

# Insurance CaseNote

July 2010

## Conflicting evidence and the value of meticulous clinical notes

In *Hollier v Sutcliffe* [2010] NSWSC 279, the plaintiff, Ms Hollier, alleged that her GP, in breach of her duty of care, incorrectly inserted an Implanon contraceptive device, causing her both physical injury and mental trauma. In his judgment, Hulme J considered the difficulties posed by conflicting evidence. He also revisited the requirements for establishing mental harm.

### The facts

On 25 September 2006, Ms Hollier attended the All Care Medical Centre (**Centre**) to discuss contraceptive methods with her treating GP, the defendant, Dr Sutcliffe. At that time Dr Sutcliffe advised that an Implanon device was a viable alternative to other available methods of contraception. Ms Hollier had previously had an Implanon device inserted and had experienced no difficulties.

On 16 October 2006, Ms Hollier had an appointment with Dr Sutcliffe and the Implanon device was inserted into her left upper arm. There appears to be some discrepancy in the evidence concerning each party's recollection as to whether the Implanon device could be felt after its insertion, as is required. Nevertheless, it was agreed that Ms Hollier should return the next day for re-examination.

That night Ms Hollier claims that she suffered a burning sensation and tightness in her armpit region, with bruising and lumps appearing in the morning. None of these symptoms were conveyed to Dr Sutcliffe at the follow-up appointment on 17 October 2006 as, according to Ms Hollier, she did not want the Implanon device removed. During this consultation, Ms Hollier told Dr Sutcliffe that she could feel the device and also signed a consent form, to the same effect.

In the period that followed, Ms Hollier alleges that the insertion site started to blacken and the lumps increased in size. The pain was so severe that on 21 October 2006 she attended Liverpool Hospital and was told that she would have to have the Implanon device removed. Ms Hollier attended the Centre the following day and had the device removed by a Dr Bui, as Dr Sutcliffe was on holidays.

## The decision

In his judgment, Hulme J conceded that the determination of whether Dr Sutcliffe had breached her duty of care would turn upon whose version of events were accepted. Hulme J based his decision on two factors, namely the consistency of each party's evidence and the absence of evidence from certain potential witnesses.

Hulme J considered the evidence tendered by Dr Sutcliffe to be reliable as it was supported by meticulous clinical notes.<sup>1</sup>

Ms Hollier's explanation of events seemed inconsistent in a number of respects, particularly in relation to whether she had been able to feel the Implanon device.

Furthermore, Ms Hollier failed to call her friend Kristy as a witness. Kristy had been with Ms Hollier when the Implanon device was inserted. Ms Hollier also failed to call the Centre nurse and Dr Bui. In the circumstances, Hulme J was satisfied that a *Jones v Dunkel*<sup>2</sup> inference could be drawn to conclude that these witnesses were not called as they did not advance Ms Hollier's evidence.<sup>3</sup>

## Causation

Hulme J did accept that Ms Hollier suffered a genuine chronic pain syndrome, but did not believe that this satisfied the factual causation test contained in section 5D(1) of the *Civil Liability Act 2002 (Act)*. According to the causation experts:

*"the harm could have occurred irrespective of whether the scenario described by the plaintiff or that described by the defendant had occurred."*<sup>4</sup>

Consequently, Hulme J was not convinced that Dr Sutcliffe had in fact breached her duty of care or that the alleged negligence was the cause of Ms Hollier's harm.<sup>5</sup>

## "Mental harm" and "a person of normal fortitude"

Section 32(1) of the Act states that:

*"A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might ... suffer a recognisable psychiatric illness..."*

Dr Sutcliffe submitted that Ms Hollier was not a person of "normal fortitude" under section 32(1) of the Act and so damages were not recoverable for any

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1 Hollier v Sutcliffe [2010] NSWSC 279 at 113.

2 Jones v Dunkel [1959] 101 CLR 298.

3 Hollier v Sutcliffe at 142.

4 Ibid at 212.

5 Ibid at 217.

mental harm suffered. Ms Hollier contended that section 32(1) of the Act did not apply as her claim was one of *consequential mental harm* not *pure harm*. Hulme J clarified the meaning of "mental harm" under the Act by stating that it may include *pure or consequential mental harm*.<sup>6</sup>

After concluding that section 32(1) of the Act did apply to the present case, Hulme J turned his mind to whether Dr Sutcliffe ought to have foreseen that a recognisable psychiatric illness might be suffered by Ms Hollier. Hulme J concluded that:

*"Whether the plaintiff was a person of "normal fortitude" is not a relevant consideration. The focus is upon "a person"."*

In light of the surrounding circumstances and expert psychiatric evidence, Hulme J held that Ms Hollier's reaction was beyond that which would ordinarily be expected of "a person of normal fortitude".

## Implications

In cases involving conflicting evidence, extrinsic factors such as meticulous clinical notes can readily influence a judge's decision as to which parties' evidence to accept. It must be borne in mind by parties when considering which witnesses to be called that the ultimate decision may be influenced by a party's choice *not* to call certain critical witnesses. The harm must be carefully balanced against the risk of a *Jones v Dunkel* finding if they are not called.

When assessing whether an action for mental harm is available, it is important to give consideration as to whether "a person of normal fortitude" would suffer the same mental harm. This is an objective test.

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<sup>6</sup> Ibid at 220.

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