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"Negligence, Insurance and the Ipp Report: Recent Developments in Australian Medical Law"

Chief Justice Paul de Jersey AC

Introduction

It is my privilege to deliver the James Pryor Memorial and Foundation Lecture. I am honoured that Mrs Pryor is present. Marie will acknowledge with gratitude – as we all do – her late husband's pre-eminence as a surgeon, and especially his contribution to rural practice, and that redoubtable field of the medico-legal. It is on the latter aspect I wish to speak today.

Last year, the federal government commissioned a major review of the law of negligence, including professional negligence, chaired by Justice David Ipp. The committee's report was released in October last year, and implementation of the recommendations is already well advanced in at least three States, including Queensland. It is that context which lends this forum its particular timeliness.

I plan to discuss the Ipp Report and its recommendations in some little detail shortly. However, in order to gain a full appreciation of the implications of the report, it is important to understand the factors underlying the federal government's review, including the way medical negligence law has developed in Australia, and the impact of the "insurance crisis" this country has in recent years faced.

Developments in negligence law

I turn first to recent developments in the law of negligence, and in particular, the law relating to medical negligence. Over the course of a decade beginning in 1992, medical negligence law underwent dramatic and far-reaching changes. In the eyes of the community, most of those changes favoured plaintiffs, such that a successful negligence action could be made out in an increasingly broad range of circumstances.

The success of a negligence claim relies on the establishment of a number of elements, including, at a fundamental level, demonstration of the existence of a duty of care. There has certainly been a perceived loosening of negligence law in relation to that element,[1] as well as the requirement the plaintiff prove that the defendant *caused* the relevant injury.[2] However, over the past decade or so, the aspect of medical negligence law subject to the greatest judicial scrutiny, and arguably the greatest relaxation, has been the very existence of the breach of duty. That element turns on a determination of what is the requisite standard of care, and subsequent consideration whether that standard has been met in a particular case. Certainly, the professional negligence aspect of the Ipp Report deals most heavily with this issue, and it forms the focus of my address today.

Until 1992, Australian cases relating to a breach of a medical practitioner's duty of care were governed by the decision in the English case *Bolam v Friern Hospital Management Committee*[3]. That involved a 54 year old patient, Mr Bolam, who underwent electro-convulsive therapy at the Friern Hospital. Staff at the hospital did not administer a muscle relaxant or apply manual restraints to Mr Bolam during that therapy, and he consequently suffered fractured

[1] See for example *Lowns v Woods* [1996] ATR 81-376.

[2] See for example *Chappel v Hart* (1998) 156 ALR 517.

[3] [1957] 2 All ER 118.

bones. There was competing evidence as to the normal practice of medical practitioners performing such a procedure.

The court found that the hospital staff were not negligent. According to McNair J:

> "a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art … merely because there is a body of opinion that would take a contrary view."[4]

Since a responsible body of medical opinion supported the approach of the Friern Hospital in *Bolam*, there was no negligence. Subsequent English cases have supported the principles outlined in *Bolam*.[5]

The impetus for change in Australia began with the South Australian case *F v R*[6]. In that case, the Full Court of the Supreme Court of South Australia criticised the *Bolam* principle and refused to apply it. King CJ held that:

> "professions may adopt unreasonable practices, particularly as to disclosure, not because they serve the interests of the clients, but because they protect the interests and convenience of members of the profession. The court has an obligation to scrutinise professional practices to ensure that they accord with the standard of reasonableness imposed by law."[7]

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[4] *idem* at 122.

[5] See for example *Whitehouse v Jordan* [1981] 1 WLR 246; *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634; *Sidaway v Board of Governors of Bethlem Royal Hospital Governors* [1985] 1 All ER 643.

[6] (1983) 33 SASR 189.

[7] *idem* at 194.

Cases decided by the trial division of the New South Wales Supreme Court[8] and its Court of Appeal[9] during the same period reflected a similar unwillingness to allow the *Bolam* test to stand in Australia. However, the most important Australian decision in relation to this aspect of medical negligence is clearly the High Court's determination in *Rogers v Whitaker*[10].

