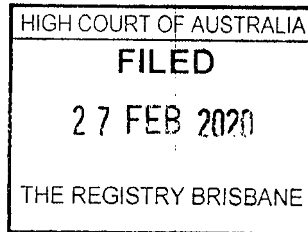
IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B63 of 2019



BETWEEN:

STATE OF QUEENSLAND
Appellant

and

10 THE ESTATE OF THE LATE JENNIFER LEANNE MASSON
Respondent

APPELLANT'S REPLY

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. There remain four issues to be decided on the appeal, though some aspects of them are accepted by the Respondent in its outline. We will adopt the identification of the four issues used in the Appellant's primary outline without repeating the issues in full.

20 **First Issue**

3. As to the first issue on this Appeal: *Did Mr Peters consider the use of adrenaline in his initial treatment of Ms Masson?*

4. The Respondent identifies this as the 'determinative issue' and contends that the Court of Appeal was correct to overturn the finding of the primary judge that Mr Peters' did consider the use of adrenaline: Respondent's Outline at [29] and following.

5. But contrary to the Respondent's Submissions, Mr Peters followed the guidance given by the CPM, and did give "consideration" to the use of adrenaline in Ms Masson's treatment. The findings have been addressed this in our primary argument.

6. The trial judge accepted the evidence that Mr Peters did give consideration to the use 30 of adrenaline. This acceptance occurred because of a combination of factors including direct questioning by the trial Judge[1]:

"I would have considered both adrenaline and IV salbutamol...

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[1] CAB page 43 [145].

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So you're saying you would have considered the option of adrenaline. Do you recall actually considering it?--- Certainly. So if Jennifer was initially presenting bradycardic/hypotensive would have been straight into adrenaline so it certainly would have been considered. So both options would have been in my mind for preparation for my actions dependent on how she presented."

7. This evidence revealed what Mr Peters stated he would have done. His evidence described a process of clinical decision-making, this being what the CPM, fundamentally, required. The CPM did not use the descriptor "*in extremis*" which was
10 a term employed by some medical witnesses (especially the Respondent's experts):

   a. Instead, the CPM asthma flowchart presented key clinical decision points – clinical signs – contained in a diamond icon or icons. For the icon directly under the heading "Imminent Arrest" (the most serious presentation) Ms Masson, at time of initial treatment, did have one of these signs namely, GCS <12, but not others (that is, not bradycardia and not absent pulses).

   b. This presentation caused Mr Peters to administer 100% oxygen and assisted ventilation, being two of pre-hospital treatments listed in the shaded text to the right of the first diamond icon, 100% oxygen.. This is what the CPM suggests.

   c. Mr Peters also applied salbutamol. Contrary to the Respondent's Submission
20 this, too, was appropriate practice under the CPM because –

      i. Henry J found that the CPM did not mandate adrenaline for every asthmatic in Imminent Arrest, and the Respondent states that it accepts the correctness of this[2];

      ii. The Adrenaline Drug Data Sheet[3] identifies the availability of salbutamol as a treatment option for Ms Masson;

      iii. The explicit warnings carried by the CPM regarding use of adrenaline[4] were not the same as warnings for salbutamol.

8. This shows, not only was salbutamol an available treatment for Ms Masson according to the CPM but also that, Mr Peters' actions fulfilled the CPM requirements.

30 9. Henry J found, in effect, that Mr Peters, based on his training, experience, and pre-existing knowledge of the CPM and Ms Masson's presenting condition, made a decision when treating Ms Masson which involved 'considering' adrenaline albeit an intuitive decision: see Reasons at [148]-[149]. At its heart, this involved the

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2 Respondent's Outline paragraph 2.
3 Set out in paragraph 36(a) of the Appellant's Submissions.
4 Referenced at paragraph 36(b) of the Appellant's Submissions.

Judge's acceptance of Mr Peters as a witness of truth, this being, essentially, a matter for the trial Judge alone.

10. In a number of places the Respondent contends that the consideration which the CPM called for required an explicit balancing of the benefits and adverse potential consequence of using of adrenaline compared with salbutamol: see Respondent outline at [37], [52]-[53]. The evidence relied on by the trial judge and which we have outlined above and in our primary argument shows that in the one minute Mr Peters had before he commenced administering salbutamol he took into account Ms Masson's presenting conditions which were the very things he knew to be relevant to the benefits or otherwise of administering the competing drugs.

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Second Issue

11. As to the second issue on Appeal: *Did the CPM, by calling for "consideration" of adrenaline, require its use in Ms Masson's presenting circumstances?*

12. In its Submissions, the Respondent states that it accepts that:

a. the CPM was a flexible guideline which preserved Mr Peters' freedom to make a clinical decision[5];

b. "in isolation" Mr Peters' decision to administer salbutamol to an asthmatic in imminent arrest was not inconsistent with the CPM and not necessarily a departure from the standard of a reasonable paramedic[6];

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c. the CPM did not mandate adrenaline for every asthmatic in "Imminent Arrest[7]".

