2104, Mr Cromwell was admitted to PAH with intense chest pains. On investigation, these were shown to be the result of the lymphoma having spread into the left thorax. Chemotherapy was administered on six occasions and was then supplemented by a course of radiotherapy. Although the tumour responded, it did so incompletely. Following further investigation, it was therefore decided in late August 2014 that the plaintiff should be subjected to high dose chemotherapy, involving the harvesting of stem cells to preserve them from destruction, the administration of chemotherapy and the replacement of the stem cells at the conclusion of the treatment. This treatment took place at Princess Alexandria Hospital. He was discharged in early September March 2014.

7. In November 2014, Mr Cromwell suffered a relapse when he developed a tumour in the right axilla, which statistically gave rise to a very poor prognosis. The result was that the chemotherapy that he was then given was intended merely as palliative. He was told that he could not be cured. In this context, "cure" meant a period of remission of at least ten years since the disease was last evident. In April 2015, there was thought to have been another relapse, although this was never demonstrated histologically. Nonetheless a further course of palliative chemotherapy was prescribed

8. As might be expected, the effects on him and his life have been devastating. He suffered severe side effects from the original treatment, in particular the high dose chemotherapy treatment in August 2014. He had to give up work. He felt very ill all of the time and has continued to feel weak and lacking in energy ever since. Since his relapse in November 2014, he has quite reasonably believed from what he has been told that he is living on borrowed time.

9. Based on what was, on the whole, an uncontested medical narrative of the progression of Mr Cromwell's condition, I make the following observations as to the relevant evidence:

- In the 13 month period between Mr Cromwell's initial consultation with Dr Holland and when treatment began, the claimant's condition "upstaged" significantly so that he was less likely to achieve complete remission and had a poorer prognosis as a result. Specifically his chances of avoiding radical high dose chemotherapy, his chance of avoiding a relapse and his chances of ultimate survival were all reduced.

- A plausible body of evidence was led by the defence to the effect that a competent general practitioner would not, in all cases, refer every lump for further examination. Such a decision was an exercise in clinical judgement, which does not automatically translate into liability in negligence simply because it is subsequently shown that an alternative course of action would have led to different outcomes.

- Expert evidence from Professor Stanhope was uncontradicted, and was to the effect that taking the plaintiff as an example of the whole population of anaplastic large cell lymphoma patients, but with no adverse prognostic features such as those occasioned

by the delay in referral, he would have had a remission chance of approximately 45% and a similar chance of disease free survival for ten years. For such a patient, the addition of the adverse prognostic factors that came to affect him because of the delay meant his initial chance of remission would have fallen to around 35% and his chances of overall survival moved from over 45% to approximately 30%.

- It is not possible to say that without the adverse prognostic factors caused by the delay the plaintiff would more probably than not have become a disease free survivor, or that he would have avoided relapse and the need for high dose chemotherapy. He may have done but it is not possible to say.
- What can be said with some certainty is that Mr Cromwell's situation has been negatively impacted by the delay in seeking a specialist opinion about the putative lipoma.

28. Based on what was, on the whole, an uncontested medical narrative of the progression of Mr Cromwell's condition, I make the following findings I therefore make the following findings.

29. The negligent failure on the part of Dr Holland was, at all times, a material contribution to the deterioration of Mr Cromwell's condition. Had Dr Holland made a referral in July 2012, it is more probable than not that Mr Cromwell's condition, while serious, would not have resulted in the reduction in life expectancy or quality of life which eventuated when Mr Cromwell suffered a relapse in January 2014, and was required to undergo more radical chemotherapy. Nor, in my view, would have Mr Cromwell's condition have reached the point which it ultimately did in November 2014, where the disease was considered incurable, and treatment became, in essence, merely palliative.

30. It fell to this Court to determine whether, on the available evidence and on the balance of probabilities, what Mr Cromwell's condition would have been but for the alleged negligence in failing to refer Mr Crowell for further investigation. Put another way, has the course of treatment, unfolding as it has, deprived Mr Cromwell of a chance of a better outcome.

31. The attribution of causation is not, as has been pointed out on many occasions in appellate courts in this country, not a process of philosophical debate or casuistry, but one of determining where, if at all, legal liability should be imposed. As such, it should be resolved by common sense … it cannot be reduced to an analytical formula.

32. Moreover, the assessment of causation must, of necessity, incorporate value judgements and some aspect of policy (*March v Stramare*).[1] There are profound policy reasons why the law should impose liability in negligence on medical practitioners when they fail to take what might be thought of as natural precautions in the process of diagnosis. Dr Holland's failure to take such a precautionary approach has clearly deprived Mr Cromwell of the chance he might have had of remission had he been treated over a year earlier.

[1] (1991) 171 CLR 506; [1991] HCA 12

33. That a body of evidence suggesting that Dr Holland's decision not to send Mr Cromwell for further investigation was in keeping with the conduct of a number of his peers does not determine liability: it seems to me that (again as a matter of common sense) such an attitude to diagnosis cannot be said to form the basis of clinical practice which is acceptable, and sufficient to discharge the obligations imposed on a doctor within the scope of his or her duty of care.

34. Accordingly, I find that Dr Holland is liable in negligence for his failure to take appropriate diagnostic steps in August 2013, the result of which was Mr Cromwell's less favourable outcome.

Quantum

35. Both parties accept that the quantum of damages claimed by the plaintiff is an appropriate amount should liability be found. That amount, as set out and calculated below in these reasons, is $185,000 plus $24,674 in interest under the appropriate scales. This is not contested.

[*Parts of the decision relating to the calculation of quantum have been removed as not being relevant*]

Contributory negligence

47. However, I am disquieted by the fact that Mr Cromwell delayed seeking any form of medical diagnosis or treatment for a period, on his own evidence, of 18 months, and in the face of considerable encouragement from his wife to "have it looked at". In this day and age, it is not unreasonable to expect that an individual will take adequate care of their own health, and seek medical opinion when appropriate. Faced with the symptoms as he described them, Mr Crowell's delay in seeing Dr Holland was, itself, a material contributor to the development of the disease.

48. While, for obvious reasons, there is a paucity of clinical evidence or opinion as to the precise effect this delay might have had on the progression of Mr Cromwell's condition, I accept (as was urged by the defendant's counsel) that such delay amounted to contributory negligence on the part of the plaintiff as understood in the *Civil Liability Act 2003* (Qld), s23 – it is a situation where the maxim *res ipsa loquitur* applies. The "common sense" to which Kirby J referred in *Chappel v Hart* applies as much to contributory negligence as it does to the issue of primary negligence. It is a concept which, as Kirby J observed, "guides courts in this area of discourse".[2]

49. Accordingly, I am reducing the amount awarded in damages by 35%.

Grounds of appeal

The defendant/appellant Dr Holland appeals on the basis that:

[2] *Chappel v Hart* 195 CLR 232 [1998]; HCA 55 at 95.

- the finding of the trial judge was an incorrect application of the law of Australia.

The plaintiff/respondent Mr Cromwell cross appeals on the basis that:

- it was not open to the trial judge to make a finding as to contributory negligence.

The law relevant to the determination of the appeal is the common law of Australia as currently applied in the jurisdiction of Queensland (ie as amended by the C*ivil Liability Act 2003* (Qld)).