MEDICO/LEGAL ASSOCIATION – ALICE SPRINGS 2002

MEDICAL NEGLIGENCE

The World Changes

In considering what some have called the crisis in medical negligence we need to bear in mind that there has been a large shift in community attitudes over many years.

You will all be aware – as am I – that the once privileged position professionals held within our society has increasingly been diminished. The reality of a better informed and better educated general public has meant that we are all under closer scrutiny. This applies to doctors, lawyers (including judges), accountants, bankers and, indeed, all professions and occupations. What members of the public accepted from members of the church just 20 or 30 years ago is no longer accepted and is now the stuff of headlines throughout the nation.

People are more inclined to recognise fault and to vocalise that fault finding. They are more inclined to want to do something about it.

Along with this change has come another change or at least a perception of change. That is that if something goes wrong someone must be to blame and compensation must be paid. It is no longer fashionable to adopt a stoic acceptance of one's lot and get on with life. Someone must pay.

I expect the push for more members of our society to be accountable is in large part a good thing. Whether you regard it as a good thing or not it is likely to be here to stay and increasingly so.

It is in that context that those in our community who believe that they have been wronged are quicker than their fathers to seek a resolution in the courts. We see matters of professional negligence of all kinds coming before the courts in increasing numbers. Unfortunately for you the medical profession is at the forefront of that process.

However all is not doom and gloom. Society, and our political and industry leaders, have become increasingly concerned as to the cost to the community of the increase in claims in tort before the courts. The costs, as reflected in increasing and sometimes prohibitive insurance premiums, is now such an issue that something must be done. Governments must be seen to be acting and they will act.

The Courts

Part of the reaction has been a subtle change in direction in the courts. There has been a swing back from the position adopted by the High Court of which the high (or low) point was the West Australian case of *Nagle v Rottnest Island Board* (1992-1993) 177 CLR 423 where a man was injured when he dived into the water at Rottnest Island and hit a submerged rock. The court found that his injuries were the result of failing to warn of the presence of submerged rocks in the vicinity. An example of the court stepping back from this point (even though the same principles were applied) is to be found in *Romeo v The Conservation Commission* (1998) 192 CLR 431 where the court accepted a finding by the Northern Territory Supreme Court that

liability did not apply where there were no signs on a cliff face at Dripstone Cliffs at Casuarina Beach and a young woman fell 6 and a half metres from the top of the cliff to the beach below. It might be thought that the cases were similar. I note that apart from a dissenting judge the court did not think *Nagle* should be overruled.

In my view the High Court and the courts below are showing signs of stepping back from the position previously adopted and we are likely to see more emphasis upon individuals being required to adopt responsibility for themselves. I expect the plaintiffs will find it harder to succeed in the more doubtful scenario.

Medical Negligence

Having looked at the wider picture I would like to say something about medical negligence. To succeed in an action for negligence the plaintiff must show a duty of care owed by the medical practitioner to the patient. Generally speaking that will be readily shown simply by the relationship between the two. It will then be necessary for the plaintiff to show that there has been a breach of that duty by the doctor which has caused damage to the plaintiff. This may occur in many ways but the most common are:

(a) a failure to warn the patient of a material risk inherent in a proposed treatment

(b) a failure to make a proper diagnosis (this includes failure to carry out a proper examination, obtain an appropriate history, take notice of the patient's concerns, adopt

appropriate testing procedures, failing to monitor and review, diagnosis and, of course, misdiagnosis)

(c) there are many other examples of negligent treatment including procedural errors, anaesthetic errors, retention of surgical items, prescribing errors, injecting errors, infection control errors, communication errors and systems errors.

The standard of care required of a medical practitioner is the standard of reasonable care and skill of the ordinary skilled practitioner exercising or professing to have the special skill. The standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion within the medical profession. While evidence of acceptable medical practice is a useful guide for the courts it is for the courts to adjudicate on what is the appropriate standard of care in all the circumstances. The court may find a medical practitioner negligent notwithstanding that the medical practitioner's treatment accords with the practice accepted as proper by a responsible body of medical opinion skilled in the relevant field of practice. Of course a court must have strong reasons for substituting its judgment for the clinical opinion of the medical practitioner where it is supported by such a body of medical opinion. However if all or many doctors habitually failed to undertake an appropriate procedure or adopt an appropriate precaution then an individual doctor may be liable provided his conduct is clearly negligent. The doctor will be expected to possess a level of knowledge of a reasonably competent practitioner in his or her field. A doctor cannot carry on with an old technique if it is contrary to what is

required by informed medical opinion. The test is not the acceptance of one equally competent body of opinion over another but rather whether there has been a failure to satisfy the standard of care imposed by the law.

The standard of care will differ depending upon the circumstances. A court will take into account circumstances of emergency.

The Politicians

Outside your own sphere the politicians are also addressing this issue. There is an enquiry underway instituted by Senator Coonan and heard by Justice David Ipp of the New South Wales Court of Appeal. That body is addressing a wide range of insurance issues and issues relating to the law of negligence. Part of its function is the particular issue of medical negligence. The body has issued its first negligence review report which is available at http://revofneg.treasury.gov.au.

The report has made a series of recommendations including that the whole problem be dealt with by way of a national response.

The recommendations of the report are of interest to you. One matter of real interest is a proposal that the standard of care be modified. It is proposed that the test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:

> "a medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational."

This is a move away from the test presently applicable and accords more with what is known as the Bolam test.

Another recommendation is to modify the duty to inform to lessen the rather onerous obligation that now applies following the decision in *Rogers v Whittaker.*

There is a total of 27 recommendations and more are likely to come. The mere fact that recommendations have been made does not mean that they will be adopted. I note in the legal journals that the Law Council has expressed concern that the report amounts to special pleading for doctors and that the modifications to the law, if they are to come into effect, should be made for the benefit of all.

We will have to await the political process.

Avoiding the Claim

Of course the obvious way to avoid liability is not to make mistakes. The reality is that we all make mistakes and a busy medical practitioner, no matter how competent, is likely to make a number of mistakes in the course of a year. Many mistakes which really do amount to negligence do not result in claims. Doctor Larry Baker who visited Australia from the Oregon Health Services University pointed out that in his experience 50 to 70 percent of complaints against doctors were based on communication difficulties between doctor and patient. If that figure be right it would reflect what we see in the law as well. The difficulty for doctors, and especially GPs, is that communication takes time. To provide appropriate communication requires personal discipline on the part of the doctor and can require

expensive administration systems. I note that when I attend upon a pharmacist now I am offered a print out of consumer medical information that contains a detailed description of the medicine that I have been prescribed, how it works, what I must avoid, how I must take it and lots of other advice including things I must do and must not do and what side effects I might expect. The documentation can reach the stage of information overload. However that meets the needs of the situation. Of course it is easier for pharmacists who are simply providing standard medicines based upon a doctors prescription to fulfill this obligation. It is harder in the surgery.

Good communication leads to less problems at a later stage.

A study on handling hospital errors reported in (1999) 131 Annals of Internal Medicine 970 recommended that immediate disclosure of errors to patients and their families and a thorough discussion with them about the results and the steps being taken to prevent re-occurrence of error is a method of reducing claims. I am not sure that your lawyer would advise you to deal with the matter that way but the authors of that study which was at John Hopkins University School of Medicine suggested that candor and an appropriate apology diminish the risk of litigation.