

Minter Ellison Health News

30 June 2010

Breaking News

Queensland

Former Bundaberg Hospital surgeon guilty of manslaughter

A jury has found Dr Jayant Patel, former Head of Surgery at the Bundaberg Base Hospital between 2003 and 2005, guilty on three counts of manslaughter and one of causing grievous bodily harm (GBH). This verdict follows a 14 week trial and a reported 48 hours of jury deliberations.

In the form it eventually took in the trial following the evidence of the key expert witnesses, the essence of the case for the prosecution was that Dr Patel made incorrect decisions to operate on four patients in circumstances in which it was indicated that the operations were inappropriate or unnecessary, and that this level of error amounted to criminal fault. The GBH charge, for example, related to surgery to excise healthy bowel tissue that could not have reasonably been suspected to have been cancerous given the tests conducted before the surgery.

The legal issues that underlie the jury's verdict involve the intended application of sections 282 and 288 of the Queensland Criminal Code 1899 to prosecutions that do not focus on a failure to use 'reasonable skill [and] care' in the performance of the surgery itself, but rather focus on the unreasonableness of performing the surgery in the first place. The trial judge, Byrne J, acknowledged during legal argument heard the absence of the jury that the prosecution case presented difficult questions of law given the relative novelty of criminal proceedings commenced in response to surgical decision making. An application for leave to appeal to the Queensland Court of Appeal has already been made.

Dr Patel was denied bail and will be sentenced tomorrow. The maximum sentences for manslaughter and GBH in Queensland are life imprisonment and imprisonment for 14 years respectively. Dr Patel faces a further trial on a single charge of causing gross bodily harm and eight charges of fraud. The charges of fraud relate to misrepresentations Dr Patel allegedly made to Queensland Health about his surgical expertise.

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LAWYERS

Case Law

Commonwealth

McMurtrie v Quadriplegic Centre Board of Management

The applicant was a nurse at the Quadriplegic Centre Board of Management (the respondent). On 24 May 2001, when the applicant was untucking a sheet under a patient, the patient struck out towards the applicant. The applicant took evasive action and was injured. In 2008, the District Court held the respondent liable in negligence for failing to warn the applicant of the patient's history of physically aggressive behaviour. In 2009, the Court of Appeal allowed the respondent's appeal, noting that there was no duty to issue a warning about the behaviour of the resident on the basis that a previous incident involving the patient was minor and isolated.

The applicant then sought special leave to appeal to the High Court of Australia. The High Court held that the application involved questions of fact and the consideration of settled principle. The decision of the Court of Appeal was not attended with sufficient doubt to warrant a grant of special leave to appeal. Special leave was therefore refused.

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New South Wales


HCCC v Sohler

The Health Care Complaints Commission (HCCC) brought a complaint to the Nurses and Midwives Tribunal of NSW (the Tribunal) alleging that Elizabeth Sohler (the respondent) was guilty of unsatisfactory professional conduct and professional misconduct during her time as a nursing unit manager at the St George Hospital.

The particulars of the allegations were that the respondent:

- made false claims for allowances;
- made false claims and forged her supervisor's signature regarding her time and attendance;
- removed procedure reports from patient medical records and replaced them with false procedure reports;
- altered a patient's consent to medical treatment;
- had been convicted of four counts of obtaining money by deception, which rendered the respondent unfit in the public interest to practise nursing; and
- suffered from depression, which was likely to detrimentally affect her physical or mental capacity to practise nursing.

In relation to the false claims and fraudulent alteration of records, the Tribunal noted that the respondent's conduct occurred over a long period of time and demonstrated systematic non-compliance with legal and civic obligations. The respondent abused her position and only stopped her behaviour when she was found out. The Tribunal held that the respondent's conduct and the fact that she failed to accept responsibility for her actions meant that neither the public nor the respondent's colleagues could have confidence in the respondent.



The respondent's convictions for obtaining money by deception also rendered her unfit to practise as a nurse. When the respondent became aware that her theft might be discovered, she took steps to cover up her actions. She was also prepared to mislead financial institutions, health practitioners, hospital investigators and the Tribunal. The respondent failed to demonstrate that the public and the profession could repose confidence in her to observe the high standards of moral rectitude required of a nurse or midwife.

Evidence was provided to the Tribunal that the respondent's depression was in remission. The Tribunal held that this did not mean that the respondent's condition was irrelevant to the Tribunal's determination because a relapse could have occurred that affected the respondent's practise as a nurse. However, the Tribunal also made reference to the 'notorious fact' that there are nurses and midwives practising their professions who have depression or psychiatric conditions that they keep under control and who have mechanisms in place to ensure that their impairments do not adversely affect their capacity to practise. Ultimately, it was necessary to determine where the respondent's current status fell in terms of the definition of 'suffers from an impairment' in section 4A of the *Nurses and Midwives Act 1991*. However, the Tribunal did not make a finding in relation to this issue because it considered that its findings as to the other complaints provided a sound foundation upon which to make protective orders.

On the totality of the circumstances, Tribunal held that the respondent was unfit to practise nursing. The respondent was deregistered and was prohibited from making an application for re-registration for a period of three years.

