

# ASSAULTS BY HEALTH CARE PROVIDERS - PASSING THE THERAPEUTIC PURPOSE TEST

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Legislation in force in Queensland and New South Wales prohibits the award of exemplary, punitive or aggravated damages unless the act that caused the personal injury was an unlawful intentional act done with the intent to cause personal injury, or an unlawful sexual assault or other unlawful sexual misconduct.

There is, accordingly, an incentive for plaintiffs to pursue a claim for assault in circumstances that might usually be pursued as a negligence claim. The recent decision of the New South Wales Court of Appeal in *Wright v Johnston* [2015] NSWCA 18 provides some further guidance about when this approach is likely to be successful, and the approach that a court will take to determining whether a patient has in fact consented to the treatment they have received.

In very general terms, assault and battery are constituted by either threatened (assault) or actual (battery) excessive and unwanted physical contact with another person.

Ms Johnston received dental treatment from Ms White during the later part of 2009. Her treatment was said to have been performed negligently and also to have been unnecessary and ineffective and to have amounted to an assault on Ms Johnston. The judge at first instance found that Ms White performed treatment on Ms Johnston without a therapeutic purpose, and had failed to prove that Ms Johnston had consented to the treatment. Assault and battery were therefore established. The judge awarded Ms Johnston \$150,000 for exemplary damages and \$10,000 for aggravated damages. Ms White appealed.

The Court of Appeal confirmed that where a medical practitioner is solely motivated by an unrevealed non-therapeutic purpose (such as financial gain) and the patient's consent is not obtained, then the treatment in question will be an assault on the person.

The court also considered who had the onus of proof with consent. The primary Judge had proceeded on the basis that the defendant must show that consent had been obtained. He found that the treatment had been undertaken on every occasion for the purpose of extracting money from the Department of Veteran's Affairs rather than for treating the plaintiff. There was therefore no consent, and the relevant treatment amounted to an assault and battery.

The Court of Appeal disagreed with this approach. It found that particularly where the allegation in question essentially amounted to an allegation of fraud by the treating practitioner, but probably more generally as well, it was a matter for the plaintiff to prove that the treatment administered was devoid of therapeutic purpose.

The Court of Appeal noted that very often conduct occurs for multiple purposes. The primary judge based his conclusion of an absence of consent on the finding that the treatment was wholly unnecessary. There was however, no evidence that dental work was incapable of constituting a therapeutic response to Ms Johnston's condition. Evidence that Ms White may have charged the Department of Veterans Affairs for work that was not actually performed did not establish that the work performed was entirely unnecessary.

In these circumstances, the award of exemplary and aggravated damages could not be sustained. The Court of Appeal accordingly remitted the matter for a further hearing on the basis of the negligence claim.

The case demonstrates the difficulties faced by plaintiffs who seek to escape the restrictions on aggravated damages in relation to claims arising out of medical treatment. While such claims are possible, the plaintiff will bear the burden of showing that the treatment was without a therapeutic purpose altogether. Evidence of a lack of credibility and dubious billing practices on the part of a health care provider will not be sufficient to succeed in such a claim.

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