

Potential legal issues for ambulance services

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This paper will review developments and emerging issues in law for ambulance services.¹ It is not intended as a comprehensive review but a reflection on issues arising from recent developments in the law and the authors' current research interests.

Negligence

Whether or not an ambulance service, and its officers, owe a duty of care to their patients was a matter of argument in the English case of *Kent v Griffiths*.² Ultimately it was held that an ambulance service should be considered on the same footing as a health service rather than an emergency service (such as the police and fire brigades). The emergency services are there for community, rather than individual benefit whereas an ambulance service is providing care to the injured clearly for that persons benefit and does owe the appropriate duty of care.

The issue has not been subject to debate in Australia. It is interesting to note that changes to the legislative position in New South Wales have reflected the views expressed in *Kent v Griffiths*. The *Ambulance Service Act 1990* (NSW) has been repealed, and the Ambulance Service is now constituted as a health service under the *Health Services Act 1997* (NSW).³ Unlike the ACT, where the ambulance service is the responsibility of the Minister for Police and Emergency Services, the NSW and Victorian Ambulance Services are the responsibility of the Minister for Health.

Case law has accepted that ambulance services owe a duty of care to their patients without the need for legal argument on the point. Two interesting cases, with very

¹ This paper was presented at a seminar held at the Department of Community Emergency Health and Paramedic Practice, Monash University, Frankston on the 8th May 2008.

² [2000] EWCA Civ 25.

³ *Public Sector Employment Legislation Amendment Act No 2 2006* (NSW), ss 7 and 8 (date of commencement 17 March 2006).

similar facts, have arisen in Victoria⁴ and New South Wales.⁵ In both cases the plaintiff/patient was intoxicated when he was struck severely around the head. The police and ambulance service attended; in the Victorian case the ambulance officer determined that there were no injuries and ambulance assistance was not required whilst in the NSW case the ambulance officers were concerned about the patient and wanted to transport him to hospital, but the patient refused ambulance assistance. In both cases, the person was taken into police custody and placed in a police cell where it was recorded that they were intoxicated. Some time after it was observed that their condition had deteriorated so an ambulance was again called, this time the patients were transported to hospital and in each case it was determined that they had extensive head injuries that lead to permanent disability, and which may not have been as severe if they had been treated earlier.

In both cases the plaintiffs sued both the Ambulance Service and the police. In both cases the ambulance service was found to bear the bulk of the responsibility (100% in NSW; 60% in Victoria) but the findings of what was negligent was different.

Victoria

The problem in Victoria was the officers' cursory examination of the patient, his failure to take a proper history and his assumptions based on his observations that the patient was intoxicated. The judge found the officer made his examination and diagnosis with 'undue haste', he failed to pay sufficient attention to the history given by police or to make adequate enquiries of bystanders and given that he knew that the patient had been hit over the head, he failed to give real consideration to clinical signs in particular his 'inability to answer simple questions and his unresponsive answers (together with his inability to stand up)'.⁶

In this case the police were also found to be negligent as they had procedures that they were supposed to follow when an intoxicated person was in custody, which they did not. Had they done so they may have detected that he was seriously unwell in less than the 2 hours it took them.

⁴ *Keller v Metropolitan Ambulance Service of Victoria* [2002] VSC 222.

⁵ *Neal v Ambulance Service of NSW* [2007] NSWDC 123.

⁶ *Keller v Metropolitan Ambulance Service of Victoria* [2002] VSC 222, [53]-[55].

New South Wales

The NSW case had similar facts with the extra complication that it was not the officers that determined that the patient did not need transport, but the patient himself, who refused transport. The Court found that, in the circumstances, it was not only reasonable not to transport the patient; it would have been illegal given his express and apparently competent refusal of treatment. The person was however taken into custody by police relying on their powers under the *Intoxicated Persons Act 1979* (NSW). Although the ambulance officers could not take him to hospital against his will, the police, relying on express statutory powers under the Act, could have. The ambulance officers did not communicate their concern about the patient to police, they did not suggest that the police take him to hospital rather than the cells and they did not give any advice to police as to what they should look for to determine if the patient's condition was deteriorating.