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S v New South Wales Medical Board

Dr S undertook a telephone conversation with a patient in February 2008 relating to an erectile dysfunction. Dr S prescribed an order for APM Nasal Spray.

A complaint by the patient about Dr S's practice of medicine was referred to a Professional Standards Committee Inquiry. The complaint alleged that Dr S did not discuss other treatment options with the patient and did not arrange any follow-up or review of the patient to assess the efficacy of the treatment.

During the course of the Inquiry, Dr S raised an issue of apprehended bias on the part of Dr Lowy, one of the members of the Inquiry. In particular, it was alleged that Dr Lowy's publications demonstrated that he had a pre-conceived view about issues in the proceedings, including whether a consultation via telephone was appropriate for patients. It was also asserted that Dr Lowy had a preference for medications manufactured by the sponsors of Impotence of Australia because, in his publications, he did not refer to medications sponsored by other manufacturers.

Price J held that there was little evidence in the proceedings from which a fair-minded observer might reasonably conclude that Dr Lowy would not be open to persuasion. It was 'hardly surprising' that a medically qualified member would be selected because of the expert knowledge he or she had in the particular area of the complaint and indeed 'familiarity is an advantage rather than a disqualifying factor.' Further, Dr S did not establish a logical connection between Dr Lowy's association with Impotence Australia and the assertion of a reasonable apprehension that Dr Lowy might not bring a fair and unprejudiced mind to the proceedings.

Dr S's application was therefore dismissed.

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New Zealand

Health and Disability Commissioner Report: Whanganui District Health Board and Whanganui Accident and Medical Clinic Ltd

The acting Health and Disability Commissioner (the Commissioner) investigated the treatment provided to Baby A by Whanganui Accident and Medical Clinic (WAM) and Whanganui District Health Board (DHB). Baby A's parents complained to the Commissioner after Baby A was seen by medical staff at WAM and Whanganui Hospital, and discharged. Baby A died shortly after from meningitis.

Baby A was assessed at WAM by Dr B, who prescribed medication to lower Baby A's temperature. Dr B was unsure of the cause of Baby A's illness and recommended that Baby A be reviewed at Whanganui Hospital Emergency Department. Baby A's parents went to the Emergency Department and Baby A was assessed by paediatric registrar Dr E and by paediatrician Dr F. Drs F and E told Baby A's parents that they suspected Baby A had a viral illness. Baby A's temperature had reduced and Drs E and F told Baby A's parents that it was appropriate for Baby A to be taken home.

Baby A died the following morning from meningococcal septicaemia. The Commissioner found no breach of the Code of Health and Disability Services Consumers' Rights (the Code) by either WAM or Whanganui DHB. WAM was found to have provided appropriate care to Baby A. The Commissioner noted that Drs E and F ensured that Baby A's parents knew that they should bring Baby A back to Hospital if he became more unwell. Baby A's parents were found to have been provided with adequate and appropriate information from Whanganui DHB.

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Health and Disability Commissioner Report: Dr B, Dentist

The Commissioner received a complaint from Mrs A regarding the treatment provided to her by her dentist, Dr B. Mrs A saw Dr B for treatment of a painful tooth and mouth pain. Dr B diagnosed Mrs A with an advanced periodontal condition and undertook extensive dental treatment on Mrs A. In spite of the treatment Mrs A continued to suffer considerable pain and discomfort. Dr B later refunded \$28,000 to Mrs A which was the cost of her dental treatment.

The Commissioner found that Dr B breached the Code in a number of respects. First, the Commissioner noted that Dr B owed Mrs A a duty to explain all of the treatment options available, and the risks, benefits and costs of each. This was particularly important, the Commissioner found, in light of the extent and impact of each treatment option.

Secondly, Dr B was found to have breached the Code in failing to carry out an adequate preliminary assessment of Mrs A. Furthermore, the treatment Dr B provided Mrs A was considered to be of a poor standard, and it resulted in ongoing problems for Mrs A.

Thirdly, the Commissioner found that Dr B did not maintain adequate documentation. Dr B deleted references in Mrs A's notes, which amounted to a breach of the Code.

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Health Practitioners' Disciplinary Tribunal: Mr L, Pharmacist

The Health Practitioners' Disciplinary Tribunal (the Tribunal) investigated a charge of professional misconduct against Mr L, in which it was alleged that he used personal information obtained from patients to send unsolicited, inappropriate and unprofessional text messages, in breach of the *Health Information Privacy Code 1994*.

Mr L was also alleged to have failed to comply with the Pharmacy's standard operating procedures, which required him to ensure only relevant and necessary information was obtained from customers. The patients in question had come to the pharmacy for the Emergency Contraceptive Pill (the ECP), and the standard operating procedure of Mr L's pharmacy made it clear that a telephone number was not required in order to dispense this pill to a patient.

The Tribunal found that Mr L's conduct amounted to malpractice in that it was unethical and likely to bring discredit to the Pharmacy profession. It found that the threshold for professional misconduct had been met.

