

Minter Ellison Health News

28 January 2010

Case law

New South Wales

Hardwick v McSwiney (No 3)

Dr Patrick McSwiney ('the defendant') was a specialist ear, nose and throat surgeon. In January 1993, Ms Suzanne Hardwick ('the plaintiff') consulted him concerning a persistent ulcerated lesion on the right side of her tongue. He performed a biopsy of the lesion, which on histopathological examination was reported as showing no evidence of significant dysplasia or neoplastic disease. The plaintiff consulted the defendant again in February the following year when he performed an excision biopsy of the lesion. Histopathological examination revealed a moderately dysplastic squamous epithelium suggesting that the lesion had been incompletely excised. The defendant reported to the plaintiff's general practitioner that she was to be kept under review, and that he had organised to see her again in 4 months time. The plaintiff consulted with the defendant again in September 1996 following which the defendant advised the plaintiff's general practitioner that clinical examination failed to reveal any abnormality. The plaintiff consulted with the defendant in May 2005, by which time she had developed squamous cell carcinoma extending deep into the muscle of the tongue.

The plaintiff commenced proceedings alleging that the defendant was negligent in failing to completely excise the lesion, refer the plaintiff for appropriate specialist treatment, or to arrange any appropriate follow up or review. Prior to the hearing of her claim, the plaintiff sought an order from the New South Wales Supreme Court ('Court') that the defendant pay her as part of her damages an amount on an interim basis pending the final determination of the proceedings.

The Court stated it must be satisfied, if the proceedings went to trial, that the plaintiff would obtain judgment for substantial damages, which requires the Court to make a preliminary assessment of the defendant's liability and the likely quantum of the plaintiff's damages. The Court considered it relevant that both the plaintiff and defendant provided expert medical opinion to support their position, yet none of the medical experts had been cross-examined, nor had any of them given evidence in the witness box. The Court indicated that it was unable to make any proper or meaningful assessment of the competing views of the experts, and could not therefore be satisfied that the plaintiff would, not merely *might*, obtain judgment against the defendant.

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LAWYERS

Health Care Complaints Commission v Abad (No 2)

Mr Abad was a nurse at the Royal Prince Alfred Hospital in Camperdown, New South Wales. It was alleged that in 2006, while he was on duty as an enrolled nurse, Mr Abad made inappropriate comments to a female patient ('Patient A') at a time that he was assisting her with washing and, more significantly, that during this time Mr Abad touched the patient in ways that were sexual in nature. As a result of that incident he was charged with, and convicted of, an aggravated indecent assault on Patient A.

In *Health Care Complaints Commission v Abad [2009] NSWNMT 23* ('initial proceedings'), the Nurses and Midwives Tribunal ('Tribunal') found Mr Abad guilty of professional misconduct, that he had been convicted of an offence in New South Wales and that the circumstances of the offence rendered him unfit in the public interest to practise nursing. The Tribunal was also comfortably satisfied that Mr Abad was not of good character, and ordered that his name be removed from the Roll of Nurses for New South Wales and that a period of at least three years elapse before he may apply to the Tribunal for a review of the removal order.

In *Health Care Complaints Commission v Abad (No 2) [2009] NSWNMT 30*, the Tribunal heard an application brought by the Health Care Complaints Commission's ('HCCC') for an order prohibiting Mr Abad from providing health services in Australia as an Assistant in Nursing. Because of its findings in the initial proceedings, the Tribunal was comfortably satisfied that Mr Abad posed a substantial risk to the health of members of the public and that it should make a prohibition order prohibiting him from providing the nursing services of an AIN at either a public or private service. The Tribunal held that the order will cease only if Mr Abad is re-enrolled as nurse by order of this Tribunal or any successor Tribunal or he becomes a Registered Nurse.


