

UNCAPPED NEGLIGENCE CLAIMS &
WIDENING THE TRESPASS DOORWAY

DEAN v PHUNG

Bill Madden, Slater & Gordon



Background

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- 2001 work injury
 - 53 consultations
 - Root canal, crowns & bridges: 28 teeth
 - Fees \$73,640
- ...inexcusably bad and completely outside the bounds of what any reputable practitioner might prescribe or perform.

Litigation

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Employer	\$344,858
Mr Dean	\$1,743,000
Health Care Complaints Commission	Misconduct – Orders pending

Issues

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Uncapped negligence claims



Trespass claims



NSW section 3B(1)(a)

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- ❑ civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death, or
- ❑ that is sexual assault, or
- ❑ other sexual misconduct ,
committed by the person.

Comparison

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Victoria

- An award where the fault concerned is an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct.

Tasmania

- in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct.

The decision: First 'exclusion' element

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- "A medical procedure will generally be an intentional act..."
 - *Dean v Phung* [2012] NSWCA 223 at [30]

- No hurdle at all?



The decision: Second ‘exclusion’ element

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- The dentist knew at the time of giving the relevant advice that the treatment was not reasonably necessary
- No therapeutic intent
 - *Dean v Phung* [2012] NSWCA 223 at [30]
- At least in the sense that he was reckless as to whether the treatment that he administered was either appropriate or necessary

The decision: Trespass issue

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- Where there has been an **ostensible consent**, which is later challenged, the convenient starting point is to consider the validity of the consent, rather than asking whether it has been obtained by fraud.

- **Note: Burden of proof**

The decision: Trespass issue

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- Where the nature of the procedure has been misrepresented consent will be vitiated.
 - Although capable of constituting therapeutic treatment, if undertaken solely for a non-therapeutic purpose not revealed to the patient, there will be no relevant consent.
- Objective?
 - Subjective?

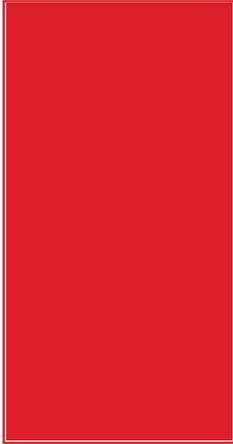
Sexual misconduct

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- ...for a woman's consent to be real, she needs to understand that the act is one of sexual connection as distinct from an act of a totally different character
 - But see also *Lee v Fairbrother* [2009] NSWDC 192

Cosmetic procedures

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- Though “non-therapeutic”, not an intent to injure
 - Something which is done with a therapeutic intent, that is, to prevent, remove or ameliorate a disability or pathological condition, would not ordinarily be so described. Indeed, even non-therapeutic treatment, such as cosmetic surgery, would not generally be so described

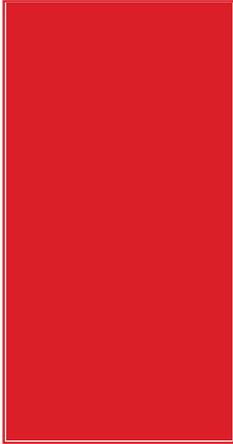
HCCC v Tiong example

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- The practitioner inappropriately and / or improperly suggested breast uplift surgery in circumstances where;
 - no inquiry or request had ever been made by the patient for such a procedure
 - the procedure was not indicated
 - the patient's breasts had not been examined by the practitioner prior to the suggestion being made
 - the practitioner telephoned the patient at home (outside the consulting rooms and environment) suggesting and recommending the procedure.

Prescribing drugs of addiction

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- *HCCC v Nemeth* example
- Prescription of Oxycodone without exercising responsible medical judgment to 27 patients
 - ▣ Prescription
 - Intentional act?
 - Reckless as to injury?

Treatment under influence of drugs

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- *HCCC v Marburg* example (modified) – Pethedine use
 - ▣ Surgery if impaired
 - Intentional act?
 - Reckless as to injury?

Withholding information

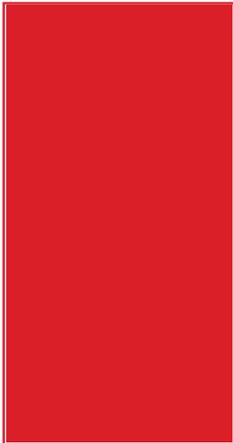
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□ *Wighton v Arnot* example (modified)

□ Non disclosure of adverse event

■ Intentional 'act'?

■ Reckless as to injury?



Indemnity?

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□ Exclusion clause
wording



Vicarious liability & Non Delegable Duty

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- Miyabi Kuroki posed as a doctor to earn cash, examining 2,300 people in 2010 - 2011.
- Passed himself off as a qualified doctor after finding identity of legitimate physician on the internet.
 - Sydney Morning Herald, 24 September 2012.
- **Organisational liability?**





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