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Ambulance Service of NSW v Worley; further legal lessons for the emergency services

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Abstract
The decision of the Court of Appeal in New South Wales, in *Ambulance Service of NSW v Worley*, gives insight into legal issues relating to the emergency services, and ambulance services in particular. This article considers the facts that gave rise to this litigation, why the trial judge found that the treating paramedic was negligent and why that decision was overturned by the NSW Court of Appeal. The paper then considers the legal principles that arise from this decision and their importance for ambulance services throughout Australia.

Keywords: duty of care; legal issues; negligence

The decision of the Court of Appeal in New South Wales, in *Ambulance Service of NSW v Worley*[1] gives insight into legal issues relating to the emergency services, and ambulance services in particular.

Supreme Court of NSW
Worley v Ambulance Service of NSW (2004)

Facts
Mr Worley was a motorcycle postal delivery officer employed by Australia Post. He was allergic to bee stings. At about 11am on the 7th October 1998 Mr Worley was delivering mail when he was stung by a bee. He managed to ride his motorcycle back to the mail delivery centre (about 20 minutes) and spoke to a supervisor. He was taken to a first aid room and an ambulance was called at 12:01pm. The ambulance arrived at 12:17pm.[1, ¶6-¶10] The two officers were both level 5 paramedics (the Ambulance Service of NSW has a graded system of training starting at level 1 for new recruits and working up to level 5 or 'paramedic'). The protocols that governed the treatment provided by paramedics indicated that a person with an allergic reaction (anaphylaxis) was to be treated with adrenaline. The relevant part of the treatment protocol said:

> ADRENALINE is indicated if any one of the following are (sic) present:-
> 1. Upper airway obstruction.
> 2. Lower airway obstruction
> 3. The "key signs" of severe shock except skin is often warm and pink. [1, ¶17]

The paramedic pharmacology, ie the document explaining to the paramedics how and when drugs were to be used said, with respect to the use of adrenaline, that adrenaline was the appropriate treatment where a patient had '…upper or lower airway obstruction or shock with B.P. <90 systolic in adults'. [1,¶18] Where adrenaline was called for it was to be administered as:

> *1ML OF 1:10,000 ADRENALINE I.V. EVERY 30 SECONDS, until the patient is no longer "in extremis" or a maximum of 5 mls.*[1, ¶18] (*Emphasis supplied).*

This treatment could be '… repeated every 5 minutes'.[1, ¶18]

The paramedics assessed Mr Worley and noted in particular, a systolic blood pressure of 78[1,¶19] thereby indicating to them that adrenaline was part of the appropriate treatment regime. Mr Worley was given 4 doses of adrenaline[1,¶20] in accordance with the treatment protocol and pharmacology. This treatment was completed at 12:24pm.[1, ¶32] At 12:30pm Mr Worley was loaded into the ambulance which departed for hospital. Shortly after departure Mr Worley experienced a cerebral haemorrhage. The haemorrhage was caused by a significant spike in Mr Worley's blood pressure which the Court accepted was caused by the administration of the adrenaline. As the paramedic pharmacology recognised, severe hypertension (ie high blood pressure) was a known adverse effect of adrenaline.[1, ¶18] Mr Worley sued the Ambulance Service of NSW alleging negligence in its treatment of him. He was at first successful[2] but the verdict was later set aside by the Court of Appeal.[1]

The trial judge's decision

The first point required the plaintiff, Mr Worley, to prove that the treating paramedic had been negligent. The trial judge, Justice Barr, found that the paramedic had been negligent for two related reasons. The first related to the treatment pharmacology which said that adrenaline was to be administered 'until the patient is no longer "in extremis"'. Having heard expert evidence Justice Barr, citing the Oxford English Dictionary, found that the term 'in extremis' meant …"at the very point of death", "in the last agonies".[2,¶150] When the term is used by emergency medical practitioners it describes patients who will die if not resuscitated by means taken there and then.[2, p.150]

Mr Worley was not about to die if the treatment was not given, so according to Barr J, to administer the treatment, with a significant risk of hypertension and when, in his view, the protocol did not call for it, [2, ¶15 9] was negligent.

A further finding against the treating paramedic related to the mechanical way in which he administered the adrenaline. The judge found that whilst administering the adrenaline, the treating paramedic was observing his watch to determine whether 30 seconds had passed to allow the next dose, rather than observing Mr Worley to determine the effect that the drugs were having and whether or not the next dose was needed. The essence of the judge's adverse findings was that the paramedic:

> … administered too much adrenaline far too fast and without any regard for the consequences. He took a dosage rate from a protocol that applied only to a dying person who had to have adrenaline by the fastest possible means without regard for the risks involved. He administered that dose to a man who was only mildly hypotensive, far better perfused than any patient contemplated by the protocol. He thereby exposed Mr Worley to an unnecessary and unreasonable risk of injury. He failed to monitor the

> blood pressure between aliquots but pressed on without knowing what effect the adrenaline was having on blood pressure. He was negligent in doing so.[2, ¶242]

Having found that the paramedic was negligent there was no issue that the Ambulance Service was vicariously liable and so the Service was ordered to pay damages in excess of $2 million.

