

Medical defence: more victories than defeats

Dr Cary Ooi, Medico-Legal Adviser, Medical Consumers Association, Sydney

Plaintiffs' lawyers know more than anyone else that might is often right in the adversarial system. David might have slain Goliath, but that is probably not even history. It appears straight out of mythology.

At a medico-legal conference on "Doctors, their patients and the law" held in Sydney back in 1988, the then Deputy President of the Administrative Appeals Tribunal, Dr Paul Gerber, shocked the medical delegates (perhaps not plaintiffs' lawyers) with this revelation:

The House of Lords in Britain and the High Court in Australia have, to a man, universally and for the last ten years, found for the doctor against the patient, even in cases where there is the grossest negligence. (Gerber 1988).¹

A few years later, Justice Michael Kirby, then President of the NSW Court of Appeal, delivered a similar "judgment":

There are, of course, frauds, cheats and manipulators of the damages system. They need to be identified and weeded out....claimants know or feel the inability to take on a powerful profession, notoriously well organised to rebuff claims. (Kirby 1992).²

Thus both judicial experts have warned that courts might have too often decided, regardless of negligence, for defendants, who are 'notoriously' well defended. However, the identity of the 'frauds, cheats and manipulators' was not revealed. What a pity. Nonetheless, it is important to probe this matter further, with a view to elicit probable reasons for this apparent injustice for medical consumers injured by medical mishaps ('negligence' is a dirty word, politically speaking).

The use of hired guns is common and needs no elaboration. However, some specialist medical colleges, following legal decisions against their members, might meet and promptly issue consensus statements too powerful for any decision-maker to disregard at a subsequent appeal. For

example, supported by medical defence organisations (MDOs), a consensus document appeared, that argues against birth injury as an important and common cause of cerebral palsy. (Rush 1997).³

One of the best pieces of news for injured medical consumers is:

APLA will be able to counter the propaganda which is fed to both state and federal governments by the insurance industry, business and professional associations about the 'claims crisis' and 'litigation explosion' in Australia and the alleged need to restrict rights and cap damages to cope with the perceived problem. (Semmler 1997).⁴

In medical litigation, MDOs have presented defendants as independent expert witnesses (!) even though the rules of evidence would not usually permit it. They then "rewrite medicine" for their own self-preservation, deceiving many inexperienced plaintiffs' advocates and decision-makers in the process. Worse still, defence teams have a tendency of launching rigorous attacks on the motivation, mental state and truthfulness of all patient-plaintiffs, in order to show them as vexatious litigants.

So as to win a war of attrition, MDOs often instruct their defendant-members to refuse patients' requests for their medical records - and never admit liability under any circumstances. When the matter finally gets to court, defendants often testify that it is their usual practice to explain and warn about treatment, even though such advice was not recorded. Besides, members of one MDO have been advised that they may testify under oath in court that medical records had been lost or destroyed when in fact they never existed!

Over the past decade, we have studied numerous medical-negligence testimony and decisions in Australia and world-wide. We have identified enough tricks of the trade to wonder if medical

defence is not medical deception of juries and judges, at least in several decided cases. ■

Dr Cary Ooi is Medico-Legal Adviser and Vice-President of the Medical Consumers Association (MCA) in NSW.

Phone 02 9680 2560.

References:

- ¹ Gerber P, "Doctors, their patients and the Law " Conference, Sydney 15 October 1988
- ² Kirby, M, Medical Observer, 4 September 1992, pp 24-25, 35.
- ³ Rush, J, QC, The medical attack on the legal profession, *Plaintiff*, June 1997, pp 4-6.
- ⁴ Semmler, P, QC, National President's page, *Plaintiff*, April 1997, p 2.

Cumpston Sarjeant Pty Ltd CONSULTING ACTUARIES

We are a new firm of actuaries,
committed to making life easier
for lawyers.

We can help you prepare evidence
for personal injury, wrongful
dismissal and family law cases.

Economic loss calculations can be
intricate, and we have developed
a personal computer program to
allow lawyers to make most normal
estimates themselves.

We provide initial training and
on-going support for this program.
Please ring Richard Cumpston or
Hugh Sarjeant on
03 6914 5099, or visit us at
Level 24, 500 Collins Street
Melbourne