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Re Dr Yuk-Fun Christina Port

Dr Port was working as a general practitioner when she wrote a number of prescriptions for Patient A between October 2000 and October 2004, including prescriptions for Sinequan, Aropax, Zoloft and Lithium. The medication was prescribed as treatment for Patient A's depression. Dr Port has since admitted that Patient A had not consulted her on those occasions. All but the first of those prescriptions were written at the request of Patient A's wife. In June 2002 Dr Port became aware that Patient A's wife had not informed Patient A that the medication had been prescribed for him and that the wife was administering the medication to him in his coffee. The Health Care Complaints Commission made a complaint to the Medical Tribunal of New South Wales ('Tribunal') about Dr Port's conduct.

Dr Port admitted the particulars of the complaint, and conceded that she had been guilty of unsatisfactory professional conduct and professional misconduct.

In deciding on the appropriate Orders, the Tribunal noted that Dr Port was not an inexperienced general practitioner; she had been practising in a rural setting for over 20 years when the incidents occurred. They noted that before issuing the prescriptions, Dr Port did not consult with Patient A, take a medical history, conduct an examination or undertake or arrange for any tests. Accordingly, she did not decide whether the appropriate treatment was medication, make an informed decision as to which of the available medications should be prescribed, or ascertain whether Patient A had any risk factors to suggest that the medication she was proposing to prescribe were contra



indicated. The Tribunal also commented that the failure to consult with Patient A meant that he did not know that he had been diagnosed with major depression and was therefore deprived of his right to give informed consent to the recommended treatment or to decide not to take the medication. He was not informed of the possible side effects and, because he was not aware he was taking the medication he may have unknowingly taken other incompatible "over the counter" medication. They noted that if he had consulted another doctor he would not have been able to give that doctor an accurate history. All these issues went directly to the health and safety of Patient A.

Although Dr Port conceded that her behaviour amounted to unsatisfactory professional conduct and professional misconduct, the Tribunal did not accept that there had been a genuine change in her standards, values or insight to as to reduce the risk of recurrence. The Tribunal was satisfied that that the gravity of the conduct was sufficiently serious such that the removal of Dr Port from the Register would be the only Order which would reflect the need to maintain proper ethical and professional standards, to protect the public and to protect the good standing and reputation of the profession. Accordingly, the Tribunal ordered that Dr Port's name be removed from the Register of Medical Practitioners and that she not be permitted to apply for her name to be restored to the Register until 18 December 2012, being a period of three years.

[Click here for decision](#)

Queensland

Inquest into the death of Yvonne Alice Davidson

Mrs Yvonne Davidson ('the deceased') presented to the Emerald Hospital on 1 September 2007 with diarrhoea and flu-like symptoms. The deceased was flown by the Royal Flying Doctor's Service to Rockhampton Hospital as it was considered that she was suffering from rapid atrial fibrillation and respiratory distress secondary to pneumonia. She had an endotracheal tube inserted prior to departure from Emerald. In Rockhampton there were two attempts in the following days to extubate the deceased. After the second failure, a decision was taken by Dr Holland, a locum Visiting Medical Officer, to perform a percutaneous tracheostomy ('procedure') on the afternoon of Sunday 9 September 2007.

The State Coroner noted that there was no urgent reason to perform the procedure on 9 September 2007, as opposed to the following day when the Director of the ICU would be on duty. The Coroner found that the procedure was not performed in accordance with the protocol in place in the Rockhampton ICU, particularly as to the requirement for two consultants to perform the procedure with a bronchoscope, but that Dr Holland was qualified and experienced to perform the procedure. There were some issues with equipment which was not fully operational, including the bronchoscope. Complications developed during the procedure, particularly in relation to management of the deceased's airway. The procedure was eventually abandoned and the Medical Emergency Team was called for urgent assistance to the deceased. She failed to recover and died. The Coroner concluded the deceased died from septicaemia as a result of the lobar pneumonia, and not from the procedure. However, the Coroner noted that the autopsy indications were that the death was hastened by the procedure.

