Barry.Nilsson. LAWYERS

PLAINTIFF IN THE SOUP AFTER FAILING TO ESTABLISH HOSPITAL'S BREACH OF DUTY OF CARE

22 JULY 2020 | HEALTH LAW

In *Hawkins v South Western Sydney Local Health District* [2020] NSWDC 308, the plaintiff failed to convince a court that the treatment provided to him by the Campbelltown Hospital's catering and nursing staff was negligent.

IN ISSUE

The plaintiff alleged that because of the Campbelltown Hospital's negligence, he suffered harm in the form of a serious infection which caused a large incisional hernia which in turn made a proposed reversal of his Hartmann's procedure impossible.

The plaintiff alleged that the Hospital was negligent for:

1. Serving, or allowing to be served to the plaintiff, food that was incompatible to his food diet plan (by non-professional catering staff).
2. Failing to refer, immediately upon complaint, the plaintiff's symptoms of nausea, vomiting and abdominal pain to a doctor for examination (by nursing staff).
3. Unacceptable delay in diagnosis and treatment of a dehisced wound (by nursing staff).

BACKGROUND

In August 2015 the plaintiff presented to the emergency department of the Campbelltown Hospital (the Hospital) with abdominal pain and a non-functioning colostomy. The plaintiff had previously undergone a Hartmann's procedure for a perforated sigmoid diverticular abscess in October 2014 at the Hospital.

On 21 August 2015, after being reviewed by a general surgeon, the plaintiff was placed on orders to be kept on a nil by mouth (NBM) with intravenous fluids diet.

On 25 August 2015, the plaintiff was required to undergo an intra peritoneal adhesiolysis surgical procedure. He was ordered to remain on a NBM diet post-operation.

By 29 August 2015, the plaintiff was upgraded to a free fluids diet including creamed or smooth soups. Later that evening, however, the plaintiff began to feel unwell and vomited twice. On 30 August 2015, some redness around the laparotomy wound was noted. A nursing entry in the evening of 30 August 2015 noted that although the plaintiff was tolerating his free fluids diet, he was upset as he had not received his preferred meal.

The plaintiff alleged that on 29 August 2015, he was served lunch including soup containing chicken solids, which caused nausea, vomiting and abdominal cramping. The plaintiff alleged that these complaints were notified to the Hospital's nursing staff, but not passed on to his surgeon until 30 August 2015. The plaintiff argued that the vomiting caused a rupture of his laparotomy wound, and that the delayed diagnosis and treatment of the wound caused a large incisional hernia, which would later prevent him from undergoing the reversal of the Hartmann's procedure.

THE HOSPITAL'S DEFENCE

The Hospital denied that there were any lumps of chicken in the plaintiff's soup. Rather, it argued that the plaintiff's infection and subsequent incisional hernia were inherent risks associated with his surgical procedure and could not have been avoided by reasonable care and skill pursuant to s 5I of the *Civil Liability Act 2002* (NSW) (CLA).

Notably, in respect of the allegation that it provided the plaintiff with inappropriate food, the Hospital initially raised a defence pursuant to section 5O of the CLA, but later conceded that the defence could not be maintained because its catering staff were not "practising a profession".

THE DECISION AT TRIAL

The court's decision turned largely on factual findings including what complaints the plaintiff made to the Hospital and whether the soup he was served contained chicken pieces, in contravention of his free fluids diet.

The plaintiff did not make any complaints about the alleged pieces of chicken in his soup until April 2017. Ultimately, the court did not accept the plaintiff's evidence in respect of the soup because of his poor recollection of events, the fact that he was medicated at the time, and because the Hospital's director of Nutrition and Dietetics provided convincing evidence as to the system in place to ensure that the correct diet was provided to patients.

Both the plaintiff and defendant called experts in respect of causation, but ultimately the court preferred the evidence of the Hospital's experts, including the plaintiff's treating surgeon Dr Zarrouk (who was not a defendant to the proceedings). Dr Zarrouk gave evidence that the plaintiff had many risk factors that led to his development of an incisional hernia, and that although it was possible that if someone coughed in a "tremendously violent manner", it might destabilise an abdominal wound, this would have no effect whatsoever regarding the development of an infection, and he was adamant that this did not occur in the circumstances.

Ultimately, the court concluded that the safe harbour defence pursuant to s 5I of the CLA was made out, and that the inherent risks of infection and incisional hernia were likely to materialise given the multiple factors that made the plaintiff more prone to infection and incisional hernia, and the risks of harm could not have been avoided by reasonable care and skill.

IMPLICATIONS FOR YOU

This case is an important reminder that the defence under s 5O of the CLA (and its inter-state counterparts) will not be available to Hospitals in all circumstances, and can only be relied upon when the alleged acts/omissions are performed by employees practising a profession.

The case is also an example of a Hospital successfully demonstrating that it took a cautious and responsible approach to the relevant risk of harm (s 5C CLA), and the Hospital's medical experts convincing a court that the plaintiff's outcome was the materialisation of an inherent risk which could not have been avoided by reasonable care and skill on its part (s 5I CLA).

Hawkins v South Western Sydney Local Health District [2020] NSWDC 308

AUTHORS

MITCHELL HAUSER
SENIOR ASSOCIATE

+61 7 3231 6344
mitchell.hauser@bnlaw.com.au