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Statutory amendments to civil liability of professionals including medical doctors

Michael Weir
Bond University, Michael_Weir@bond.edu.au

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Associate Professor Michael Weir
School of Law Bond University

Introduction

In the last year or so we have heard a lot about how there is a crisis in medical indemnity and in the insurance industry generally. We have witnessed large increases in premiums for public liability and professional indemnity insurance. For some doctors (such as obstetricians – doctors who deliver babies) it is said that the potential for litigation is so great that they are obliged to pay premiums of $140,000 per annum for professional indemnity insurance. This apparent crisis was partially caused by the collapse of HIH. This resulted in an industry wide crisis in insurance as premiums that had been kept low by vigorous competition began to increase. The Federal government responded to this crisis by commissioning a Review of the Law of Negligence in July 2002. This review was chaired by The Honourable David Andrew Ipp a New South Wales Supreme Court judge. The first report of the review was completed in August 2002 and is known as the Ipp Report. This report suggested some statutory reforms to the law of negligence to deal with the burgeoning premiums for insurance. As the recommendations of this report have been implemented there have been significant statutory changes to the law of negligence for medical doctors and other professionals. The changes that have been introduced in a number of states are complex. This article will raise some of the most important and interesting changes.

Civil Liability Legislation

Most states have introduced amendments to the law relevant to negligence recently but New South Wales (*Civil Liability Act 2002*); Queensland (*Civil Liability Act 2003*) and Tasmania (*Civil Liability Act 2002*) have introduced similar (but not identical) legislation that incorporates the most significant amendments to the common law of negligence. Other states may eventually follow suit with these reforms.

Duty of Care of a Professional

One of the most significant reforms in all three statutes is the provision that the limits liability of a professional when they act in accordance with accepted practice. Section 22 of the Civil Liability Act 2003 (Qld)[1] states:

> "1. A professional does not breach a duty arising from all the provisions of a professional service if it is established that the professional acted in a way that (at the time the services was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.
>
> 2. However, peer professional opinion can not be relied on for the purposes of this section if the court considers that the opinion is irrational or contrary to a written law.
>
> 3. The fact that there are differing peer professional opinions widely accepted by a significant number of respected practitioners in the field concerning a matter does not prevent any 1 or more (or all) of the opinions being relied on for the purposes of this section.
>
> 4. Peer professional opinion does not have to be universally accepted to be considered widely accepted.
>
> 5. This section does not apply to liability arising in connection with the giving of (or failure to give) a warning, advice or other information, in relation to the risk of harm to a person, that is associated with the provision by a professional of a professional service."

This provision is significant for both medical doctor and other professionals. The extent that this provision introduces significant reform to the law awaits judicial interpretation. What the provision does is to take away some concerns that were expressed about the medico legal case of *Rogers v Whitaker*[2]. In that authority the High Court deemed an eye specialist was negligent when he failed to advise a patient of the possibility of blindness occurring in her good eye when operating on her bad eye. The doctor's defence was based upon the fact that he had followed standard professional practice in not advising of that rare risk of treatment.

The High Court confirmed that the court not the profession determined what was negligent in regard to advising of risks of treatment. Subsequent High Court cases appeared to broaden this approach to all aspects of the provision of treatment by a medical doctor[3]. Where a doctor has performed a task (or has decided not to take a step) for a patient under these new provisions they will be protected from liability if they are able show that approach is supported by their peers even if it is not universally accepted. The rider on this is when a court considers that approach is 'irrational'. This will presumably refer to an activity or omission that is patently unacceptable even if accepted by the profession under consideration. Note subsection 5 states that the section does not apply to advice of risks of treatment.

This provision moves Australia closer to the English model of liability for medical doctors. In England under the principles expressed in *Bolam v Friern Hospital Management Committee*[4] the court confirmed that the determination of medical negligence was primarily determined by what was or was not acceptable performance as determined by the medical profession.

The significance of this legislative initiative goes beyond the medical profession and applies the test to the liability of all professionals. One issue that will need to be determined is what is meant by the term 'professional'. For example could a properly qualified massage therapist be considered a professional?

Inherent Risk

Another significant provision in New South Wales and Queensland states that a person is not liable in negligence for harm suffered by another person as a result of the materialization of an "inherent risk[5]". Inherent risk is a risk of something that can not be avoided by the exercise of reasonable care and skill. This might apply to a known side effect of a medical procedure that occurs even in the absence of negligence in a percentage of cases. It is likely that there will be a substantial level of legal argument about what is or is not an "inherent risk". This section does not exclude the obligation to warn of a risk of treatment so liability could accrue if an inherent risk materializes and a person was not warned of that risk.

