

***Neal v Ambulance Service of New South Wales: a
postscript to (2007) 5 e Journal of Emergency Primary
Health Care Article number 990235.***

Michael Eburn
Senior Lecturer
School of Law
University of New England
ARMIDALE NSW 2351

In the paper cited above, the decision of the NSW Court of Appeal in *Ambulance Service of NSW v Worley*¹ was reviewed and some comments on the law of negligence that applies to the practice of ambulance officers and ambulance services was made. That article appeared in 2007. At about the same time Mr Neal was bringing action against the Ambulance Service of NSW and the NSW Police in the District Court of NSW.²

As in the case of *Ambulance Service of NSW v Worley* the plaintiff, in this case Mr Neal, won at trial but lost his case in the Court of Appeal. On the 10th December 2008 the Court of Appeal handed down its decision in *Neal v Ambulance Service of New South Wales*.³

Facts

The facts are described by Mr Justice Basten of the Court of Appeal. He said:

2 On the night of 27 July 2001 Mr Neal (the plaintiff) suffered a serious blow to the head whilst walking alone on the streets of Hamilton, near Newcastle. He was discovered by police, who called an ambulance. He rejected assistance from the ambulance officers and, being clearly inebriated, was taken into custody by the police under the *Intoxicated Persons Act 1979* (NSW). He declined to tell them where he was living and to identify any person who might be able to look after him. He was

¹ [2006] NSWCA 102. Available at:
<http://www.austlii.edu.au/au/cases/nsw/NSWCA/2006/102.html>

² [2007] NSWDC 123. Available at:
<http://www.lawlink.nsw.gov.au/dcjudgments/2007nswdc.nsf/00000000000000000000000000000000/9b6450eb8ebe2785ca2572f40016f9ae?opendocument>

³ [2008] NSWCA 346. Available at:
<http://www.lawlink.nsw.gov.au/scjudgments/2008nswca.nsf/00000000000000000000000000000000/000000/4a3854b369ac262eca257519007c8a13?opendocument>

taken to Newcastle Police Station. The following morning his condition was observed to deteriorate and, being unable to rouse him easily, the police had him taken to hospital by ambulance.

3 At the Mater Hospital the plaintiff underwent a CT scan, which revealed an extradural haematoma, with an overlying linear fracture of his skull. The plaintiff was transferred to the John Hunter Hospital in Newcastle for surgery to drain the haematoma.

4 The plaintiff suffered a variety of ongoing disabilities following the assault. Some, he accepted, were caused solely by the blow to the head. However others, particularly a right-sided weakness (hemiparesis), were said to have flowed from the failure to take him to hospital when he was discovered in the street by the police. He brought proceedings in the District Court for negligence against the State (as responsible for the negligence of the police) and the Ambulance Service of New South Wales (“the Ambulance Service”).

The District Court

The District Court judge 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).⁴ 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.

⁴ This Act has been repealed and replaced by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) Part 16.

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.'⁵

The trial judge found there had been no negligence by the police.

The Court of Appeal

Mr Neal appealed to the Court of Appeal arguing that the trial judge was wrong to find there had been no negligence by the police and that the trial judge had miscalculated the amount of damages he should receive.

The Ambulance Service also appealed arguing that the trial judge was wrong to find that they owed a duty of care to Mr Neal, that they had been in breach of that duty and that this breach had caused any damage.

With respect to the police Mr Neal argued that the police officers who detained him under the Intoxicated Persons Act 1979 (NSW) should have taken him to hospital. Having failed to take him to hospital, the Custody Manager at the police station should have observed that Mr Neal had suffered a head injury and arranged for an ambulance to attend. The Custody Manager is appointed to protect the interests of prisoners and one of his or her obligations is to arrange medical assistance where that is requested or required.⁶

The three judges that made up the Court of Appeal⁷ confirmed that in their opinion there had been no negligence by the police officers. The officers at the scene were aware that Mr Neal had refused ambulance assistance and had no reason to think that

⁵ *Neal v Ambulance Service of NSW* [2007] NSWDC 123, [39]-[40].

⁶ Then *Crimes Act 1900* (NSW) s 356M; see now *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 129.

⁷ Tobias JA, Basten JA and Handley AJA.

they should take him to hospital. The Custody Manager was aware that an ambulance had been called and that officers had examined Mr Neal. He was not aware that Mr Neal had refused assistance. The situation he was faced with was two constables bringing a person into custody who he knew had already been provided with medical assistance and who had not been transported by ambulance. There was nothing to indicate that further examination was warranted or would achieve anything that the initial examination had not achieved.

