

Doctors, the duty to rescue, and the Ambulance Service¹

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Introduction

The 'Emergency Medicine Quiz' that appeared in the June 1999 edition of *Current Therapeutics* raised the issue of whether a doctor, who has come across a cyclist who has been struck by a car and is being attended by ambulance officers near the doctor's surgery, is legally obliged to offer their assistance. This article will consider the legal duties that may be imposed on doctor's in this scenario and will conclude, perhaps rather unsatisfactorily, that the legal answer is not clear.

Woods v Lowns

In *Woods v Lowns*² it was held that, in certain circumstances, a doctor was under a legal duty to go to the aid of a stranger and could be liable in damages for failing to attend when called upon to do so. This decision was a significant departure from the previously accepted position that, at common law, there was no obligation to go to the aid of a stranger. The decision in *Woods v Lowns* has left many questions unanswered and it is unclear when, as a matter of principle, the duty to assist arises and what is the obligation of a doctor when the person in need of care is already being attended to by ambulance officers.

Woods v Lowns involved an allegation that Dr Lowns failed to come and assist Patrick Woods, who was suffering from a prolonged epileptic fit, when asked to do so by the boy's sister. The case involved a substantial factual

¹ I acknowledge the valuable assistance of Jason Bendall of the Ambulance Education Centre, Ambulance Service of NSW in reviewing various drafts of this article.

² (1995) 36 NSWLR 344 (NSW Supreme Court, per Badgery-Parker J at first instance); *Lowns v Woods* (1996) Aust Torts Reports ¶81-376 (NSW Court of Appeal, Kirby P and Cole JA; Mahoney JA dissenting).

dispute where Dr Lowns argued that the sister was mistaken in her identification of him, and in fact he was never asked to attend. Many issues were conceded by Dr Lowns, in particular he conceded that had he been asked to attend he would have been duty bound to go; that he was aware that his failure to attend could expose Patrick to further injury; and that he would, as a doctor, have been able to administer treatment that would have alleviated Patrick's condition.

Badgery-Parker J resolved the factual issue against Dr Lowns finding, on the balance of probabilities, that he had been asked but refused to attend the fitting boy. The admissions made by Dr Lowns meant that there was little difficulty in holding that it was foreseeable that Patrick would suffer greater injury if Dr Lowns did not attend and this gave rise to a duty to attend. The Court also had no difficulty, given Dr Lowns' admissions, in finding that his failure to attend caused Patrick's injuries. The result was upheld on appeal by a 2:1 majority.

The rationale for the duty

The law of negligence will impose a duty on one person to take care to avoid acts or omissions that may foreseeably harm another provided that there is sufficient proximity, or closeness, between the plaintiff and the defendant. In *Woods v Lowns*, Badgery-Parker J (the judge who first heard the matter) found that there was sufficient proximity between Dr Lowns and Patrick Woods. In particular he held that there was physical proximity as Patrick was only some 300 metres from Dr Lowns surgery; causal proximity, as Dr Lowns knew that there was a 'major medical emergency, life threatening and calling for urgent attention' and circumstantial proximity in that Dr Lowns knew that there would be serious consequences for Patrick if he was not treated and that he, Dr Lowns, was competent and equipped to treat him.³ Further Dr Lowns was:

...at his place of practice ... ready to begin his day's work and not yet occupied in any other professional activity which would

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Woods v Lowns (1995) 36 NSWLR 344 at 359-360

preclude his treating the plaintiff. ... What was asked of him involved no health or safety risk to himself; and he was not disabled by any physical or mental condition from travelling to and treating the plaintiff.⁴

Badgery-Parker J also considered

... that a doctor is, by virtue of his training, qualifications and registration, permitted by the community to become a member of a relatively small group of persons in the community who alone are recognised as having the capacity and are accorded the privilege of affording medical treatment to those who require it.⁵

The conclusion was that Dr Lowns fell under a duty to attend because

1. he was asked in a professional capacity;
2. in circumstances where he was able to get easily to the patient;
3. knew of the seriousness of the condition; and
4. believed he would be able to assist him.

When, as a matter of principle, does the duty to assist arise?

One essential aspect of the finding of a duty of care was the fact that Dr Lowns was 'asked in a professional capacity' to attend, that is Patrick's sister approached him because he was a doctor at his surgery. What if he was not at his surgery? What if, for example, a doctor is at a sporting event watching her children play and is known to the other families to be a doctor. When a player is injured and the doctor is asked to assist, are they being asked in a professional capacity?

On one view the answer must be 'no'. They are not at their surgery and not ready to see patients. On another view, the answer is 'yes' they are being asked to assist precisely because they are a doctor and for no other reason. It is their professional assistance that is being sought whether they like it or not. The question of "what determines whether a person is being asked in a professional capacity?" remains to be answered.