Warning of Risks of Treatment

One primary duty of a professional that arises most clearly in the case of a health professional is an obligation to warn of inherent risks of treatment. Thus, a doctor is obliged to warn of possible outcomes from medicines they prescribe or procedures that they may recommend. In *Rogers v Whitaker* the High Court concluded that based on the particular patient under consideration and the potentially serious consequences of sympathetic ophthalmia in her case that the doctor should have warned of that somewhat remote risk (1 in 14,000 chance). This created concerns for doctors and other health professionals who were worried that every possible outcome of surgery or medicines would bave to be revealed to a patient to avoid liability. The indemnity legislation attempts to reduce this concern by:

- Stating a person is presumed to know of obvious risks ie obvious to a reasonable person.
- A defendant is not obliged to warn a plaintiff of an obvious risk.
- For doctors the duty to warn to risk of treatment is placed in statute. The doctor is not in breach of a duty to warn of a risk unless the doctor fails to warn about a risk that a reasonable person in the patient's position would require to make a reasonably informed decision about whether to undergo the treatment or follow the advice and the doctor knows or ought reasonably to know the patient would want that information before making a decision on the treatment or advice. This reflects to a great extent the principles discussed by the High Court in *Rogers v Whitaker* and involves a subjective aspect ie what that patient would need to know and an objective aspect ie what a reasonable person would want to know before making a decision. By placing these criteria in statute this may reduce the possibility of the development of more expansive common law principles.

Dangerous Recreational Activity

One concern about potential public liability claims has been the view that on occasion persons with little obvious concern for their own safety undertake dangerous activity and then seek to recover compensation from someone who might provide the means to indulge in that activity. This might occur when someone partakes in parachuting or paragliding. The legislation attempts to reduce the potential for an action in that type of situation. Provision is made that a person is not liable in negligence for harm suffered by another person as a result of the materialization of an obvious risk of a dangerous recreational activity engaged in the person suffering harm.[6] Dangerous recreational activity is defined to include "an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person." An "obvious risk" is a risk that in the circumstances would have been obvious to a reasonable person in the position of that person and includes patent risks or matters of common knowledge. This provision may permit the promoter of an activity to avoid liability, where there was no negligent failure of equipment, when the risks inherent with that activity cause injury.

Contributory Negligence

Contributory negligence can occur when a person contributes to their injury by their own failure to take proper care of their own affairs. An example might be when a person drives too fast in a go cart raceway and is injured in an accident. This could reduce partially any claim made under a claim for negligence. Under previously applying legislation and common law principles it was sometimes difficult to reduce a claim for negligence on the basis of contributory negligence as the courts tended to apply a somewhat liberal interpretation on what was expected in the behaviour of a plaintiff. The civil liability legislation in Queensland, New South Wales and Tasmania[7] requires a person wbo suffers harm to apply a standard of care of a reasonable person in the position of the person injured on the basis of what they knew or ought reasonably to have known at that time. Contributory negligence may now reduce damages by 100% in appropriate cases. Other provisions provide that if a person injured was intoxicated (under the influence of alcohol or drugs) and the person who is sued (the defendant) alleges contributory negligence then contributory negligence is presumed. This can only be rebutted if the intoxication did not contribute to the breach of duty or the intoxication was not self-induced.

Criminals not to be awarded damages

Many people have been dismayed when claims have been made by persons injured while in the course of the commission of a criminal act. This might occur where a person breaks into a home and the home owner assaults the intruder. In some instances this may provide the basis of a claim for injury suffered by the intruder. The civil liability legislation confirms that no compensation is payable if the injury is suffered while that person engaged in an indictable offence (serious offence) and their conduct contributed materially to the risk of harm.[8]

Jury Trials

Sometimes a jury will award larger damages than a judge. The legislation requires a claim for personal injury to be decided by a judge only.

Expressions of Regret in Personal Injury matters

One concern when a negative outcome occurs and personal injury is suffered is that a statement by a professional indicating sorrow about the result may be given in evidence to support a claim in negligence. In Queensland and Tasmania an expression of regret without any admission of liability is not admissible in any ensuing litigation.[9] The New South Wales legislation is more liberal as an expression of regret is inadmissible even if it contains an admission of liability.[10]

Conclusion

The extent to which these reforms will provide the reduction in professional indemnity and public liability claims will be subject to how they are interpreted by judges. Assuming courts are prepared to apply the social purpose of these provisions, that is, to provide a balance between the interests of plaintiffs and defendants these provisions may provide a circuit breaker in the insurance crisis in Australia.

Debate

Should people who indulge in dangerous activities for recreation purposes ie rock climbing; parachuting or other similar activities not be entitled to recover damages for injury they may suffer?

If a burglar is assaulted while in the act of a burglary should a house owner be entitled to use deadly force i.e. a knife or a gun or should a citizen be limited to less violent methods?

1 s5 O NSW; s 22 Tas.
2 (1992) 75 CLR 479.
3 *Naxakis v Western General Hospital and Another* (1999)197 CLR 269
4 (1957) 1 WLR 582.
5 Section 16 Qld; s5I NSW.
6. ss 13,14, 17-19 Qld; ss 5F-5G, 5J - 5 N NSW; s20 Tas.
7 s23-s24 Qld; s5R NSW, s23 Tas.
8 s45Qld; s54 NSW; s7 Tas.
9 ss68-72 Qld.
10 ss67-69 NSW.a