Mrs Whitaker suffered from limited sight in her right eye, although she had full use of her left eye and led an active life. Dr Rogers was to perform an operation on her right eye in order to restore some sight. The operation was conducted by Dr Rogers with the required skill and care, but Mrs Whitaker contracted a rare condition referred to as sympathetic ophthalmia, which resulted in the loss of sight in her left eye. There was evidence that the condition only occurred in one of every 14,000 patients, and that Dr Rogers had not warned Mrs Whitaker of the possibility.

The High Court held that Dr Rogers had breached his duty of care. There was evidence that a respectable body of medical practitioners would have acted as Dr Rogers had in failing to warn Mrs Whitaker of the possibility of such a rare affliction. However, the court specifically refused to endorse the *Bolam* principle, finding that the standard of care "is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade."[11] Instead, "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."[12]

[8] *H v Royal Alexandra Hospital for Children* [1990] 1 Med LR 297.

[9] *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542.

[10] (1992) 109 ALR 625.

[11] *idem* at 631 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ.

[12] *ibid*.

The reason why the court considered a warning should there have been given was that Mrs Whitaker presented to Dr Rogers as keenly interested in the outcome, concerned about the risk of any accidental interference with her good left eye. She incessantly questioned him.

The principle espoused in *Rogers v Whitaker* was subsequently reinforced by the High Court in other cases. For example, in *Naxakis v Western General Hospital*[13], Gaudron J reiterated that "the test for medical negligence is not what other doctors say they would or would not have done in the same or similar circumstances."[14] Similarly, in *Rosenberg v Percival*[15], Gleeson CJ held that:

> "In many cases, professional practice and opinion will be the primary, and in some cases it may be the only, basis upon which a court may reasonably act. But, in an action brought by a patient, the responsibility for deciding the content of the doctor's duty of care rests with the court, not with his or her professional colleagues."[16]

Thus, prior to the commission of the Ipp review, the Australian law relating to medical negligence involved a clear divergence from the English position. Whereas under English law a medical negligence action could be defended on the basis that the treatment was consistent with the approach of a respected body of medical practitioners, Australian courts undertook an independent assessment of the appropriateness of the treatment.

[13] (1998) 197 CLR 269.

[14] *idem* at 275.

[15] (2001) 178 ALR 577.

[16] *idem* at 579.

The insurance crisis

The increasingly plaintiff-friendly state in which medical negligence law found itself prior to the Ipp Report had a number of consequences. Perhaps most significantly, insurance premiums rose sharply. According to the ACCC, premiums for professional indemnity insurance rose by an average of 27 percent in the 2000-2001 financial year, and by 24 percent in the 2001-2002 financial year.[17] Senator Helen Coonan remarked that "the impact of the past year's dramatic increases in insurance premiums and the reduced availability of cover across a range of insurance classes has caused widespread concern for all areas of the Australian community."[18] The situation was commonly described as a "crisis",[19] and there was evidence that doctors practising in certain high-risk areas had been forced to give up work.[20]

Of course, it is unreasonable to attribute the situation entirely to changes in the law of negligence. Plainly, such a claim would be incorrect. In its report of September 2002, the Neave Committee[21] concluded that empirical data supporting such a proposition was conspicuous for its absence. It is generally accepted that the rise in insurance premiums was at least partly attributable to events such as the World Trade Centre attacks on September 11 in the United States, and the collapse of HIH in this country.

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[17] ACCC, *Second Insurance Industry Market Pricing Review*, ACCC Publishing Unit, Canberra, 2002 at 38.

[18] Coonan H, "Insurance Premiums and Law Reform – Affordable Cover and the Role of Government" (2002) 8(2) *UNSWLJ Forum* 7 at 7.

[19] see for example Graycar R, "Public Liability: A Plea for Facts" (2002) 8(2) *UNSWLJ Forum* 2 at 2.

[20] Ipp D, "Negligence – Where Lies the Future?" (2003) 23 *Australian Bar Review* 1 at 2.