⁴ ibid 360

⁵ ibid at 358

Whether or not the doctor is being asked in a 'professional capacity' the other factors identified in *Woods v Lown*s clearly apply in the scenario given above: the doctor is physically close to the patient, they may be able to see that the patient is in need of some care and may be able to provide some assistance. For example they may see that the young player has an obviously broken leg that is being mishandled by the coach. They are close to the scene, they can see the injury, they know that if they intervene they will be able to better treat the patient and perhaps prevent long term harm.

The essential issue is that there is a person in need of care, and a doctor who is, by virtue of their training and registration able to assist, aware of the need for assistance and aware that they can provide some necessary assistance. It would be perverse to hold that a doctor who is in his or her surgery is under a duty to attend when called upon, but a doctor at the scene is under no duty, or only under a duty if directly called upon because others at the scene recognise him or her as a doctor.

To put that into context, imagine that the doctor at the sporting event described above, is a GP who has invited her friend, an orthopaedic surgeon along to watch. Because the other parents know the GP and know that she is a doctor, she is asked to assist. If a crucial issue is 'was the doctor asked to assist?' (whether in a professional capacity or not) then the GP is under a duty to attend, but the orthopaedic surgeon, who is not asked, is under no such duty, either because he is not asked or because he is not recognised as being a doctor. If this were correct, then the question of whether "A", a doctor, is under a legal duty to assist is answered by reference to another persons, "B's", knowledge that A is a doctor. The obligation upon A would depend on facts personal to B, that is the state of B's knowledge about A, rather than on facts personal to A. The state of B's knowledge about A cannot however, in the circumstances, be a suitable basis for the imposition of a duty on A.

If, on the other hand, the essential issues are physical closeness, an awareness of the need for assistance and a belief in ability to assist, then both doctors in the above example, are duty bound to help to the best of their ability, as would be a doctor who sees a cyclist who has been hit by a car. Disregarding how a doctor came to know that there was an emergency requiring medical assistance (ie disregarding whether they are asked as a bystander, asked as a doctor or merely see the emergency occur) would be consistent with the view that doctor's may be expected to render assistance when able to do so by virtue of the privileged position they are accorded in society by virtue of their 'training and registration'. The issue of how a doctor becomes aware that someone needs care should not be the basis for the imposition of a legal duty, rather the fact that they know of the circumstances requiring their attention should be sufficient provided the other factors of proximity identified in *Woods v Lowns* are met. The test should be: "Did the doctor become aware that there was a person in need of urgent medical care (that is where there would be serious consequences to life and limb if care was not provided as soon as possible), in circumstances where there was nothing to stop the doctor coming to assist, and in circumstances where it was reasonable for the doctor to believe that if he or she attended, they would be able to provide some care that would assist the person in need."

Stated in that form the test adopts the issues of proximity identified in *Woods v Lowns* yet avoids the irrelevant issue of how did the doctor become aware of the need to attend. The fact that the doctor is subject to "a direct request for assistance"⁶ becomes relevant to the factual question of whether or not the doctor was aware that assistance was required. In cases where the emergency is not independently observed by the doctor or in circumstances where the practitioner sees what appears to be a minor incident the fact that there is a direct request for assistance will alert the practitioner to the fact that their assistance is required. In obviously serious cases, the duty to attend may be imposed whether or not there is a direct request for assistance.

⁶ *Lowns v Woods* (1996) Aust Torts Reports ¶181-376 at 63,176 per Cole J.

Reasons to justify non-attendance

Notwithstanding the finding that in some circumstances there may be a duty to assist another, the court did accept that there may be reasons that would justify a doctors non-attendance at an emergency. Matters such as being engaged with another patient, being tired, ill or inebriated or being required to expose oneself to a risk to health and safety were all suggested as being grounds to refuse to attend when asked.

One fact that may justify non-attendance is the fact that the person is already being cared for by ambulance officers. In *Woods v Lowns*, the family of Patrick Woods had already obtained the services of the Ambulance Service of NSW when they asked Dr Lowns to attend. Dr Lowns did not argue that the fact that Patrick was in the care of Ambulance officers meant that he had a reasonable excuse for not attending upon the patient⁷ but this does not mean that the argument is not open in the future. In his judgement, Kirby P acknowledged that had Dr Lowns attended he may have "reasonably concluded, that the best course, the ambulance being available, was simply to expedite Patrick's transfer to hospital, avoiding the delay of any attempted treatment on his own part."⁸ Mahoney JA (dissenting) said that:

An experienced doctor may properly conclude that the stated condition was properly accommodated by eg, ambulance officers or other paramedics or require the hospital rather than him.⁹

A review of some facts about the ambulance services and the comments of Dr Lowns and Badgery-Parker J demonstrate that this argument may have considerable merit.