The Service argued that the patient's refusal of treatment meant that they owed no further duty of care but the court said that the creation of the legal duty of care did not depend upon the patient's consent. The patient's refusal would shape what it was the officers could do and determine what was 'reasonable' in the circumstances, but it did not determine whether or not there was a duty to take reasonable care.

Notwithstanding the patient's refusal they still had to do what they reasonably could given the limitations imposed upon them, and what the Court found that they should have done, but did not do, was tell the police that they had not been able to examine the patient, what the possible consequences of that were and 'tell the police that the plaintiff may have a head injury and should be medically assessed.'⁷

Discussion

As legal precedents these cases are of relatively little value, given they are decisions of single judges and in Victoria the actual issue that the judge had to decide was how to apportion responsibility between the Ambulance Service and the Police as the case

⁷ *Neal v Ambulance Service of NSW* [2007] NSWDC 123, [39]-[40]. It might be thought that the patient should accept some responsibility for the outcome and it should be noted that while the ambulance service carried 100% of the obligation to pay the damages awarded, the amount of damages was only 25% of the amount calculated to take into account the fact that all the plaintiff lost was a chance of a better outcome, and the ambulance service did not cause his initial head injuries.

with the plaintiff was settled 'out of court'. At best these cases serve as a reminder for, or a warning to, officers that they must take their time and make their own professional judgment about what is required, rather than rely on pre-conceived ideas of what is wrong. In particular, it would be important not to assume that the police know what to do, or that leaving someone in the care of police is sufficient. Officers must not be pressured by the fact that police are standing by waiting for the ambulance officers 'OK' to take someone into custody. Telling police that a person needs to be transported to hospital might make life more difficult for police who then have to delay their work, or arrange for police to go to hospital with a patient, but these are not matters that should concern an ambulance officer. An officer has to take time, find out what they need to find out, and exercise their own professional judgment.

Neal's case also serves as a reminder that health care is not an 'all or nothing' exercise, a patient has a right to refuse all treatment or some treatment but that does not absolve the health provider (doctor, nurse or ambulance officer) of all responsibility. It is not the case of 'you take the treatment I'm offering or it's nothing to do with me'. The obligation on a health professional is to act reasonably in the circumstances which can include circumstances where a patient refuses some or all treatment. Just because a patient refuses a blood transfusion it does not mean that health teams do not continue to treat and try to save their life; a patient may allow an ambulance officer to examine them and provide first aid but refuse transport, but the care that is provided must be reasonable and in appropriate circumstances.

Reasonable care may require a warning or strong advice that the person should be transported. In *Neal's case* the patient would not allow any examination or treatment but the officers involved both felt he should have gone to hospital and they would have transported him if he had let them. In the circumstances it was found their duty of care required them to tell the police of the sorts of things to look for and even suggest that they take him to hospital as they could well have done.

Occupational Health and Safety

A very interesting case arose, again in New South Wales, in *WorkCover v NSW Fire Brigades*.⁸ Clearly this was not a case involving the ambulance service but its findings will be of interest to ambulance services and officers. This case involved a fire in a silo at an oil seed crushing plant. The silo was emptied under the supervision of the Fire Brigades. When it was thought to be empty some employees of the factory opened an inspection hatch in the silo. This allowed an influx of oxygen that caused an explosion killing three employees. A fire-fighter dressed in his protective clothing and helmet, but who had removed his gloves, suffered burns to his hands but was otherwise uninjured, demonstrating the value of his Personal Protective Equipment (PPE).

The NSW Fire Brigades were prosecuted for breaches of the *Occupational Health and Safety Act 2000* (NSW). This was a criminal prosecution rather than a civil claim for damages and was based on the Fire Brigades for their failure to properly train their staff on how to handle a silo fire and for failing (via their incident commander) to ensure adequate supervision of the site to ensure there was no risk to fire-fighters and others.⁹ The *Occupational Health and Safety Act* applies to a 'place of work' and this was the place of work for the fire-fighters so the fire brigade had a duty to take steps to ensure the health and safety of its own staff (ie the fire fighters) but also other people at that place of work, ie the staff of the factory.

From a legal point of view, the significance of this case was the finding by Boland J that section 78 of the *Fire Brigades Act 1989* (NSW) did not apply to criminal prosecutions. Section 78 said:

A matter or thing done by the Minister, the Commissioner, any member of staff of the Department, any member of a fire brigade or any person acting under the authority of the Commissioner does not, if the matter or thing was done in good faith for the purposes of executing this or any other Act, subject such a person personally, or the Crown to any action, liability, claim or demand.

