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Admitting medical evidence in personal injuries cases from experts that have not been agreed upon or court appointed

A recent decision of Master Harper in the ACT Supreme Court casts doubt on the validity of section 84 of the *Civil Law (Wrongs) Act 2002* (ACT).

Yani Pappas v Victor Noble

[2006] ACTSC 39 (Harper M, 27 April 2006)

In an action for damages for personal injuries, Master Harper allowed the treatment notes of a plaintiff's general practitioner to be admitted into evidence. Section 84 of the *Civil Law (Wrongs) Act 2002* (ACT), which would have prevented the evidence from being admitted, was held to be inconsistent with the relevance provision in section 56 of the *Evidence Act 1995* (Cth). The restriction therefore had no effect by virtue of section 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

Master Harper also considered it arguable that the restriction was contrary to the right to a fair trial contained in section 21(1) of the *Human Rights Act 2004* (ACT). He did not determine the issue finally given his decision on the inconsistency point.

Background

The plaintiff sought to tender a copy of a general practitioner's treatment notes, which were expected to contain matters of both fact and opinion. The relevance of the treatment notes was not in question.

The defendant objected on the grounds that it was contrary to section 84 of the Civil Law (Wrongs) Act, which provides:

> Expert medical evidence may be given in a proceeding in a court based on a claim only by –
>
> (a) an expert appointed by the parties under section 85 or section 89(1) (an ***agreed expert***); or
>
> (b) an expert appointed by the court under section 86 or section 89(2) (an ***appointed expert***).

Findings

The plaintiff could admit the expert evidence.

Section 84 of the Civil Law (Wrongs) Act was held to be inconsistent with section 56 of the *Evidence Act 1995* (Cth), which states:

> (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

Section 55 of the *Evidence Act 1995* (Cth) provides:

> (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

Given the treatment notes were regarded as relevant, the Commonwealth law and Territory law operated inconsistently. This inconsistency was resolved by reference to section 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). This section provides:

> (1) A provision on an enactment has no effect to the extent that it is inconsistent with a law defined by subsection (2), but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law.

Subsection (2) defines 'law' to include a Commonwealth law and an 'enactment' is defined in section 3 to mean an act of the ACT Legislative Assembly. Master Harper had no hesitation in reaching the conclusion that the subsection in question could not operate concurrently with the provision of the Commonwealth law.

Master Harper also considered a further argument that the restriction operating by virtue of section 84 might fall foul of the *Human Rights Act 2004* (ACT). Section 21 of that Act deals with the right to a 'fair hearing', providing:

> (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair an public hearing.

Master Harper stated:

> There seems to me a respectable argument that a provision in another Territory Act which makes inadmissible evidence which would otherwise be relevant and admissible and which might be determinative of issues in the trial of a civil action, might well be categorised as inconsistent with the right to a decision after a fair hearing.

However, having formed the conclusion that the evidence was admissible, Master Harper considered it unnecessary to make a declaration of incompatibility under the Human Rights Act.

Implications

The decision affects any proceeding in which a party seeks to adduce expert evidence relating to a medical issue. Section 82 of the Civil Law (Wrongs) Act defines a 'a medical issue' as an issue relating to:

> (a) the medical condition or prospects of rehabilitation of a person; or
>
> (b) the cognitive, functional or vocational capacity of a person; or
>
> (c) the question whether particular medical treatment amounts to professional negligence.

Section 84 allows a party to rely on such evidence only if it comes from an expert that is either agreed to by both parties or is appointed by the court. The decision has cast doubt on whether this restriction can apply. Master Harper's decision suggests that parties may decide which, and how many, experts to rely upon, subject to the issue of the relevance of that material.

By rendering section 84 ineffectual, the decision threatens to undermine the progressive aims of the section. The section was introduced in response to the recommendations of the national *Review of the Law of Negligence Report 2002* (The Ipp Review). The goals of the amendment were summarised in the explanatory memorandum:

> This new regime should remove some of the adversarial process, as it will provide for medical experts to assist the court rather than their respective parties. This regime will also reduce costs in litigation, as parties will share the cost of one medical expert rather than having at least one medical expert for each party.

Of course, this will be of particular relevance to the Territory's scheme given the operation of the Commonwealth Evidence Act in the Territory courts. The states have all enacted state specific versions of the Evidence Act.

Other provisions of the Civil Law (Wrongs) Act restrict the admission of evidence. These sections include:

- section 131(1), which restricts the admission into evidence of any statement or admission made in connection with the making or acceptance of an offer to make amends in relation to an action for defamation. However this section is consistent with section 131 of the Evidence Act which restricts the admission into evidence of any communication made, or document prepared, in connection with an attempt to negotiate a settlement of the dispute.
- section 139N(2), which provides that an incriminating answer, document or thing that is produced in accordance with section 139N(1) in a civil action for defamation is not admissible in proceedings for criminal defamation. Although this section would seem to restrict the admission of relevant evidence, it is consistent with the privilege against self-incrimination contained in section 128 of the Evidence Act.
- section 199(4), which creates a privilege that covers any document prepared for, or in the course of, a neutral evaluation session. However, this section is also consistent with protection offered by section 131 of the Evidence Act concerning evidence of settlement negotiations.

Although these sections restrict the admissibility of evidence, they are nevertheless capable of operating concurrently with the Evidence Act, unlike, as Master Harper found, section 84 of the Civil Law (Wrongs) Act, which restricts the admission of evidence that the Evidence Act would have held to be admissible.

The decision raises a question of the impact on the operation of the Supreme Court Rules 1937 (ACT) and its regime for service of material which frequently has the potential to restrict the admission of otherwise relevant material. However, section 11 the Evidence Act provides:

> (1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

Those provisions of the Supreme Court Rules are unlikely to fall foul of the Evidence Act because it does not render something inadmissible in the same way that the offending section 84 does, but merely provides a regime to enable the parties and the Court to deal with the material in a fair manner.

Regarding the Human Rights Act, it is unlikely that a decision based on Master Harper's preliminary comments regarding the potential incompatibility of the section with the legislatively entrenched right to a fair hearing would be sustainable. Cases in other jurisdictions have held that it is only in exceptional circumstances that the unavailability of a witness could potentially render a *criminal* trial unfair: see for example, *R v Scott* [1998] NSWCA 60485/98 (Unreported, Grove, Newman and Levine JJ, 8 December 1998). This type of argument would be even less likely to succeed in the context of a civil trial where the consequences to either party are less severe.

As an aside, section 86(2) of the Civil Law (Wrongs) Act permits the court to appoint additional experts where a single expert is not qualified to give an opinion on all the medical issues or where the court considers the interests of justice otherwise require it. Given this provision, and the reference to the broad test of the 'interests of justice', it would seem that parties have to opportunity to avoid the restrictions of section 84 without reference to the inconsistency created by sections 55 and 56 and the Evidence Act.

Text of the decision is available at: http://www.courts.act.gov.au/supreme/judgments/pappas.htm

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