In 1996-1997 officers of the Ambulance Service of NSW responded to approximately 500000 emergency calls. This figure increased to over 545000 emergency responses in 1997-1998. The number of cases classified as 'fits/convulsions' exceeded 16000 in both years. There are in excess of 2300

⁷ ibid., 63,176.
⁸ ibid., 63,156.

Ambulance Officers based at 228 locations throughout the State.¹⁰ On those approximate figures, the average number of emergency calls dealt with by an individual officer was 237 in the year 1997-1998 with an average of 7 cases being 'fits/convulsions'. Of course this figure is misleading as it is likely that Paramedic officers in the major population centres attended many more emergency calls than officers in remote areas. Notwithstanding the imprecise figures, it appears likely that an average ambulance officer will attend many emergencies and may be expected to be "more skilled and equipped to render first aid in a 'hostile' environment"¹¹ than the average GP practicing in his or her suburban rooms. Similar conclusions might also be expected with respect to ambulance services in other States and Territories.

In *Woods v Lowns*, the role played by ambulance officers was discounted by the judge and the parties to the case. In the first instance, it was agreed that the essential action for Patrick's mother was to arrange for medical attention and to transport him to hospital. Badgery-Parker J¹² assumed that 'medical assistance' or 'medical treatment' was limited to the care provided by doctors. It was also clearly the view of Mrs Light (Patrick's mother) and her daughter that it was a doctor, and only a doctor that would do. Joanna Woods gave evidence that she told the doctor "... we need a doctor. We have already got an ambulance".¹³ Mrs Light gave evidence that "I just said to the ambulance men 'Can you get a doctor? Can you please get a doctor?'"¹⁴

The *Medical Practice Act* 1992 (NSW) provides that a person, other than a doctor, or, inter alia, 'an ambulance or first aid association'¹⁵ must not:

...advertise or hold himself or herself out to be entitled, qualified, able or willing to practice medicine or surgery in any

⁹ ibid., 63,168.

¹⁰ Bendall J, Clinical Educator, Ambulance Service of NSW, Personal Communication, 6 July 1999.

¹¹ Fulde, G 'Emergency Medicine Quiz' *Current Therapeutics* Vol 40 No 6, June 1999, 29; 103 at 103.

¹² (1995) 36 NSWLR 344 at 358.

¹³ Quoted in the judgement of Cole JA at 63,172.

¹⁴ ibid.

¹⁵ *Medical Practice Act* 1992 (NSW), s. 105(4)

of its branches or to give or perform any medical or surgical advice, service, attendance or operation.’¹⁶

Section 111 of the Act provides that the terms of the Act do not affect the right of an ambulance officer to perform his or her duties.¹⁷

The fact that the *Medical Practice Act* provides exemptions for people other than doctors to allow them to ‘perform any medical or surgical advice, service, attendance or operation’ indicates that, in the view of the Parliament, these professionals do, in fact, provide medical care (otherwise they would not need the exemption). Ambulance officers provide medical care when they treat persons who are sick or injured or transport patients with varying degrees of illness and disability. The finding by Badgery-Parker J that it is doctors ‘alone’ who are “...recognised as having the capacity and are accorded the privilege of affording medical treatment to those that require it” denies that many other professionals, including ambulance officers and nurses, provide care that may also be described as medical care, and they do so independently of doctors. It follows that a doctor in a future case, may be justified in arguing that where the ambulance service is in attendance the person in need of care is in fact receiving adequate and specialised medical care, with the result that there would be little, if anything, that the doctor can do to add to that care.

The evidence of Dr Lowns, accepted by Badgery-Parker J, suggested that the ambulance officers would act only on the direction of the doctor. Dr Lowns, in evidence, said:¹⁸

Q. And you [sic] then you would have said to the ambulance officers; Take him straight to hospital?

A. Yes.

¹⁶ *ibid.*, s. 105(3).

¹⁷ Section 111 also applies to nurses.