⁸ [2006] NSWIRComm 356.

⁹ It should be noted that the owner of the factory was also prosecuted for offences against the Act.

There is a similar provision in nearly every piece of ‘emergency services’ legislation.¹⁰ This provision did not create an immunity from prosecution from the OHS Act and equally would not give an immunity for offences involved in for example, driving a vehicle negligently, or any other criminal offence.

More interesting for my theme was the issue of the duty of the Brigades to protect the people who were ultimately killed, who were all employees of the factory involved. From that point of view the case raises for consideration obligations to bystanders at an emergency. It is easy enough to say that bystanders should be excluded from an emergency scene but that is not really practical. First bystanders will usually be on the scene before the emergency services arrive, from an ambulance point of view that means at an accident or incident the community not only expects, but encourages people to be trained in first aid and to step forward and often save lives before an ambulance can get there. To require people who have been actively and emotionally involved in a scene to ‘step back’ and stop taking any further action once the ambulance service arrives would be to deny those people the chance to finish the task they may have competently started and may well deny the ambulance officers the chance to use the skills they may have, whether they are doctors who can assist in patient care or bystanders who can be asked to hold the drip or help lift the stretcher.

As with the factory fire bystanders may well be employees at the scene, eg the factory first aid officer or they may be related to the patient. To have a blanket rule that once the ambulance is on scene no other person is to be involved could cause emotional trauma to people that are then dismissed despite prior, gallant, life saving efforts and diminish their value to the work place or the patient. Sending the message that once the emergency services are on scene then no-one else is required is to say to the community ‘we will come with lights and sirens and take all responsibility; there is nothing for you to do’.¹¹ Such an attitude would not help develop a resilient community that is prepared to take responsibility for its own emergency response.

¹⁰ For NSW Ambulance see *Health Services Act (NSW) s 67I*; there does not, however, appear to be an equivalent provision in the *Ambulance Services Act 1986 (Vic)*

¹¹ To paraphrase from the evidence in *Gardner v NT* [2004] NTCA 14; see Eburn M, ‘A case study of tort liability for fire damage’ (2007) 22(1) *Australian Journal of Emergency Management* 44-48.

What would be required is some consideration of how they might be protected. Clearly in a dangerous situation people (including ambulance officers) may have to be kept out until other emergency services (fire and rescue) can make the scene safe, but failing that ambulance services should consider how they will make use of bystanders. They should have, and be prepared to make available, the sort of PPE that they may use, at a minimum gloves, and eye protection but perhaps, depending on the circumstances, hard hats and/or overalls.

A potential problem could arise when there are volunteers on scene, eg the SES volunteer rescue service. Although the SES may be charged with the responsibility for conducting the rescue, the ambulance officers are at their place of work whereas the volunteers are not. The duty to protect the volunteers from themselves may fall upon the employed officers even though they have not command authority over the rescue service. The legislation does make provision that the person at work need only take action to protect people from those matters under their control, so of course ambulance officers may have an obligation to make sure sharps are disposed of but not to tell others, even volunteers, how to do their job. It follows that the conflict is unlikely to arise, but it could if the professional officers believe that volunteers are about to do something dangerous (or vice versa)¹² that does cause injury to someone.

Notwithstanding this, if the danger really was obvious, particularly if it was danger to the patient, then failure by the ambulance officers to say something could lead to legal consequence. Another way this confused area of responsibility could lead to conflict is if there was a dispute whereby professional staff felt compelled to try and tell volunteers, ie people at 'their' workplace, how to do their job safely. If everyone is at their place of work then there could well be territorial disputes over who is in command eg at a fire where the factory owner, aware of risks tries to tell the fire brigades how to do their job. The problem with OHS regulation is that it can put equal obligations on a number of people making it difficult to determine, in advance, exactly who is in control of a given situation. At this stage these issues are at best

¹² But again, if that were the case one would expect someone to say something: safety is meant to be the concern of everyone and at a rescue, everyone should be looking out for each other and not being concerned with territorial issues.

hypothetical, and presumably if everyone is working safely, will not arise, but there could be legal complications in the event that something untoward does happen.

