

# case study

31 May 2012

## Jordan v Lee and Baker [2012] WADC 74

On 25 May 2012 the District Court of WA dismissed a claim against two medical practitioners relating to their alleged failure to advise the parents of a child with a brain tumour that between 1996 and 2000 resection of the tumour was the first choice for curative treatment and that, despite their views that the risks of such surgery outweighed the potential benefits, there were surgeons who, acting reasonably, would have performed the resection.

### FACTS

In August 1996, the 11 year old Plaintiff was referred to Mr Lee, neurosurgeon, for further investigations which confirmed that he had a benign long standing tumour in the basal ganglia with leptomeningeal metastases. Mr Lee advised the Plaintiff's parents that the risks of surgery to remove the tumour outweighed the benefits to be gained given the neurological status of the Plaintiff. Mr Lee referred the Plaintiff to Dr Baker, oncologist, for adjuvant management of his condition.

Between 1996 and 2000, the Plaintiff underwent oncological treatment and surgical aspiration of the cyst associated with the tumour. In May 2000, following a deterioration of the Plaintiff's neurological condition and growth of the cyst which allowed safer access to the tumour, Mr Lee recommended in favour of an attempt to debulk the tumour. The Plaintiff's parents accepted Mr Lee's recommendation and the Plaintiff proceeded to such surgery. However, for reasons unrelated to the performance of the surgery, Mr Lee was unable to complete the procedure.

In June 2000, the Plaintiff was referred to Dr Charles Teo, neurosurgeon, in Sydney. Dr Teo resected about 98% of the Plaintiff's tumour mass, over 3 surgical procedures.

### THE PLAINTIFF'S CASE

The Plaintiff accepted that the advice given by Mr Lee was reasonable, but contended that the Defendants had a duty to go further and advise in 1996, 1998, 1999 and 2000 that resection of the tumour was the first choice for curative treatment of the Plaintiff's tumour and that there were other surgeons who, acting reasonably, would have undertaken resection of the tumour.

The Plaintiff also alleged that had resection occurred in those earlier years, he would have avoided a number of unnecessary surgical procedures and adjuvant therapy and he would not have the residual disabilities with which he was now encumbered.

In support of his case the Plaintiff relied solely upon the evidence of Dr Charles Teo, who gave evidence as both a witness of fact and an expert. The thrust of Dr Teo's evidence was that Mr Lee

should have proceeded to resect the Plaintiff's tumour at all times from 1996 onwards and that a large body of surgeons would have recommended that procedure. Dr Teo's evidence was that he and other surgeons in the USA were removing tumours like the Plaintiff's in 1996. However, he failed to explain the basis for his opinions or identify the other surgeons allegedly performing the surgery, other than in general terms.

## THE DEFENDANTS' CASE

Mr Lee gave evidence to the effect that he did advise of the option of radical resection but that, in each of 1996, 1998, 1999 and 2000, he recommended against such surgery as the benefits of the surgery were likely to be outweighed by the potential risks of such surgery given the Plaintiff's relatively good neurological condition at each of those separate points in time. His evidence was that he was unaware of any surgeons who, at the relevant times, would have recommended that radical resection of the tumour was appropriate in the circumstances.

Dr Baker's position was that he was not involved in the diagnosis of the tumour or in the decision as to whether or not surgery to resect the tumour was appropriate. He maintained that any decision regarding surgery fell within the expertise of the treating neurosurgeon, Mr Lee, and he took advice from Mr Lee regarding neurosurgical matters. However, Dr Baker did facilitate referrals to alternative neurosurgeons for the Plaintiff on more than one occasion.

All of the neurosurgical experts called on behalf of the Defendants gave evidence that they were not aware of any neurosurgeon who, in 1996, would have given advice that the benefits from an attempt at gross total resection of the Plaintiff's tumour outweighed the risks of that procedure. The same opinions were held for 1998 and 1999. None of these experts considered resection of the tumour was in the Plaintiff's best interests and all said that they would not have undertaken such surgery had they been requested to do so by the Plaintiff's parents.

## DISTRICT COURT FINDINGS

Goetze DCJ was not persuaded by Dr Teo's evidence and made various adverse comments in relation to his credibility as a witness. The Court found that Dr Teo was clearly passionate about

the resection of brain tumours as providing the best chance of a cure. However, he had allowed his passion and his subjective involvement in the Plaintiff's treatment to interfere with his objectivity and impartiality as an expert witness.

