NewsFlash

27 April 2009

The pitfalls of being an emergency services officer – a review of Neal v Ambulance Service of New South Wales [2008] NSW CA 346?

Who should make decisions about emergency medical treatment – the intoxicated and unreasonable patient or the sober and considered emergency services officer?

A recent decision of the New South Wales Court of Appeal has left open the question of what is the appropriate response for emergency services faced with a situation where their offers of assistance are rejected. This situation has in recent times caused particular concern for ambulance services given the ramifications of a failure to treat as opposed to treating without consent. This raises the question, in what circumstances should an ambulance officer ignore a patient's refusal of treatment and transport them to the hospital for assessment and treatment? A failure to do so may render the ambulance officer, or as the legislation provides, the Ambulance Service of New South Wales, liable for consequential injuries for failure to administer treatment to a patient. The alternative is that if treatment is administered without consent, the ambulance officer may be liable for assault or the tort of trespass to the person.

The case of Neal v Ambulance Service of New South Wales [2008] NSWCA 346 arose from a failure to provide treatment resulting in subsequent and significant injuries being suffered by the appellant.

In July 2001, Mr Neal suffered a blow to the head (possibly due to an assault) while walking the streets of Newcastle. Police officers found Mr Neal on a driveway and noticed that he was heavily intoxicated. The police officers also noticed a contusion on Mr Neal's forehead and so called for ambulance assistance. When the ambulance officers arrived, Mr Neal refused treatment and would not allow a proper examination of the contusion on his head. Given Mr Neal's refusal of treatment and his inebriated state, the ambulance officers left and the police officers took him into custody pursuant to the powers provided by the Intoxicated Persons Act 1979 (NSW). The following morning, Police were unable to easily rouse Mr Neal and again contacted the ambulance service so that he could be taken to the Mater Hospital for observation. Following a CT scan at the Mater Hospital, it became apparent that Mr Neal suffered an extradural haematoma with a fracture to the skull.

It also became apparent that the delay in Mr Neal receiving treatment was the likely cause of his subsequent disabilities, including hemiparesis which paralysed the right side of his face.

Mr Neal sued the State of New South Wales on behalf of the New South Wales Police and the Ambulance Service of New South Wales for failing to transport him to hospital so that doctors could assess the significance of his head injury. At first instance, the trial judge found in favour of Mr Neal as against the Ambulance Service on the basis of a "loss of chance" of a better outcome, however, did not consider the police officers to be negligent.

On appeal, the Court of Appeal was asked to consider:

- whether the ambulance officers were liable to Mr Neal for breaching their duty of care by failing to advise the Police that Mr Neal needed to be conveyed to hospital;
- whether the police were liable to Mr Neal for breaching their duty of care by failing to take Mr Neal to hospital; and
- whether damages were assessed correctly on a loss of chance basis.

This article will only focus on the first two questions.

In respect of the duty of the ambulance officers, the Court of Appeal held that the ambulance officers should have passed on information about the plaintiff's injury to the police as the police were unable to provide relevant medical assistance and they knew that the plaintiff was about to be taken into police custody. Having so determined, the Court of Appeal went on to say that the trial judge, in finding the ambulance service liable, failed to determine if Mr Neal would have agreed to go to hospital or, if taken unwillingly, whether he would have submitted to an assessment by doctors and received treatment. The only reasonable inference to be made on the facts was that Mr Neal would not willingly have gone to hospital and consented to medical assessment whether transported by an ambulance or by the police. Essentially, Mr Neal could not demonstrate that any breach of duty by the ambulance officers was causative of his loss.

In respect of the duty of the police, it was noted that the Police custody manager has a general legal obligation to provide any necessary medical treatment to Mr Neal, however, the Court found that there was no breach on the facts. Although the Police may have had the power to detain Mr Neal for the purposes of the Intoxicated Persons Act 1979 (NSW), they could not have forced him to stay in hospital and receive treatment.

The ambit of police powers is outlined in the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) which states at section 129 that the officer responsible for a detained person "must arrange immediately for the person to receive medical attention if it appears to the custody manager that the person requires medical attention or the person requests it on grounds that appear reasonable to the custody manager." No such provision existed in the Intoxicated Persons Act which was in force at the time of the incident. In any event, this again raises the question of whether Mr Neal would have consented to treatment in his intoxicated and irrational state.

As eluded to earlier, the problem faced by emergency services, especially the ambulance service, is that there is a fine line between negligence and assault or, as one commentator put it, ambulance officers are "damned if they do and damned if they don't." Where ambulance officers provide treatment to a competent adult who refuses treatment (even if it is for their own good), the ambulance officers may be faced with a case of assault or trespass against them. In the event that a person who is not able to provide an informed refusal of treatment so refuses, say for example if they are suffering a mental illness or are heavily intoxicated, the ambulance service may be found negligent for failing to treat the injuries.

It is likely that Mr Neal would not have refused treatment but for his intoxication. This raises the question of whether intoxicated persons should be entitled to make decisions about medical treatment. This obviously has difficulties especially in circumstances where, for example, an intoxicated person refuses a blood transfusion but would have refused in any event because of their religious beliefs. There is also the obvious issue that such an act would be an invasion of personal liberties.

The decision to provide medical treatment against a person's wishes also raises the question as to who should decide when a person is so intoxicated that they are unable to make their own decisions about medical treatment.

The decision in Neal v Ambulance Service of New South Wales has arguably raised more questions that it has answered. Unfortunately, it means that in future, emergency services might be overly cautious and transport everyone in Mr Neal's situation to hospital, even if they do not require medical assistance. This will inevitably place further pressure on our already strained emergency services.

Debbie Kaminskas
Solicitor
T: 02 8281 4443
E: dlk@cbp.com.au