[21] Australian Health Ministers Advisory Council Legal Process Reform Group, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package*, 2002. See also Ipp D, supra note 20 at 2.

Ultimately, however, the increasing ease with which negligence actions could be made out was a relevant factor contributing to the crisis, albeit one whose impact is difficult to measure. As New South Wales Attorney-General Bob Debus pointed out, "recent events [such as the September 11 attacks and the HIH collapse] cannot be seen as the primary justification for current reform initiatives. Rather, they [are] symptoms of more longstanding and fundamental problems concerning the scope of civil liability that provided a catalyst for government action."

The Ipp Report

It was in the context of this insurance crisis, and the preceding decade of perceived plaintiff-friendly judgments, that the Government announced its review of the law of negligence on 2 July 2002. The Hon Justice David Ipp, who chaired the review, has been an Acting Judge of Appeal in the Court of Appeal in New South Wales since 2001, and a Judge of the Supreme Court of Western Australia since 1989. The other committee members were Professor Peter Cane, a law professor from the ANU, Dr Don Sheldon, a medical practitioner, and Mr Ian Macintosh, the Mayor of the Bathurst City Council. After delivering an interim report on 2 September 2002, the committee released its final report on 2 October 2002.

Unsurprisingly, the committee's report strongly favoured a tightening of the law of negligence in favour of defendants and away from plaintiffs. Such a conclusion was not unexpected, given the committee's establishment during a period of intense scrutiny of court decisions and insurance premiums. Indeed, the committee's terms of reference themselves included the following statement: "The award of damages for personal injury has become

unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another."[22]

The report canvassed a broad range of issues, most of which are beyond the scope of this address. My focus is upon those recommendations specifically directed at the law of professional, and particularly medical, negligence. On that issue, the report was principally aimed at specifying the appropriate standard of care by which a breach of duty should be assessed. According to the committee, the standard of care should differ between two separate contexts: first, in relation to the provision of information about treatment, and second, in relation to the treatment itself.

In relation to the provision of information, the prevailing law was essentially outlined in *Rogers v Whitaker*, requiring medical practitioners to take reasonable care when advising patients of the potential risks of treatment. The Ipp Report endorsed that approach, which it characterised as a proactive duty to warn of risk. According to the committee:

> "the proactive duty to inform requires the medical practitioner to take reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment."[23]

Additionally, the committee supported a reactive duty, which:

> "requires the medical practitioner to take reasonable care to give the patient such information as the medical practitioner knows or

[22] *Review of the Law of Negligence: Final Report*, Canprint Communications, Canberra, 2002 at 25.

[23] *idem* at 53.

> ought to know the patient wants to be given before making the decision whether or not to undergo the treatment."[24]

Such a reactive duty is also consistent with *Rogers v Whitaker*. There, Mrs Whitaker's active lifestyle and reliance on her good left eye, against the background of her intense quest to be informed, meant that Dr Rogers had a reactive duty to warn her of even a minute risk that that eye would be damaged. Thus, essentially, the formulation of a dual proactive/reactive duty to inform by the committee conformed to the prevailing law.

By contrast, however, the report's discussion of the standard of care applicable to medical treatment represented a sharp departure from the existing Australian legal landscape. While the possibility was certainly canvassed, the committee expressly refused to recommend the reintroduction of the *Bolam* principle in relation to treatment. The committee's preferred test was, in part, as follows: "a medical practitioner is not negligent if the court is satisfied that the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the relevant field."[25] In that respect, the proposal effectively supported the *Bolam* test, deferring as it did to the body of medical practitioners.

But appended to the proposed test was the following: "… unless the court considers that the opinion was irrational."[26] In other words, the committee's suggestion was that while the key element of the *Bolam* test should be reinstated, there should be an escape clause. The likely practical effect of this proposal is that if accepted, the law in Australia relating to treatment will in most cases revert to the *Bolam* position, relegating *Rogers v Whitaker* – as applied to treatment – to the footnotes.

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[24] *ibid*.

[25] *idem* at 41.

