

## Chewing the Fat on Recent Cases: *Varipatis v Almario*

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### THE DECISION AT 1<sup>ST</sup> INSTANCE

*Almario v Varipatis (No 2)* [2012] NSWSC 1578

Campbell J held that Dr Varipatis had breached his duty of care by failing to refer the Plaintiff to a Bariatric Surgeon for possible surgical management of his obesity, and found that:

- If such a referral had been made, the Plaintiff would have successfully undergone surgery; and
- The resultant loss of weight would have prevented him from developing cirrhosis, and would have ensured that his condition did not progress to liver cancer.



## THE DECISION AT 1<sup>ST</sup> INSTANCE

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Although Campbell J also found that Dr Varipatis had also breached his duty of care by:-

- Failing to re-refer the Plaintiff to an obesity clinic or Endocrinologist; and
- Failing to refer the Plaintiff to a Hepatologist by the end of September 2000

he determined that these breaches were of no causal relevance.



## ISSUES ON APPEAL

- i. Whether Dr Varipatis breached his duty by failing to refer the Plaintiff to an obesity clinic or Endocrinologist;
- ii. Would a reasonable General Practitioner have referred a patient such as the Plaintiff to a Bariatric Surgeon in 1997-1998;
- iii. Whether the Plaintiff would have lost sufficient weight had Dr Varipatis properly advised him about the cause of his liver disease and other health issues; and
- iv. Would the Plaintiff have lost a sufficient amount of weight if he had been referred to an obesity clinic or Hepatologist.

## DECISION OF THE COURT OF APPEAL

*Varipatis v Almario* [2013] NSWCA 76

*i) Whether Dr Varipatis had breached his duty by failing to refer the Plaintiff to an obesity clinic or Endocrinologist:-*

- The Court held that there is no obligation for a GP to do more than advising a patient of the reasons as to why weight loss is necessary, alternatives for achieving this, and encouraging acceptance of appropriate referrals; and

## DECISION OF THE COURT OF APPEAL

*i) Whether Dr Varipatis breached his duty by failing to refer Mr Almario to an obesity clinic or endocrinologist:-*

- As the Plaintiff had demonstrated an unwillingness to lose weight, by failing to act on a previous referral to an obesity clinic, he was unlikely to have acted on a re-referral or lost weight; and
- Where the Plaintiff had declined to take the “*firm advice*” of Dr Varipatis, or of Specialists to whom he had been referred, the failure of Dr Varipatis to write a further referral did not constitute a breach of his duty of care.

## DECISION OF THE COURT OF APPEAL



### *ii) Would a reasonable General Practitioner have referred a patient such as the Plaintiff to a Bariatric Surgeon in 1997- 1998*

- The expert evidence did not support the conclusion that in 1998, a reasonable GP would have referred a patient in the Plaintiff's circumstances to a Bariatric surgeon;
- Moreover, the evidence indicated that it would not have been reasonable in 1998 to expect an Endocrinologist to refer a morbidly obese patient to a Bariatric Surgeon;
- Accordingly, there was no basis upon which to impose a greater duty to make such a referral upon a GP.

## DECISION OF THE COURT OF APPEAL



### *iii) Whether the Plaintiff would have lost sufficient weight had Dr Varipatis properly advised him about the cause of his liver disease and other health issues*

Although the Court found that Dr Varipatis should have disabused the Plaintiff of the belief that exposure to toxic chemicals was at least a contributor to his ill-health:-

- There was no causal link between this belief and the Plaintiff's failure to lose weight; and
- The evidence established that the Plaintiff had been advised by Dr Varipatis and a number of other Medical Practitioners that he needed to lose weight to improve his health

## DECISION OF THE COURT OF APPEAL



*iv) Would the Plaintiff have lost a sufficient amount of weight had he been referred to an obesity clinic or Hepatologist*

- Firstly, the Plaintiff's evidence did not establish that he would have acted on a referral to an obesity clinic;
- His evidence also did not indicate that a timely referral to a Hepatologist would have resulted in weight loss; and
- As the link between obesity and liver damage was not well understood until 2002, it is unlikely that a Hepatologist in 1998 would have emphasised the importance of weight loss in preventing the development of a fatal liver condition

## APPLICATION FOR SPECIAL LEAVE



*Almario v Varipatis* [2013] HCA Trans 193 (16 August 2013)

The issue on appeal was *whether Dr Varipatis breached his duty of care in failing to refer Mr Almario to a Hepatologist prior to late September 2000*

- Special leave to appeal was refused on the basis that there were insufficient reasons to doubt the correctness of the Court of Appeal's decision

## LESSONS LEARNT

- Frank, open and well-documented conversations with patients who do not follow medical advice is essential
- *Varipatis v Almario* confirms that a Medical Practitioner will not be held responsible for a deterioration in a patient's health which has resulted from their failure to follow medical advice

## LESSONS LEARNT

- Keeping accurate and contemporaneous patient notes is essential
- The trial judge was critical of the notes made by Dr Varipatis, finding they did not accurately reflect the content of the discussions which occurred during the Plaintiff's consultations
- In particular, the trial judge held that Dr Varipatis' entry on 30 July 1998 stating "*so patient declining this regime*" represented a reconstruction which was "*of no evidential value*"
- However, the Court of Appeal instead determined that there was "*no basis for inferring that the note was other than a contemporaneous record of (Dr Varipatis') understanding of the Plaintiff's position*"