The appeal by the Ambulance Service was successful, but on very limited grounds. The Court of Appeal dealt very quickly with the assertion that there was no duty of care. It is axiomatic that a relationship that is as close as that between the Ambulance Service, acting through its employees the ambulance officers, and the patient, must give rise to a duty of care. The correct question was whether the duty, in the circumstances, extended to giving advice to the attending police that they should take Mr Neal to hospital.⁸

At the end of the hearing the court did not have to decide any of the issues of duty or breach as they found that even if the ambulance officers had advised the police officers that in their view Mr Neal should go to hospital, the outcome would have been the same. Even if the police could, under the *Intoxicated Persons Act 1979* (NSW), take Mr Neal to hospital they could not force him to accept medical treatment and the inference to be drawn from his behaviour is that he would not have done so. Even if the constables had informed the Custody Manager that the ambulance officers had not been able to fully examine Mr Neal there was no reason for the Custody Manager to call an ambulance to the police station as Mr Neal had made it clear he did not want ambulance assistance.

In any civil case the plaintiff must show that it is more likely than not that if the alleged negligence had not occurred, the outcome would have been different. In the opinion of the Appeal judges the trial judge did not give adequate consideration to that issue, and, on the evidence, the inference was that he would have continued to

⁸ Basten JA, [23]-[24].

refuse treatment. The result was, even assuming there had been negligence, it did not cause Mr Neal's damage and so his claim for damages was dismissed.

Discussion

With respect to the judges of appeal, the decision in this case is unsatisfying. It is unsatisfying as there is no clear ruling on whether or not the conduct of the ambulance officers was or was not up to an acceptable standard.

In many ways this case exemplifies much that is wrong with a fault based compensation scheme. Mr Neal has suffered long term injuries. He suffered from a loss of hearing, loss of the senses of smell and taste, cognitive (including memory) deficits right-sided hemi paresis. These are significant injuries and were caused through no fault of his own; he was assaulted by an unknown person whilst walking along a public street in Newcastle. The tragedy for him is that if he cannot point at someone to label 'negligent' he is left with limited avenues to find the funds to make up for lost earnings and the cost of providing necessary care. In this case he may have been able to get criminal injuries compensation⁹ but that is unlikely to have been as generous as an action under common law. Where a person cannot claim compensation they are limited to basic medical care that is covered by Medicare and Centrelink benefits. Centrelink benefits are the same for everyone and do not take into account pre-accident income or future prospects.

That identifies the first problem with a fault based compensation scheme, and that is that the amount of compensation one obtains depends on the circumstances of how the injury occurred rather than the needs of the injured person. Where a person gets injured in a motor vehicle accident,¹⁰ at work,¹¹ whilst playing sport¹² or as a victim of crime¹³ there are statutory compensation schemes to help meet the costs arising from the accident but they are not uniform so the amount of damages received may be

⁹ *Victims Support and Rehabilitation Act 1996* (NSW).

¹⁰ *Motor Accidents Compensation Act 1999* (NSW).

¹¹ *Workers Compensation Act 1987* (NSW).

¹² *Sporting Injuries Insurance Act 1978* (NSW).

¹³ *Victims Support and Rehabilitation Act 1996* (NSW).

different and in each case and in each case different from the case where someone can 'blame' another for their injuries. The system itself encourages an injured person to find someone or some institution and to affix the label 'negligent' to them.

The second issue is the effect that this action must have had on the officers involved. In this case the defendants, that is the organisations meeting the cost of defending the case and paying the damages if they had lost were the Ambulance Service of NSW and the State of NSW. In fact both would have been insured by the Treasury Managed Fund¹⁴ a self insurance scheme that covers all State entities. There was no suggestion that the officers themselves were liable for damages. Notwithstanding this the two ambulance officers, including one who had been a probationary officer at the time, had to give evidence and be questioned on their conduct and then live with the finding of negligence. The two attending police took Mr Neal into custody under the *Intoxicated Persons Act 1979* (NSW). This power is unlike the general power of arrest. Generally police arrest a person because they believe they have committed a criminal offence and the police intend to prosecute them. Detention under the *Intoxicated Persons Act* (and now under Part 16 of the *Law Enforcement (Powers and Responsibilities) Act*) is of a different, nature, it is protective custody where a person is taken into police custody for his or her own good. The officers were clearly taking Mr Neal into custody because he was intoxicated and they couldn't leave him on the street. He may have been better off in hospital but it was his own behaviour (albeit affected by alcohol and by the fact, now known that he had a head injury) that meant that was not possible so he was taken to a police station. He was better off there as at least his injury was ultimately detected. If he had been left on the street he may have died. In short five public employees, two ambulance officers and three police officers became involved in Mr Neal's case solely because he needed assistance and they tried to help. It was of course Mr Neal's case that he did in fact need assistance in the form of transport to hospital and they did not provide that assistance, but whether that was negligent or not is a separate issue to the fact that they set out to help him and ended up facing litigation that has so far taken seven years to resolve. That outcome must be impact upon people's willingness to try and help others in need.