It should be noted that at the time of the treatment s 26 of the *Ambulance Services Act 1990* (NSW) was in force. That section said:

> **26 Exculpation from certain liability**
> An employee of the Ambulance Service or an honorary ambulance officer is not liable for any injury or damage caused by the employee or officer in the carrying out, in good faith, of any of the employee's or officer's duties relating to:
>
> (a) the provision of ambulance services, or
>
> (b) the protection of persons from injury or death, whether or not those persons are or were sick or injured.

The effect of this section was to ensure that the paramedic was not personally liable but it provided no bar to suing the Ambulance Service directly.[1, ¶62; 2, ¶65]

NSW Court of Appeal

Ambulance Service of NSW v Worley (2006)

The Ambulance Service appealed from Justice Barr's decision to the Court of Appeal. There, three judges; Justices Tobias, McColl and Basten all agreed that Justice Barr's decision was wrong, and there had been no negligence by either the paramedic or the Ambulance Service.

With respect to the treatment administered by the paramedic, the Court rejected the notion that the term 'in extremis' necessarily meant at the point of death. The Court was critical of the fact that the evidence, led, and relied upon, was by medical practitioners, expert in emergency medicine, rather than paramedics or other experts in the administration of care in the field by people other than doctors. As Justice Basten said:

> Perhaps surprisingly, … each party at trial called five medical specialists, whose evidence was directed mainly to the question as to what was accepted medical and pharmacological practice in relation to the administration of adrenaline in 1998. Without objection, experts in emergency medicine discussed their own practices in well-equipped teaching hospitals, with far less attention being given to the position of ambulance officers and the nature and purpose of the protocols which governed their conduct.[1, ¶30]

The question that had to be asked was not 'was the officer negligent for not making treatment decisions that a doctor might make?' but 'was he negligent in applying the protocol in the way that he did?' The paramedic was given no option as to the treatment to be given, or the route by which the drug, adrenaline, was to be administered. Further, even if Justice Barr was correct and the protocol was meant to be applied only when a patient was near death, was the paramedic negligent in believing that it applied in the circumstances he faced? The Court found that the answer to that question had to be 'no';[1, ¶64-¶68] if the protocol was flawed or ambiguous it was reasonable for the paramedic to believe that it applied in the circumstances he faced. The Court went further however to find that the paramedic did not make a

reasonable error, rather his interpretation was correct and the protocol was intended to apply whenever the listed symptoms were present.

> … it is reasonable to infer that the phrase "in extremis" included, relevantly for an ambulance officer reading the protocol, a person exhibiting the signs of severe shock. The language used, taken with the relevant indications with respect to asthma, no doubt informed the officer's understanding, as may have his or her training, about which none of the witnesses was cross-examined. To know whether a specialist in emergency medicine would adopt the same language when considering a person in the intensive care unit of a major teaching hospital, or have the same understanding of the protocol was of little direct assistance.[1, ¶87]

On the finding of the Court of Appeal, the paramedic had applied the protocols as he had been trained to do so, in circumstances where it was intended they would be applied. There could be no negligence on his part.

This led the Court to consider other possible grounds of liability, and in particular, whether the Ambulance Service was negligent in the way the protocols were designed, drafted and implemented.[1, ¶90] The evidence showed that there was debate within the professional literature about the use of adrenaline to treat anaphylaxis and in particular about the dose and route of administration (that is should it be administered intramuscularly or intravenously, as required by the Ambulance Service protocols). It was clear that the Medical Advisory Committee, responsible for the preparation of the treatment protocols, was aware of this debate and had taken it into account when preparing the treatment protocols. The fact that the Committee adopted a particular treatment regime did not establish that the Committee

> … did not have available to them up-to-date information, nor that they did not take into account that which was available. The only tenable conclusion is that the scientific evidence did not support the view that a change was reasonably required, nor did it support a finding that the Medical Advisory Committee was negligent in maintaining the 1997 protocol permitting the use of IV adrenaline for the specified indications, in October 1998.[1, ¶133]

In the absence of negligence in determining the treatment standards, the Ambulance Service had not breached any duty owed to Mr Worley.

Given that neither the treating paramedic, nor the Ambulance Service, was in breach of their duties, the finding of negligence could not stand and the decision of Justice Barr was reversed.

Lessons and Principles

As a story this case is of course tragic. It was tragic for Mr Worley who suffered severe and permanent disabilities no doubt caused by the administration of treatment that was intended to save his life. The family of the treating paramedic (as he died before the case could come to court) had to face the trauma, and personal indignity, of having his no doubt well intended actions subject to close scrutiny and detailed analysis and for the period between February 2005 and May 2006 they also lived with the Court's finding of 'negligence'. For ambulance services, health services and other emergency services the case is more than just a story as there are important lessons that can be taken from this decision.