The Tribunal concluded that the misconduct warranted a disciplinary sanction and was concerned that Mr L's conduct involved three separate women over a period of four and a half years, and that Mr L abused his position by using the information entrusted to him to pursue young women inappropriately.

Having regard to both aggravating and mitigating factors (including Mr L's good history), the Tribunal suspended Mr L's registration for six months, ordered him to undergo counselling, a law and ethics interview, to undertake a course on the practice of pharmacy in a professional manner, and not to personally dispense the ECP or its equivalent for three years following the expiry of his suspension. Mr L was also censured and ordered to pay a fine of \$15,000 and 35% of the costs of the Professional Conduct Committee and the Tribunal hearing.


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Health Practitioners' Disciplinary Tribunal: Dr Sean Parker, Chiropractor

The Tribunal investigated two charges against Dr Parker relating to his treatment of two patients. The first patient, Ms Clegg, consulted Dr Parker for treatment of an elbow injury. Dr Parker told Ms Clegg that the treatment would cost \$3700. Ms Clegg declined the treatment in spite of Dr Parker pressuring her to proceed. Ms Clegg later received a payment demand on Dr Parker's behalf seeking the \$3700 even though she had not had the treatment.

The second patient, Mr E, injured his back and sought treatment from Dr Parker. The Tribunal found that Dr Parker exerted pressure on Mr E to enter into a finance agreement to fund his treatment, even though Mr E told Dr Parker that he could not afford it.

The Tribunal found that Dr Parker's behaviour constituted malpractice and brought discredit to the profession of a chiropractor. Dr Parker was found to have exploited his "position of power and trust" and provided inadequate information about the treatment he provided to the complainants. The Tribunal concluded that Dr Parker's actions in pressuring patients into treatment and arranging unacceptable finance schemes constituted professional misconduct.



Dr Parker was suspended from practising as a chiropractor for 18 months. The Tribunal imposed a number of conditions that he is required to fulfil before recommencing practice, which include demonstrating his competency to the Chiropractic Board, undertaking a psychiatric assessment and arranging to be supervised in his practice. The Tribunal did not impose a fine in light of Dr Parker's financial situation.

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News

Aged Care

Government Acts on Victorian Nursing Home

The Australian Government has imposed sanctions on Islamic Society of Melbourne Eastern Regions Inc, the approved provider of Isomer Retirement Home in Victoria.

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GST 'bombshell' rocks retirement villages

The \$50 billion retirement village sector has warned that "a bombshell" from the ATO could potentially wipe billions of dollars off the value of the villages.

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E-Health

E-health standard urged

Doctors have called on the Federal Government to prioritise the creation of software standards that will make national electronic health records a reality following the passing of legislation in the Senate.

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Healthcare Identifier Bills get through Senate

The Federal Government's controversial electronic healthcare identifier legislation has passed in the Senate.

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General Health

Dentist who lied to patients struck off

A Sydney dentist who was cleared of manslaughter after one of his patients died has been deregistered for five years.

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Health access 'lacking'

Australia's health system rates third out of seven nations in overall performance but shares last place with the US on access to affordable and timely care, an American study finds.

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Demand for action on mental health

About 70 mental health experts and organisations will deliver a letter to Prime Minister Rudd urging immediate improvements of the sector.

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Boy dies after being sent home by hospital

Staff at Campbelltown Hospital twice told Grace Chiundiza to take her son home and give him painkillers after a crunching tackle during a school rugby game on Saturday afternoon.

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Pathology

Roxon stands by pathology changes

The Federal Government is going ahead with its plans to abandon limits on the number of collection centres a pathology company can operate. The amendment is expected to enable smaller companies to break into the market, which is currently dominated by a few big companies.

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Preventative Health

Suicide-prevention groups say the need is desperate

A nine-month Government inquiry into suicide prevention would be wasted unless more funds were urgently injected into mental health, experts say.

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Undiagnosed heart condition costs \$1.2b

A commonly undiagnosed heart condition that causes one in six strokes is costing the Australian health system more than \$1.2 billion a year.

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We're living longer, but getting fat

Australians are closer to the top of the world's life expectancy league as death rates from a range of diseases continue to drop.

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Address gambling like binge drinking: report

Problem gambling costs the nation \$4.7 billion a year and should be tackled in a similar way to binge drinking, the Productivity Commission has recommended.

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Cancer cases on the rise, says health report

New cases of cancer are headed for a 10 per cent increase this year compared to 2006. The number of people diagnosed with the disease in 2010 is predicted to rise to 115,000.

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New Zealand

Future of 'town' of embryos on ice

Around 10,000 frozen embryos are sitting in New Zealand laboratories – the equivalent of the entire town of Greymouth – amid a growing issue over what to do with them when the donors can't be found.

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Shock for NZ smokers

New Zealand smokers are exposed to much more nicotine from cigarettes than are Australians, possibly because of a preference for high-nicotine brands on this side of the Tasman.

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Surgeons stay working into old age

More than 10 per cent of New Zealand surgeons are practising into old age - some to beyond 70 - partly because of a lack of younger replacements.

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