



Judgment Summary

Supreme Court
Australian Capital Territory
Court Of Appeal

Wednesday, 29 November 2023

Austen v Tran [2023] ACTCA 44

McCallum CJ, Wheelahan J and Crowe AJ

The Court of Appeal has dismissed an appeal from a single judge of the Supreme Court holding that the primary judge was correct in finding no medical negligence.

On 19 September 2017, the plaintiff was diagnosed with non-Hodgkin's lymphoma and after a period of remission her prognosis became terminal. Sadly following this appeal and before judgment could be given, the plaintiff passed away. The plaintiff brought proceedings claiming that the defendant had been negligent in the conduct of his examination of her by ordering only blood tests and no follow up appointment despite her severe leg pain. The plaintiff further claimed that but for this negligence, she would have received an earlier diagnosis and moved into remission sooner.

The primary judge gave judgment for the defendant holding that the defendant did not breach his duty of care to the plaintiff having regard to the risk and the probability of it eventuating and alternatively that if there had been a breach, the plaintiff had not established that any negligence of the defendant was a necessary cause of the plaintiff's terminal prognosis. The primary judge was of the view that given the low probability of the risk, impacting 15 in 100 000 women in Australia, the general practitioner was entitled to assume that if the pain the plaintiff described persisted, the plaintiff would seek additional care on their own volition.

The grounds of appeal concerned two topics being errors in findings relating to the first consultation with the defendant on 17 October 2016; and errors in findings relating to causation. In dismissing the appeal, their Honours acknowledged the benefit of the primary judge in hearing the evidence of the witnesses and found that the primary judge properly considered the evidence before her Honour and the appropriate legislative provisions. Notably, the Court did not accept the submission that the primary judge did not properly consider factors in s 43(2)(a) or (b) of the *Civil Law (Wrongs) Act 2002* (ACT). Her Honour identified the risk of harm was that a delay in diagnosis would leave lymphoma untreated and develop to a point that was terminal and the probability of harm was referred to by her Honour when addressing the expert evidence saying that non-Hodgkin's lymphoma was a rare explanation for symptoms initially presenting as leg or back. The rejection of the plaintiff's first topic of appeal directed to the judge's findings that there was no breach of

duty meant that it was unnecessary to address those grounds directed to the judge's findings as to causation or the issues raised by the notice of contention.

This summary has been prepared for general information only. It is not intended to be a substitute for the judgment of the Court or to be used in any later consideration of the Court's judgment.

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