¹⁴ 'Treasury Managed Fund' < <http://www.treasury.nsw.gov.au/insure/tmf> > at 12 January 2009.

Another problem with litigation is that it is meant to set standards that are to be applied. The standards arise from the particular facts but need to be generalised if they are to be applied by others, in this case other ambulance and police officers. If we assume that the decision of the trial judge becomes part of the folklore of the police and ambulance services what is the message? For police it is always ring the ambulance, for ambulance officers it is 'transport everyone even if they don't want to go' and the consequence is that hospitals are likely to receive more and more patients for examination with associated costs to the health services. Whether officers will learn that the Court of Appeal set aside the verdict it is still the case that they did not say there was no negligence, so a prudent police and ambulance officer will not attempt to make decisions but attempt to ensure that they have called someone else to 'pass the buck' to them.

The ambulance officers also faced the situation that they could be 'damned if they do and damned if they don't'. A patient has a right to refuse treatment but that refusal must be informed and made by a person who has the legal capacity to refuse treatment.¹⁵ Where an officer treats a person who has refused treatment that is the tort of assault or battery. Where, however, an officer withholds treatment as the patient appears to have refused treatment, but the patient was not in fact competent to do so, that would be negligence.¹⁶ Officers must make decisions about whether or not the patient is competent. It was not, but could have been argued that Mr Neal was not in fact competent to refuse treatment and therefore should have been transported to hospital by ambulance despite his apparent refusal.

Officers must make the judgement of competence with the risk of legal liability if they are wrong; ie they can liable if they treat and a court later rules the person was competent to refuse treatment and liable if they don't treat and a court later rules that they were not competent.

¹⁵ *In Re T* [1993] Fam 95.

¹⁶ *Ibid.*

All of this could be resolved by having a non-fault compensation scheme such as the one adopted in New Zealand.¹⁷ Under that scheme the right to sue for personal injuries compensation is abolished.¹⁸ Instead everyone in New Zealand is provided with insurance type cover to allow them to receive compensation for injury.¹⁹ The compensation scheme provides for:

- (a) rehabilitation, comprising treatment, social rehabilitation, and vocational rehabilitation:
- (b) first week compensation:
- (c) weekly compensation:
- (d) lump sum compensation for permanent impairment:
- (e) funeral grants, survivors' grants, weekly compensation for the spouse or partner, children and other dependants of a deceased claimant, and child care payments.²⁰

Where there such a scheme in Australia, people like Mr Neal, and ambulance officers (and police officers, and doctors, and car drivers and amusement machine operators etc) would all be able to conduct their business knowing that anyone who is injured will be provided for and that no-one, plaintiff or defendant, has to spend seven years resolving the issue. Such a scheme does not invite negligent or poor conduct as there is still the opportunity to complain about sub-standard performance to the relevant organisation, in this case the ambulance service or Police Force.

Conclusion

As with the case of *Ambulance Service v Worley* discussed in the article 'Ambulance Service of NSW v Worley; further legal lessons for the emergency services'²¹ the legal principle arising from this case is not particularly significant. The case sets little in the way of precedent for general application as the result turned entirely on the particular facts of the case rather than an exposition of a novel legal rule.

What the decision does, sadly, is remind us all that no matter how well intentioned one's actions, the reality is that the system for providing for the future care of injured persons encourages them to sue, to find someone to call 'negligent'. Where once one

¹⁷ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ)

¹⁸ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) s 317.

¹⁹ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) s 20.

²⁰ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) s 69.

²¹ 2007; Volume 5 : Issue 2 Article Number: 990235

would have said the emergency services do not get sued for their actions that claim is becoming harder to make.²²

It is not possible to make a ‘special’ case and argue that the emergency and ambulance services should not be subject to the law. What this case shows however, is how slow, inefficient and ultimately unsatisfactory the fault based system of compensation is. Rather than tinker at the edges with changes to the law to reduce the amount of small claims and to limit claims to those that are morally deserving (generally people who are both law abiding and sober)²³ it is time to rethink the whole system and consider whether it would not be better for plaintiffs, defendants, insurers and the State to abolish the system all together and look to a no-fault scheme such as that adopted across the Tasman.

²² See for example *NSW v West* (involving the NSW Rural Fire Service); *Keller v Metropolitan Ambulance Service of Victoria* [2002] VSC 222 (which has very similar facts to Neal’s case); *State of NSW v Tyszyk* [2008] NSWCA 107 (involving a response to storm damage by NSW Police) and further reports of litigation arising from the response to rural fires – ‘Farmers join class action on alpine fires’ *The Land* 5 January 2009.

²³ See *Civil Liability Act 2002* (NSW).