

# High Court revisits Common Law Duty of Care in the Exercise of Statutory Powers

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## Background

Phillip Pettigrove had a history of chronic paranoid schizophrenia. He lived in Victoria. Whilst visiting New South Wales with his friend, Stephen Rose, concerns were raised in relation to Mr Pettigrove's behaviour and he was involuntarily admitted to and detained at the Manning Base Hospital (**the Hospital**) under the **Mental Health Act 1990 (NSW)**.

After assessment, it was agreed with Mr Pettigrove's family and Mr Rose that Mr Pettigrove would remain in hospital overnight, before being driven back to Victoria with Mr Rose the following day, where he would continue treatment with his usual medical team.

During the course of the night, Mr Pettigrove was witnessed by nursing staff to have been pacing in his room and talking loudly to himself. On route back to Victoria, whilst they had stopped for the night, Mr Pettigrove strangled Mr Rose, believing that Mr Rose had killed him in a past life and desiring revenge.

Mr Rose's family (**the Plaintiffs**) sought damages for psychiatric injuries they had suffered as a result of learning of Mr Rose's death from the Hunter and New England Local District Health (**the Authority**), the authority responsible for the Hospital and its staff. The claim alleged that the treating doctor and nurses failed to exercise reasonable care in releasing Mr Pettigrove into Mr Rose's care for the trip back to Victoria.

## The Earlier Decisions

In the first instance (*Simon & McKenna v Hunter and New England Local Health District* [2012] NSWDC 19), the focus of the District Court's attention was whether there had been a breach of duty and the "competent professional practice" defence.

Whilst critical of the doctor's treatment of Mr Pettigrove, the District Court dismissed the claim on the basis that the Plaintiffs had failed to establish there was a "not insignificant" risk of Mr Pettigrove behaving as he did and the doctor had acted in a manner that was widely accepted by peer professional opinion as being competent.

However, in a 2:1 judgment, the Court of Appeal allowed the appeal and entered judgment in favour of the Plaintiffs on the basis that the discharge of Mr Pettigrove from Hospital was negligent (*Simon & McKenna v Hunter and New England Local Health District* [2013] NSWCA 478).

## High Court

Unlike the Courts below, argument in the High Court focussed on whether a duty of care was owed to Mr Rose and the Plaintiffs and the terms of the **Mental Health Act**.

The objects of the **Mental Health Act** included providing mentally ill people with the best possible care and treatment in the least restrictive environment. In the Act:

- + a person was considered to be mentally ill if the person was suffering from mental illness and, owing to that illness, there were reasonable grounds for believing that care, treatment or control of the person was necessary for the:
  - ◆ person's own protection from serious physical harm; or

- ◆ protection of others from serious physical harm.

- + a mentally ill person could not be detained unless the Hospital was of the opinion that no other care of a less restrictive kind was appropriate and reasonably practicable.

The Authority argued that it owed no relevant duty of care to the Plaintiffs because the Hospital and the doctor did not owe Mr Rose a duty to take reasonable care to avoid Mr Pettigrove inflicting physical injury on him. In support, the Authority relied on the terms of the scheme for the involuntary detention of mentally ill people, which it submitted meant that the Hospital had no power to detain a person where it believed less restrictive care was appropriate and practicable.

In response, the Plaintiffs argued that the following factors indicated the existence of a duty of care:

- + the Hospital controlled the source of the foreseeable risk of harm to Mr Rose, being Mr Pettigrove;
- + there were face to face dealings between Mr Rose and the Hospital staff;
- + there was an implicit assumption by the Hospital of responsibility to Mr Rose and implicit reliance by Mr Rose on the Hospital's judgment concerning Mr Pettigrove's fitness to make the road trip back to Victoria;
- + Mr Rose was vulnerable in the sense that his safety was dependent upon a careful exercise of judgment by the Hospital; and
- + imposition of a duty of care was not inconsistent with the statutory scheme, given that the protection of other people from serious physical harm caused by a mentally ill person is explicitly referenced in the Act (in the definition of mentally ill, as outlined above).

Ultimately, the Court held that no duty was owed.

The "determinative" factor in the Court's reasoning was the consistency of the alleged common law duty with the Hospital's statutory obligations – that is, whether a common law duty would be consistent with the Hospital's obligations in deciding whether the powers under the Mental Health Act which had been used to detain Mr Pettigrove should continue to be used.

After noting that a doctor had to be satisfied that no other care of a less restrictive kind was appropriate and reasonably available to be able to detain or continue to detain a mentally ill person, the Court held that a common law duty would not be consistent with the doctor's statutory obligations. The Court explained that the inconsistency arose because a common law duty would require regard to be had to the interests of those people with whom the mentally ill person may come into contact when making its decision as to whether or not to detain (or continue to detain) the mentally ill person.

The Court also said the following were relevant considerations to the duty question (but not determinative):

- + the nature of the harm suffered, being harm caused by the criminal acts of a third party (Mr Pettigrove);
- + the indeterminacy of the class of persons to whom the duty may be owed;
- + the need to preserve the coherence of other legal principles or statutory schemes.

However, in light of the Court's decision regarding the compatibility of a common law duty with the Hospital's statutory obligations, it was not necessary to consider the above matters in any detail.

## Where Next?

The decision is of importance in considering novel duties of care generally. It makes it clear that difficulties may arise where the loss suffered is caused by the criminal acts of a third party and the class of persons to whom the alleged duty may be owed is indeterminate.

An additional layer of complexity exists where the defendant's acts (or omissions) are in the exercise of (or the failure to exercise) statutory powers. The law in relation to whether a common law duty of care is owed by entities exercising statutory powers remains unsettled, although ensuring a defendant is not subject to conflicting duties is taking prominence as a determinative factor. This underlines the importance of the terms of the relevant statutory scheme in determining whether a common law duty exists.

Further comment on the common law duty owed in the exercise of statutory powers from an appellate level was hoped to have been received in the near future, with the Victorian Court of Appeal due to hear the appeal in the Abalone virus class action litigation this week. The case concerned pure economic loss suffered as a result of the outbreak of a virus in abalone populations in Victoria.

The first instance decision in that matter (*Regent Holdings v State of Victoria* [2013] VSC 601) similarly held that a duty was not owed by relevant State parties as it could result in conflicting duties on them and additionally because the class of persons to whom the duty would be owed was indeterminable.

However, the hearing of the appeal has been vacated, with reports indicating the claim has been compromised and will be listed for a hearing for approval of the compromise shortly. ■

For further information, please feel free to contact:

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