The first is an effective restatement of a principle generally believed to be true but without little direct authority, and that is an officer, such as an ambulance officer or some other officer who performs a skilled task but with a limited discretion, will not be negligent if they perform that treatment in accordance with their training. A previous authority for that proposition is *Cattley v St Johns [sic] Ambulance Brigade* where the trial judge said:

> [Any] … person holding himself out as a first-aider trained in accordance with the [First Aid] manual I referred to, would be negligent if he failed to act in accordance with the standards of the ordinary skilled rescuer exercising and professing to have that special skill of a rescuer …
> If in any situation the first-aider acts in accordance with the First Aid Manual and he does so with ordinary skill, then he has met the test and he is not negligent.[3]

The decision in *Cattely*[3] was the decision of a single judge, sitting in the United Kingdom, dealing with volunteer first aiders, not qualified ambulance paramedics. In terms of legal precedent it is of little value. The New South Wales Court of Appeal did not cite *Cattley* nor did they express their finding in the same or even similar words, but the essence of their decision is the same. The treating paramedic was not negligent in this case, regardless of the outcome to Mr Worley, because he applied the treatment that he had been trained to give, in circumstances where it was meant to be applied, in an appropriately skilful way. Paramedics (and other grade ambulance officers and other persons who might be called upon to provide first aid) are not doctors and they are not expected to bring to their professional practice the same sort of scientific rigour that an expert medical practitioner may bring to the task. For the ambulance officer (and others) there is no 'choice' as to treatment to be given in a particular case, they give the treatment that their training tells them to give, and they are not negligent for doing so. Of course there could be a finding of negligence if the officer made a misdiagnosis (eg failed check a patient's blood sugar level or, having checked it, found it to be something it was not) or did not exercise proper skill and care when administering the treatment (eg applied a piece of equipment in a way that it was not intended to be applied) but neither of those happened here. Here the officer did what he was instructed, trained and authorized to do, and for that he could not be negligent.

The second lesson is that finding that the officer was not negligent is not enough to ensure there was no liability. The presence of section 26 of the *Ambulance Services Act 1990* (NSW) (and see now the *Health Services Act 1997* (NSW) s 67I)[4] did not present a bar to suing the Ambulance Service directly. This was a proposition argued for elsewhere[5, pp.144-145] and which has now been endorsed by the Court of Appeal. Most if not all the emergency services have a similar liability clause[i] and in most cases they will only serve to ensure that where a claim of negligence is made, it is the service, and not the officer involved, who will be liable if negligence is made out.

In this context, just because the officer was not negligent for applying his training, there is no doubt that had the plaintiff shown that the Ambulance Service had been negligent in adopting, or maintaining a treatment protocol that was out of step with scientific thinking in the area, then the Service could have been liable for breaching the duty it owed to Mr Worley. A service must be able to show (as the Ambulance Service could) that they were part of the professional community that monitored training and scientific theory and that they took developments into account in developing, maintaining and monitoring their treatment protocols. Where there is debate on practices and procedures and the defendant can show

[i] See for example: *Ambulance Services Act 1991* (Qld) s 39; *Emergency Management Act 2004* (SA) s 32; *Emergencies Act 2004* (ACT) s 198; .

that they are aware of the debate, and take it into account in determining their procedures then it will not be negligent to adopt a view supported by evidence, even if there are other views. In this case the Ambulance Service was able to show that it was actively engaged in monitoring relevant scientific developments and could justify its decisions by reference to these developments. This went a long way to defeating a claim of negligence.

For ambulance services a complacent attitude of 'we do things the way we do them because we have always done it that way or because that's what our colleagues in another State do' will not be defensible if modern practices, techniques and equipment have moved on. In *Rogers v Whitaker*[6] the High Court of Australia determined that the question of whether a particular practice is or is not 'reasonable' is a legal question to be determined by the Courts, not by the professional or common practice of the defendants. The question for the Courts is 'did the defendant act reasonably' not 'did the defendant act as others might have in the same circumstances'. A defendant can show that there actions meet the legal test of 'reasonableness' if they can point to a proactive attitude of engaging with the relevant community, taking part in professional development and keeping informed of scientific developments and taking them into account in reviewing practices. This approach will help to defeat claims of negligence if the defendant service can then show either that the debate is not yet sufficiently certain to warrant changes in practice (as was the case here); that suggested changes in practice are not appropriate in a particular context or that developments are being appropriately incorporated into current practice.

Conclusion

In terms of legal principle, the decision in Ambulance Service of NSW v Worley is not hugely significant. The case relied on the application of traditional tort law principles. The main area of disagreement between the Court of Appeal and the trial judge lay in the value of medical experts to determine what can be reasonably expected from a paramedic in the field. Looking beyond the issues of fact, the case does reinforce some previously identified principles. They are:

- An ambulance officer or first aider may feel reassured that if they provide care in accordance with their training, that is not negligent even if adverse consequences occur;

- Where the actions of an ambulance officer are called into question, the standard of care to be expected is that of a reasonable person exercising the skill and care of the officer[6] but the standard is that of the reasonable ambulance officer, not the reasonable expert in emergency medicine.

- Just because an officer is not negligent it does not mean that the service that employs them is not negligent. The service may be liable if it has failed to ensure that its staff are trained and the training and procedures adopted by the service meet acceptable standards. Whether an ambulance service or any other emergency service, a defendant will need to demonstrate that their treatments and procedures reflect current, scientifically defensible thinking.

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