[26] *ibid*.

The report was greeted with cautious approval by the community. Senator Coonan, the Minister responsible for administering the review, argued that "the Review of the Law of Negligence provides a range of significant proposals and outlines a principled approach to reforming tort law which impose[s] a reasonable burden of responsibility on individuals to take care of others and to take care of themselves,"[27] and to a large extent there seemed to be support for that attitude. For example, AMA Vice-President Dr Trevor Mudge indicated that "the report provides a comprehensive review of the law of negligence and the "heads of damages" that comprise common law awards, and offers a template for a fair and national approach to tort law reform."[28]

Implementation of the Ipp Report

Proposals for the implementation of the Ipp report are currently circulating in a number of States. The State furthest advanced in this regard is New South Wales. There, the *Civil Liability Act* 2002 (NSW) (as amended by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW)) is already in force. The Act does not expressly implement the proactive/reactive duty to warn, but does enact the *Bolam* compromise proposal almost exactly.[29] According to the New South Wales Act, "a person practising a profession … does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that … was widely accepted in Australia by peer professional opinion as

[27] Coonan H, "Minister Welcomes Final Negligence Review Report" 2 October 2002, available at http://assistant.treasurer.gov.au/atr/content/pressreleases/2002/106.asp.

[28] AMA, "Final Report on the Ipp Review of the Law of Negligence" 2 October 2002, available at http://domino.ama.com.au/AMAWeb/MediaRel.nsf.

[29] *Civil Liability Act* 2002 (NSW) s 5O (as amended by *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW)).

competent professional practice"[30] unless "the court considers that the opinion is irrational."[31]

In Queensland, the *Civil Liability Act* 2003 (Qld) has also very recently come into effect, and contains a number of provisions relating to professional negligence. As in New South Wales, the *Bolam* compromise proposed by the Ipp report is almost precisely reflected in the legislation,[32] and additionally, a provision relating to the proactive/reactive duty to warn is included as suggested by the committee.[33]

Western Australia is also actively pursuing the implementation of the proposed reforms, although legislation there is yet to come into effect.

Other Initiatives

Interestingly, in very recent times, the trend towards tighter negligence laws embodied by the Ipp Report also appears to have been reflected in court decisions. The majority of such decisions admittedly do not relate to medical negligence laws, but there is some evidence courts are taking a more stringent approach in that context as well. Last year, for example, the Queensland Court of Appeal considered the controversial case of *Briant v Allan*[34].

The case concerned a patient undergoing artificial insemination procedures. The hands of the medical practitioner performing the procedures remained

[30] *Civil Liability Act* 2002 (NSW) s 5O(1).

[31] *Civil Liability Act* 2002 (NSW) s 5O(2).

[32] *Civil Liability Act* 2003 (Qld) s 22; *Explanatory Notes to the* Civil Liability Bill *2003 (Qld)* at 7.

[33] *Civil Liability Act* 2003 (Qld) s 21.

[34] [2002] QCA 157.

ungloved throughout. It was alleged that as a consequence of the treatment, the patient contracted the herpes simplex virus, and in the District Court, the trial Judge found that the doctor was liable in negligence. However, the Court of Appeal allowed an appeal by the doctor, principally on the basis there was insufficient evidence to establish he had caused the infection. While that point is arguably more procedural than substantive, nevertheless, the case supports an argument that tightening of the approach to negligence is being echoed in the courts.

The role of the judiciary

The process I have described is one of gradual court-initiated change, followed by a legislative response. That process is itself jurisprudentially interesting and worthy of consideration. Judges are sometimes criticized for assuming a legislative role. That may happen in relation to developments in the common or judge-made law. An example is the criticism endured by the High Court of Australian in relation to the *Mabo* case. But intermediate courts of appeal, which are more often than not final because of the requirement for special leave to proceed in the High Court, also sometimes develop the common law, by giving decisions in circumstances which may be described as unique and to which existing precedent does not readily apply. The law of negligence provides a good example. Judges do their conscientious best to regulate the common law by adherence to the doctrine of precedent, that is, following the parameters to be drawn from cases already decided in similar situations in higher courts, so that the law in endowed with the requisite certainty; and where higher courts develop the law to meet changing social circumstances, they tend to do so incrementally, that is, by small steps.