International Disaster Response

This issue arises not from any recent case law or legislative reforms, but from the author's current research interests. Ambulance services have responded to recent international events, for example NSW Ambulance responded as part of the NSW Health Counter-Disaster team to the 2004 Boxing Day South East Asian Boxing Day Tsunami.¹³ The problem with international disaster response is that it brings the Commonwealth Government into play, effectively using State resources to meet Commonwealth obligations. The Commonwealth's plan for providing overseas assistance is AUSASSISTPLAN issued by Emergency Management Australia (EMA) as the 'Managing Agent for Disaster Assistance for the Australian Agency for International Development' (AUSAID). AUSASSISTPLAN largely deals with the deployment of Commonwealth resources and approval processes to allow Commonwealth resources to be deployed overseas. AUSASSISTPLAN does not expressly deal with the role State based resources (eg health teams including ambulance officers) will have in providing assistance to other countries on behalf of Australia. There is no doubt that the Commonwealth could call on State resources and those resources could be deployed as part of the Australian (rather than say a Victorian) response.¹⁴

The International Federation of Red Cross and Red Crescent Societies has identified a number of problems involved in international disaster response,¹⁵ problems that are not clearly addressed under current Australian law or policy (including AUSASSISTPLAN). For ambulance officers who may be deployed overseas these will include issues such as the issue of visas, recognition of professional qualifications to ensure that they can carry and administer drugs in the foreign country as well as drive motor vehicles, legal indemnity and accountability provisions, and provision of travel type insurance to cover losses due to illness, injury or other misadventure.

¹³ *Specialist skills in disaster situations...*

<<http://www.asnsw.health.nsw.gov.au/what/countdisaster.html>> at 16 December 2005

¹⁴ See Emergency Management Australia *National Emergency Management Coordination Centre (NEMCC) Standing Operating Procedures (SOPS)* (September 2002) [11.5.1].

¹⁵ David Fisher, *Law and legal issues in international disaster response: a desk study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

AUSASSISTPLAN and State and Federal legislation do not deal with these issues. The most significant thing that AUSASSISTPLAN has to say about such arrangements is that the costs will generally be borne by the Commonwealth.

Legal indemnity will be an issue as there may well be an issue whether it is Australia or the State that would be responsible for meeting any legal claims should they arise from the conduct of the emergency response.

Although it is anticipated that any international response will be managed by the Commonwealth via AusAID and EMA there is no legislative requirement for this to be the case, and it is interesting to note that the fire brigades (particularly the Victorian Country Fire Authority and Department of Sustainable Environment) have entered into agreements with foreign governments and foreign fire fighting agencies to provide mutual assistance during fire operations. This is beyond mutual training and idea exchange, they are actually bringing fire fighters onto the fire ground, to exercise the authority of the fire brigade. From what I have determined so far this is generally outside the scope of the provisions of COMDISPLAN or AUSASSISTPLAN. What the Brigades have done is enter into agreements that do generally cover issues such as insurance and indemnity and the role of their operators in each other's territory.

Ambulance services may well do, or wish to consider, doing the same thing. It is less likely that State ambulance services will require assistance from international colleagues but experience has shown that there may be calls on such services to respond overseas. A prudent service would, in my view, be seeking to enter into agreements with the Commonwealth to ensure when, and in what circumstances, they will make resources available to the Commonwealth to provide international assistance and encouraging the Commonwealth to ensure arrangements are in place in neighbouring countries to ensure that their officers are legally able to perform their duties.

Conclusion

This paper has addressed some legal issues that may arise for ambulance services in the future. With the exception of the negligence issues, they are perhaps more theoretical than real, but recognising potential risks is a necessary pre-condition for dealing with the. With respect to the discussion of negligence, being holding people and agencies to account for their actions is a fundamental role of law and will continue to be 'an issue' for everyone in their day to day operations, including ambulance services. What the cases cited here remind us of is the need to be vigilant and to apply professional judgment in all cases. Even where, for whatever reason, an officer cannot do everything they are trained to do, they must still be flexible and consider what other options there are to provide the best care they can for the patient. Sometimes that may be just telling them, or the person who cares for them, what to look out for.

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