Further criticism of Dr Teo's evidence related to his failure to address any literature which took a different view to his own, and his failure to respond to the Defendants' evidence of the higher risks associated with the surgery he proposed and how these risks may have impacted upon the Plaintiff.

The trial judge also noted several inconsistencies in the information contained in Dr Teo's reports to the Plaintiff's solicitors and in his oral evidence at trial. It was also noted that he made a number of concessions during both cross examination and re-examination.

In contrast, the trial judge found that the quality and consistency of the expert evidence for the defence was compelling. Their evidence was accepted in its entirety.

It followed that Goetze DCJ was not persuaded that resection of the tumour was a treatment option that other neurosurgeons, acting reasonably, would have attempted between 1996 and 1999, after advising of the risks and benefits of surgery.

Goetze DCJ held that, in the circumstances of Mr Lee providing surgical advice, Dr Baker did not have a duty of care in respect of surgical matters, except in a most general way. In any event, the Plaintiff's parents did not rely on him for surgical advice. Only Mr Lee was responsible for matters of surgery and it was for the Plaintiff's parents to determine whether there should be an election for resection or expectant management. However, resection was not a reasonable option given the Plaintiff's circumstances. There was no, or no persuasive evidence, to support resection prior to 2000.

In the circumstances, neither Mr Lee nor Dr Baker breached their respective duties of care. Goetze DCJ stated [at 976 - 977]:

*"To retrospectively impose a duty mandating the giving of advice between 1996 and 2000 that other neurosurgeons, acting reasonably, would have resected [the Plaintiff's] tumour would be*

*wrong on the facts of this case. Such other neurosurgeons would not have been acting reasonably in resecting [the Plaintiff's] tumour. Further, there is no or no sufficient evidence that there were then such surgeons resecting tumours of the kind [the Plaintiff] suffered. Given that, it would have been too abstruse to impose a duty to advise that an unnamed and unknown surgeon somewhere in the world, acting reasonably, would have resected the tumour.*

*Further, to impose a duty to have inquired where radical resection might have been reasonably undertaken in the circumstances of [the Plaintiff's] tumour would be too onerous and productive of great uncertainty as to the duty of care owed by a medical practitioner to the patient."*

Goetze DCJ was also not persuaded that the Plaintiff's current disabilities would have been avoided or their severity lessened had the surgery performed by Dr Teo in 2000 been carried out at an earlier time. It was almost certain that the same inability to remove the tumour would have been encountered at any stage between 1996 and 2000. The probability was that if the kind of surgery Dr Teo performed had been performed earlier, then the same result would have occurred.

Accordingly, the Plaintiff's claim failed.

## COMMENT

Apart from Dr Teo, whose evidence was not accepted, no other doctor who gave evidence at trial could name a surgeon who would have proceeded to surgery prior to 2000. Not even Dr Teo could offer another name, other than that he and other unnamed surgeons at unnamed institutions in the USA, would have recommended surgery on the basis that it was the best curative treatment.

As Mr Lee did not consider surgery to be a reasonable medical procedure in the Plaintiff's particular circumstances, how could he then be expected to advise the Plaintiff's parents that other surgeons would undertake resection? Those other surgeons, if any existed, must then, by analogy be acting unreasonably.

The case serves to reinforce general principles of expert evidence. The trial judge was critical that Dr Teo had not adequately explained the underlying basis for his opinions and the fact that

his opinions were not supported by the bulk of the literature. A significant criticism arose from the fact that Dr Teo's reports to the Plaintiff's solicitors did not address any literature which did not support his opinion, which left him vulnerable in cross examination, during which he made a number of concessions.

Such criticism reinforces the need to always critically analyse any expert opinions received and to identify areas which may not be adequately addressed by the expert, including alternative versions of facts relied upon.

The trial judge also made observations about experts giving evidence as both a treating doctor and medical expert and the risk that this interferes with independence, impartiality and objectivity of the expert. Careful selection of experts is always required.

Panetta McGrath acted for the Defendants in this matter.

This publication is intended to provide a general outline and is not intended to be and is not a complete or definitive statement of the law on the subject matter. Further professional advice should be sought before any action is taken in relation to the matters described in this publication.

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