The Coroner recommended that all hospitals under the management of Queensland Health ensure that formal orientation for locum doctors be conducted prior to their commencing duty, including procedures and policies for the Unit/s in which they are

working and that those doctors be given an understanding that there is an expectation that those policies and procedures be adhered to. The Coroner further recommended that where protocols or policies have been developed in Queensland Hospitals to ensure best practice and the highest level of patient safety, Queensland Health ensure that those policies are shared and communicated to doctors in all Queensland Hospitals for consideration and adoption in order to promote consistent safe practice in the performance of medical procedures across Queensland. Several recommendations regarding the percutaneous tracheostomy protocol were also made, including that percutaneous tracheostomies be performed in normal working hours, unless urgent, to enable sufficient staff including skilled personnel to manage airway to be available to perform the procedure in accordance with the protocol and as safely as possible.

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New Zealand

Health and Disability Commissioner Report: Sports Doctor, Dr B

The Commissioner received a complaint from Mr A alleging a sexual relationship between his wife, Ms A, and Dr B.

There was no dispute that Dr B and Ms A engaged in a sexual relationship between April 2008 and June 2009. The professional doctor-patient relationship commenced in February 2008, and Dr B provided Ms A with medical treatment on several occasions after their sexual relationship commenced, the latest being in April 2009.

The Commissioner found that Dr B did not undertake the steps required by the Medical Council to end the professional relationship when intimacies began to develop in April 2008. Accordingly, Dr B had engaged in simultaneous sexual and professional relationships with Ms A between April 2008 and April 2009. The onus was on Dr B, as the medical professional, to maintain professional boundaries.

The Commissioner concluded that Dr B's decision to commence and maintain concurrent professional and sexual relationships with Ms A was contrary to professional and ethical standards, and that Dr B breached Right 4(2) of the Code.

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Health and Disability Commissioner Report: Obstetrician and Gynaecologist, Dr B

The Health and Disability Commissioner (the Commissioner) investigated the appropriateness of care and adequacy of information provided to a patient, Ms A, by Dr B following a complication during gynaecological surgery.

Dr B performed a laparoscopic operation on Ms A, during which one of the camera ports went through one of Ms A's arteries. Dr B immediately recognised and controlled the bleeding, continued the operation as planned and informed Ms A of the complication soon after the surgery. Postoperatively, a pseudoaneurysm¹ was discovered in the region of the incision. This was surgically repaired by vascular and general surgeon Dr D without further complications.

¹ A condition in which the entire arterial wall is injured and blood is retained in surrounding tissue.

The Commissioner concluded that by describing Ms A's injured vessel as an "arteriole" rather than an artery, by failing to inform Ms A that her ongoing pain was likely to be related to the injury from surgery and by suggesting that Ms A's pseudoaneurysm was equally or more likely to be pre-existing rather than a consequence of the surgery, Dr B did not provide Ms A with adequate information and accordingly breached Right 6(1) of the Code of Health and Disability Services Consumers' Rights (the Code). The Commissioner noted that: "When a surgical complication occurs, the patient is entitled to open, truthful, and timely information about the complication, its effect and its significance. Open disclosure is not a single conversation but a process of ongoing communication."

The Commissioner also found a breach of Right 4(2) of the Code due to a failure by Dr B to adequately record in her operation note the details of the operation and nature of the harm suffered by Ms A.

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Health Practitioners Disciplinary Tribunal: Aleisa Ruth Bishop, Registered Nurse

A charge of professional misconduct involving the use of physical force against a patient was brought against Ms Bishop. The particulars of the charge included allegations that Ms Bishop had grabbed the patient by the arm in an attempt to drag her from a couch, and verbally threatened the patient with seclusion without any reasonable or clinical rationale.

The Health Practitioners Disciplinary Tribunal (the Tribunal) accepted the evidence of witnesses and the complainant that Ms Bishop had used force on, and inappropriately threatened, the patient and accordingly found Ms Bishop guilty of professional misconduct. It noted that Ms Bishop had breached one of a nurse's most fundamental obligations not to touch a patient.

In considering penalty, the Tribunal took into account a previous conviction of Ms Bishop for stealing money from a tetraplegic patient for whom she was caring, noting that this illustrated a clear previous breach of ethical boundaries. The Tribunal ordered the cancellation of Ms Bishop's registration, censured her and ordered her to pay 30 percent of the costs of the PCC, the prosecution and the Tribunal.