¹⁸ *ibid*

Badgery-Parker J then found, as a matter of fact, that after "[h]aving injected the medication, he [Dr Lowns] would have directed the ambulance officers to take the patient directly to hospital."¹⁹

It is the function of an ambulance officer to render treatment in accordance with his or her training and protocols and to transport the patient to hospital for further treatment.²⁰ The presence of Dr Lowns in this case, or any other doctor in any other case, would not necessarily determine the course of action taken by the ambulance officers and is not required to ensure that ambulance officers provide the care they are trained to provide or transport the patient to hospital. Although Dr Lowns gave evidence that he would have given directions to the ambulance officers and would have been successful in administering intravenous drugs when the ambulance officers could not, another doctor, in another case, may well concede that the ambulance officers knew what to do without direction, and if they, with their experience could not treat the patient, then it would have been unlikely that the doctor with no equipment and less experience of roadside trauma, would have been able to treat the patient with better effect. If that is accepted as true, then there could be no duty to attend, and even if there was, a failure to attend would not be a cause of any damage if the doctor's attendance would not, in fact, have effected the outcome for the patient.

The situation may be different if the doctor was asked to assist by the ambulance officers themselves. This would not be because the doctor is asked per se, but because the fact that he or she is asked to assist makes it clear that his or her services are required, even though the ambulance is in attendance. Where there is no direct request however, it may be reasonable for a doctor to believe that the presence of the ambulance service, who will treat the patient and then transport them to medical care, means that his or her services are not required, as the person concerned is already receiving adequate medical care.

¹⁹ cited in the judgement of Cole JA at 63,173.

Conclusion

The decision in *Woods v Lowns*, established the principle that there will be, in some circumstances, a legal duty cast upon doctors to assist strangers in need of medical care. It remains to be seen how and when that duty will be found to exist.

It has been argued here that in determining when that duty arises, the fact that a doctor is asked to assist should be considered relevant only in determining whether the doctor was aware that his or her services were needed. As a matter of principle, the duty should exist whenever a doctor is aware that his or her services are needed in circumstances where the doctor is physically close to the patient and believes that they will be able to assist the patient. Whether they are asked directly or not, and whether others at the scene of the emergency know they are a doctor, should not be considered directly relevant to the imposition of the legal duty.

It has been further argued that where the ambulance service is in attendance, that should, in the absence of a request from the ambulance officers, represent sufficient justification for a doctor not to attend the scene of the accident, as the ambulance officers are equipped and trained to provide emergency medical care and have the statutory authority²¹ and responsibility for the treatment and transport of the patient.

If these conclusions are correct, it is now possible to revisit the scenario of a doctor, who has come across a cyclist who has been struck by a car and is being attended by ambulance officers near the doctor's surgery²² and answer the question 'Are you, as a doctor, under a duty to assist?' In my view whether or not you are under a duty to attend, given that you are physically close to the patient and can see that there is a potentially serious incident, depends on whether it is reasonable to think that you will be able to help the patient involved. The existence of the duty will not depend on whether or not

²⁰ Bendall J, *ibid*.

²¹ Except in the Northern Territory and Western Australia.

²² Fulde, G *op. cit.* at 29.

members of the public recognise that you are a doctor, for the duty, if it exists, will exist because you are a doctor, not because someone else knows you are a doctor. Having said that, prima facie it would appear that there would be a duty to attend and offer assistance unless you reasonably believe that you will be able to add nothing to the care being given by the ambulance officers (and that will depend on what you can see of the situation and your own knowledge about your experience in trauma medicine, and the equipment if any that you have with you). You may then argue (if the matter arose) that there was no duty to attend as there was no reason to think that your services were required.

It remains to be seen how the courts will approach these issues should they arise in future litigation however if doctors want to avoid being the subject of such litigation, they should never refuse to assist at an emergency when it is reasonably open for them to do so.²³ The courts have said that they wish to encourage rescuers²⁴ and *Woods v Lowns* can be seen to be consistent with that philosophy. If nothing else, in Australia, there are no reported cases of a doctor being sued for negligently assisting at an emergency, but there is now one case where a doctor has been sued for refusing to assist!

²³ Here medical practitioners in NSW are reminded that failure to provide emergency medical assistance is an express part of the definition of *Practice* unsatisfactory professional conduct or professional misconduct under the *Medical Act 1992* (NSW). A similar view may be inferred into the legislation governing medical practitioners in each State and Territory: Law Reform Committee *Legal Liability of Health Service Providers, Final Report* Parliament of Victoria, Melbourne, 1997 at 25; Eburn, M *Emergency Law*, Federation Press, Sydney, 1999 at 64.

²⁴ Eburn, M *Emergency Law*, Federation Press, Sydney, 1999 at 191.

Salient Points:

The existence of the duty will not depend on whether or not members of the public recognise that you are a doctor, for the duty, if it exists, will exist because you are a doctor, not because someone else knows you are a doctor.

The fact that a doctor is asked to assist should be considered relevant only in determining whether the doctor was aware that his or her services were needed.

Where the ambulance service is in attendance, that should, in the absence of a request from the ambulance officers, represent sufficient justification for a doctor not to attend the scene of the accident.

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