That process was interestingly described in the High Court in *Breen v Williams* (1996) 186 CLR 71, 115 per Gaudron and McHugh JJ:

> "Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal

> reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must "fit" within the body of accepted rules and principles. The judges of Australia cannot, so to speak, "make it up" as they go along. It is a serious constitutional mistake to think that the common law courts have authority "to provide a solvent" for every social, political or economic problem. The role of the common law courts is a far more modest one.
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> In a democratic society, changes in the law that cannot logically or analogically be related to existing common rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the "new" rule or principle that has been created has been derived logically or analogically from other legal principles, rules and institutions."

The non-elected judiciary is independent of the other arms of government. The judiciary determines upon such developments in the law without direction from parliament. To the extent that Judges “make” law, some people find it difficult to accept the legitimacy of their doing so, because of a view that the “law” should only be made by the people's elected representatives in parliament: if the people are dissatisfied with the laws so made they may register their disapproval at the ballot box. But practically speaking, it is not possible to legislate to cover every exigency of the human condition, and Judges are therefore left with the discretion to proceed as they do. The people do, however, have an ultimate safeguard should the unelected judiciary, the third arm of government, be perceived to have got it wrong, and that is through parliamentary intervention.

As put recently Hayne J of the High Court ("Restricting Litigiousness", a paper delivered at the 13th Commonwealth Law Conference):

> "Subject to applicable constitutional restraints, it will be the legislatures of Australia which ultimately determine the course

> that is to be taken in restricting litigiousness. It will be for the parliaments to say what kinds of litigation are to be restricted and how that restriction is to be effected. That is not to deny the importance of the roles of the courts in promoting efficient and predictable disposition of litigation. But if those legislatures choose to modify, or even abolish, legal rights of a kind which those legislatures consider give rise to too much litigation or litigation which is costing too much, that, subject to applicable constitutional restraints, will be a matter for them."

As I have indicated, prior to the Ipp Report, the view was expressed that the courts had developed the law of negligence to the point where recovery had become too easy, and the relevance of common sense unduly downplayed. Some were surprised at the verve with which this message was effectively spread by medical practitioners concerned to lower the standard of care applying to their own profession, and by insurance companies said, by some, simply not to have engaged in prudent, forward financial planning. In short, those at the vanguard of the promotion of the view that parliament should intervene did appear to have a major self-interest in the outcome. But the message nevertheless caught on, and legislatures are intervening by modifying rights of recovery for damages for negligence, both in the field of medical negligence and negligence more broadly. While one may regret the prospect that persons injured through no fault of their own, but the fault of another, should be denied reasonable compensation, what has occurred, is occurring, is actually nevertheless an example of the governmental system working well, with the parliament intervening to meet perceived public concern as to the level of recovery which to that point had been ordained by the courts.

That is, ultimately an example of the operation of what we call the rule of law: the courts acting independently, subject nevertheless to the public safeguard ultimately of parliamentary intervention to support the perceived public interest.

Conclusion

I return to Anton Chekhov. In addition to his wise words comparing lawyers and doctors, he wrote that "if you cry "forward!" you must without fail make plain in what direction to go." In the area of medical negligence, the government has indeed cried "forward", having witnessed a decade of gradual court-directed movement, and to its credit it has clearly indicated the direction in which it intends to go. These have been, and are, fast-moving times in medical law, and hopefully, from the perspective of medical practitioners, they are fast-moving in the preferred direction. Perhaps the most significant criticism voiced by doctors in recent times has been a lack of certainty as to the standard of care required of them. In that sense at least, the reformulation of the standard of care by reference to the generally accepted approach among practitioners is a favourable step. However, regardless of one's particular viewpoint on the desirability of the reforms, it is clear that the process of legislative reform, following the preceding decade of case law, represents a model example of the effective interaction of the arms of government.