

Supreme court decision vindicates doctor over referral delay



Key messages from the case

A state's Supreme Court of Appeal decision reassures doctors on their legal duty to chase up referrals for patients in the public healthcare system after it overturned a \$190,000 negligence ruling against a GP member.

The original case alarmed the profession when it found the GP had breached his duty of care for failing to chase up a referral to a surgeon for a patient with a hyperkeratosis (corn) on his foot.

The appeal ruling clarifies the extent of a doctor's duty of care for patients where the only option is the public healthcare system with long waiting lists. The decision confirms doctors do not have a duty to follow up referrals for public patients with non-urgent conditions where the action would not result in any escalation of the care.

Details of the decision

Doctor sends another referral

The patient initially presented to the doctor complaining of pain in the sole of his right foot associated with hyperkeratosis. The doctor ordered an ultrasound which revealed a cyst underlying the hyperkeratosis. He offered to excise the hyperkeratosis, provided antibiotics and recommended that the patient get in-soles.

About six months later, the doctor referred the patient to a surgeon at a public hospital as he had no private health insurance or means to pay for an operation privately.

The patient presented again a month later. As there had been no response to the first referral, the doctor sent a second referral to the surgeon highlighting that the hyperkeratosis was impacting the patient's ability to work. A period of two years elapsed during which there was no response from the hospital and the patient was treated with painkillers and an antidepressant.

Patients infected foot leads to surgery

A little over two years after the second referral was sent, the patient presented to hospital and was diagnosed with an

infected foot. He underwent surgery to drain an abscess on his foot and excise the hyperkeratosis.

Over a year later, the patient sued the doctor for compensation, claiming the doctor had failed to refer him for specialist treatment, follow up the referral appropriately and institute a proper treatment plan for his condition. The patient argued that if the doctor had chased the referral, the patient would have been treated earlier and not had to undergo surgery in the manner that he did.

The original decision

In the original case, the primary judge ruled the doctor had a duty of care to follow up the referral if the patient hadn't been seen within a reasonable timeframe, deemed to be a month. The primary judge found that by December 2014, following up the referral would not have been unduly onerous or costly, and would have been a "reasonable precautionary measure to take" to ensure the selected treatment was effective.

"I am not satisfied the [doctor] took any step from that date to satisfy himself that the plaintiff, as his patient, had not somehow got lost in the system.

In that regard, there was a breach of [the doctor's] duty of care," the primary judge said.

The court found that had the doctor followed up the referral, triaged as category 3 (non-urgent), he would have discovered the referral pathway was ineffective and been able to take measures to have the patient seen by a specialist for some initial advice.

The primary judge ruled the patient's surgery would have occurred at least a year earlier, allowing him to work with an increased level of mobility and less pain.

The patient was awarded \$190,000 for damages plus the legal costs incurred in running the claim.

Grounds for appeal

Avant successfully appealed the original decision in favour of the member. The appeal turned on what precautions a reasonable GP would take to guard against the risk of harm to the patient and whether any breach of the doctor's duty of care caused the patient's injuries. The three key grounds for appeal were as follows:

- The patient's referral to the hospital had not gone "awry" or "got lost in the system."
- The scope of the doctor's duty did not require follow up which was futile
- Had the doctor followed up the referral to the hospital this would not have resulted in the patient being seen by a surgeon at any material time earlier than he was.

Attempting to escalate referral futile

In handing down its decision, the court of appeal confirmed a doctor may have a duty to follow up a referral, but this depends on the facts of the case.

The court of appeal accepted Avant's argument that the doctor did not have a duty to follow up the referral in this case as a reasonable GP in his position would know it was futile unless there was a significant deterioration in the patient's condition.

In considering what would have occurred if the doctor had tried to escalate the referral, the court of appeal emphasised the evidence of an independent GP, briefed by Avant, who spoke of his experience with delays in the particular hospital system.

The GP described the wait times as "not a matter of particular surprise," and observed that surgery for category 3 patients is recommended to be completed within 365 days. However, in 2013 and 2014, wait times were even longer.

Ultimately, the appeal judges accepted the expert GP's and member's evidence that if the doctor had phoned the hospital to escalate the referral, it would not have led to earlier treatment for the patient.

Duty to consider alternative options

The original case also investigated the doctor's duty to consider alternative options when a patient faced delays in the public health system. This included the possibility of calling a private surgeon to obtain advice on management.

The court of appeal noted there was no evidence that any specialist would have been prepared to give advice without seeing the patient, let alone what the advice would have been or how it would have affected the patient's outcome.

Overstretched health system to blame

Based on the evidence, the court of appeal rejected the finding that something had gone "awry" in the hospital's processing of the referrals.

Instead, the delay was found to be nothing more than the "normal operation of a significantly overstretched public health system" based on the patient being on a long waiting list and allocated low priority.

The claim was dismissed, and the patient was ordered to pay the doctor's costs. The patient has applied for special leave to appeal so there may be further judicial comment on this case.

Key lessons

- Doctors may have a duty to follow up a referral in certain circumstances and the likelihood of such a duty being imposed will increase if follow up is likely to improve the patient's outcome or avoid an adverse outcome.
- This case demonstrates the importance of submitting evidence in follow up cases involving the public health system from doctors who had personal experience of working in the system at the particular time.

References and further reading

Avant factsheet – [Patient follow-up and recalls](#)

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