13. Notwithstanding these concessions, the appeal outcome for which the Respondent contends is to the opposite effect namely that, for every case of imminent arrest under the CPM, adrenaline *was* required.

a. The Respondent submits that Mc Murdo JA found (and it seems to submit correctly) that the exercise of reasonable care required Mr Peters to be 'guided by the CPM" Respondent's argument at 32 and R [161].

b. The Respondent submits that the CPM represented the QAS's opinion of the preferred drug to be used: and seemingly supports the reasoning of Mc Murdo JA (at [162]) that for an ambulance officer in the position of Mr Peters "the required 'consideration' should have proceeded upon that premise."

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c. Further, it is said that where adrenaline is the indicated drug according to the CPM, for Mr Peters to follow 'a body of medical opinion that adrenaline should not be used in a case such as this ... would have involved a failure to take

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5 Respondent's Outline paragraph 19.
6 Respondent's Outline paragraph 19.
7 Respondent's Outline paragraph 2.

reasonable care" per Mc Murdo JA at [164], and the Respondent's argument at [28].

14. Indeed, in relation to the issue of causation (to which we shall return below) the Respondent submits that it is irrelevant to consider whether or not Mr Peters, had he considered the use of adrenaline (as the Respondent contends he did not do), would have administered salbutamol: Respondent's argument at [28]. But this can only be because the Respondent contends the only reasonable course was always to administer adrenaline.

15. However, it is not possible to discern, based on the Respondent's written material, what features of Ms Masson's presentation required her treatment with adrenaline, and which distinguished her situation from others in "Imminent Arrest", where the CPM allows the flexibility which they concede it affords. Nor is it discernable what content is to be given to the requirement to 'consider' adrenaline.

16. Accordingly, while the Respondent contends the CPM is a flexible guideline, its case on the Appellant's liability requires that it be treated in fact as mandating the treatment and not inviting 'consideration' at all.

Third Issue: *Was there a responsible body of opinion in the medical profession in 2002 to support administration of salbutamol to a patient with Ms Masson's high heart rate and high blood pressure?*

17. Paragraphs [38] to [58] of the Appellant's primary argument canvas extensively two, of three, issues relevant to this topic namely (1) What is the nature of the opinion relied upon in the Appellant's case; and (2) Was it relevant to Ms Masson?

18. There is a third issue which is now raised by the Respondent in its argument: that is, the contemporaneity of the body of opinion on which the Appellant relies to 2002.

19. The trial judge found that the body of medical opinion existed in 2002: see Reasons at 9.3. The Court of Appeal did not overturn the finding: see Reasons [161]. The notice of appeal in the Court of Appeal did not raise any challenge to the trial judge's findings as to the existence of the body of medical opinion or its currency in 2002.

20. But in any event, there was ample evidence, at trial, to support the existence of the body of medical opinion (canvassed in the Appellant's primary outline) and its contemporaneity. Professor Brown (Exhibit 10, Page 15-6), Associate Professor Ramin (Exhibit 17, Pages 227 and 334), Keneally (T4-72.10-15), and Hucker (Exhibit 18, Paragraph 1(h)) each based their opinion on what was considered to have been the clinical knowledge and evidence-base available in 2002.

Fourth Issue: *Assuming the existence of the relevant body of medical opinion, was it correct for the Queensland Court of Appeal nonetheless to conclude that Mr Peters was negligent to act in accordance with it because, to do so, was not in accordance with the CPM?*

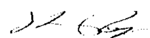
21. On the evidence, there was a range of medical responses which were non-negligent. The Court of Appeal, however, concluded that, even if the paramedic acts knowingly in accordance with one such response, that is nonetheless negligent because the manual prefers a competing response (and the paramedic is to act in accordance with the CPM). Indeed, as mentioned above, that is even if the body of medical opinion was that adrenaline *should not be used* Reasons: [163].

22. If correct, the Appeal Court's approach means that, even if an ambulance officer believes that adrenaline could actually harm the patient, and holds this belief on the basis of a body of (sound) medical opinion of which he is aware, the paramedic must apply the competing treatment, because the CPM so requires. It is not possible to reconcile this with the test of liability (which is to consider the response taken by a reasonable person in the position of Mr Peters).[8]

23. Additionally, it is only by this (erroneous) reasoning that the Respondent contends the causation issue to which the Appellant referred in the primary argument is 'irrelevant'. The Court of Appeal did not find (and the Respondent has not made out a case) that a failure by Mr Peters' to consider the use of adrenaline was causative of the claimed loss, unless it is right to conclude there could only be one response to such consideration: the use of adrenaline. But that case is contrary to: the acceptance of the CPM as a flexible guideline; to the language of the CPM which calls for 'consideration' of the use of adrenaline rather than its use; and to the finding (not challenged on appeal below) that there was a responsible body of medical opinion which supported the (non-negligent) use of salbutamol in the case of someone with Ms Mason's presentation.

24. The respondent's contention on causation (and liability) does not sit comfortably with its concession (Outline paragraph 19) touched upon above. It is stated "in isolation" Mr Peters' decision to administer salbutamol to an asthmatic in imminent arrest was neither 'inconsistent with the terms of the CPM' nor did it 'necessarily depart from the standard of a reasonable ambulance officer'. There is nothing in the facts to give any relevant content to the qualifications in the concession (namely 'in isolation' or 'necessarily').

Dated: 27 February 2020



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[8] *Wyong Shire Council -v- Shirt* (1980) 146 CLR 40 at 47.