

HUNTER AND NEW ENGLAND LOCAL HEALTH DISTRICT v MCKENNA

(S142/2014)

HUNTER AND NEW ENGLAND LOCAL HEALTH DISTRICT v SIMON & ANOR

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Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 476

Date of judgment: 23 December 2013

Special leave granted: 20 June 2014

On 20 July 2004 Mr Stephen Rose arranged for his friend, Mr William Pettigrove, to be admitted to the Manning Base Hospital in Taree ("the Hospital") due to concerns he had over Mr Pettigrove's mental health. Pursuant to the *Mental Health Act 1990* (NSW), Mr Pettigrove was compulsorily detained overnight. He was however released into Mr Rose's care the next day following a subsequent psychiatric assessment by the Hospital's psychiatrist, Dr Coombes. Mr Pettigrove was released to enable both men to travel by car to Victoria which is where Mr Pettigrove's mother lived. After stopping en route near Dubbo, Mr Pettigrove strangled Mr Rose to death. Mr Pettigrove later told police that he had acted on a revenge impulse, apparently believing that Mr Rose had killed him in a past life. Mr Pettigrove himself subsequently committed suicide.

Mr Rose's mother and sisters ("the Family") then sued the Hunter and New England Local Health District ("the Health District"), being the legally responsible entity, in negligence. They claimed that the Hospital owed Mr Rose (and them) a common law duty of care and that it had breached that duty by discharging Mr Pettigrove into Mr Rose's custody. The Family also claimed that they suffered from psychiatric injury resulting from nervous shock following Mr Rose's death.

On 2 March 2012 Judge Elkaim found for the Health District, holding that the Family had not established negligence. His Honour further found that they had not satisfied him that Mr Rose's death (and consequently their injuries) were causally related to that alleged negligence.

On 23 December 2013 the Court of Appeal (Beazley P & Macfarlan JA; Garling J dissenting) allowed the Family's appeal. The majority held that the Hospital owed Mr Rose a common law duty to take reasonable care to prevent Mr Pettigrove causing him physical harm. This was because the Hospital not only had direct dealings with Mr Rose, but it also controlled the source of the risk to him (being Mr Pettigrove). They found that there was a foreseeable (and not insignificant) risk of serious harm being occasioned to Mr Rose upon Mr Pettigrove's discharge. The majority found that a reasonable person in the Hospital's position would have responded to that risk by continuing Mr Pettigrove's detention. Negligence had therefore been established.

The majority further held that the Health District was not entitled to the protection of s 50 of the *Civil Liability Act 2002* (NSW) ("the Liability Act"), as there was no relevant practice to which Dr Coombes had conformed when discharging Mr Pettigrove. Their Honours also found that the Health Service was not entitled to the protection of s 43 or s 43A of the Liability Act. This was because the Family's claims were not for breach of a statutory duty or based on the Hospital's exercise of, or failure to exercise, a special statutory power conferred by s 35(3) of the *Mental Health Act 1990*.

The majority additionally held that the Family had established that Mr Rose's injuries (and therefore their own) were causally related to Dr Coombes' negligence. For the purposes of s 5D of the Liability Act, the Hospital's breach was a necessary condition of the harm and it was therefore appropriate that liability extend to that harm.

The grounds of appeal (in both matters) include:

- The New South Wales Court of Appeal erred in concluding that the Health District owed a duty of care to Mr Rose and the Family.
- The New South Wales Court of Appeal, having found that the Health District owed a duty of care to Mr Rose, erred in finding that the relevant 'risk of harm' for the purposes of section 5B of the Liability Act was the risk of any physical harm to Mr Rose, including physical harm that Mr Rose might suffer as a result of Mr Pettigrove attempting to harm himself.