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Legislation

Australian Capital Territory

Medicines, Poisons and Therapeutic Goods Amendment Regulation (No. 2) 2010 No. 2 (ACT)

The *Medicines, Poisons and Therapeutic Goods Amendment Regulation (No. 2) 2010 No. 2 (ACT)* amends the *Medicines, Poisons and Therapeutic Goods Regulation 2008 No. 42 (ACT)*. The amending Regulation inserts a new Division 3.4.3 (Standing orders for walk-in centre) to provide the chief health officer with authorisation to issue a standing order for: (a) the supply of a medicine at a walk-in centre; and (b) the administration of a



medicine at a walk-in centre. The amending Regulation also outlines the particulars which must be included in the standing orders, and defines a "walk-in centre" as a non-residential facility operated by the ACT for the treatment and care for people with minor illness or injury. The amending Regulation commenced on 22 January 2009

[Click here for legislation](#)

Western Australia

Hospitals (Service Charges) Amendment Regulations (No. 6) 2009 (WA)

The *Hospitals (Service Charges) Amendment Regulations (No. 6) 2009 (WA)* amend the *Hospitals (Services Charges) Regulations 1984 (WA)*. The amending Regulations increase charges for drugs and medication for out-patients in Sch. 1 (Charges for services). The amending Regulations commenced on 20 January 2010.

[Click here for government gazette](#)

News

Aged Care

2009-10 Aged Care Approvals

Minister for Ageing Justine Elliot, has announced that more than 12,000 new aged care places throughout Australia, worth more than \$477 million in annual funding, will be on offer as part of the 2009-10 Aged Care Approvals Round.

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Fears for sick, elderly in food safety overhaul

The process of checking food safety standards at NSW hospitals, aged-care facilities and other food handling businesses has been privatised by the State Government, leading to fears of an increase in food poisoning outbreaks among the sick and elderly.

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E-Health

Privacy concerns persist on national e-health plan

The Federal Government has reportedly failed to calm fears over patient privacy and data security risks related to its proposed Healthcare Identifiers regime.

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Government says e-health will deliver a safer system

The Federal Government says its proposed e-health system will improve patient safety and free up GPs.

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General Health

Business Outlook – December 2009

Access Economics has released its quarterly publication aimed at those who require depth of detail about the business environment, analysing prospects across 22 industries and each of the Australian States and Territories. It provides facts, figures and forecasts on Australian and world growth prospects, interest rates and exchange rates, wages and prices, exports and imports, jobs and unemployment, taxes and public sector spending.

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PM in alert on health spend

Prime Minister Rudd has declared 2010 a year of "major health reform", warning that health spending alone will outstrip state tax revenues within two decades.

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'The drill slipped and my life changed completely'

Helen Kerner trusted her neurosurgeon when he said he had performed the delicate spinal operation she required 1500 times before.

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Call for change in cervical cancer tests

Australian women could soon be subjected to fewer pap smears and have longer intervals between cervical cancer screening tests after new research prompted calls for current practices to be overhauled.

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AMA ends support for bush doctor rule

Pressure is mounting on the Federal Government to end its requirement for doctors trained overseas to work for 10 years in rural or regional Australia before they can move to the city.

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Budget must provide 'stimulus package' for health

AMA President, Dr Andrew Pesce, said that the May Federal Budget must provide a significant 'stimulus package' for the Australian health system.

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[Click here for AMA Federal Budget Submission](#)

Caution urged after home-birth risks revealed

The Royal Australian and New Zealand College of Obstetricians and Gynaecologists has voiced concerns over home births after a study showed increased risk of preventable baby deaths.

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[Click here for AMA media release](#)

Solariums ignoring new laws

A Government audit of solariums in New South Wales has found almost none of them are following new laws.

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Dental scheme must target the needy

In an Opinion Piece in the Australian, Neil Hewson, Federal President of the Australian Dental Association, writes "Australian Governments continue to dither, with no firm action to assist disadvantaged Australians gain more equitable access to dental care".

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Hospitals

Shake-up to merge children's hospitals

The NSW State's two biggest children's hospitals are expected to merge within six months in a sweeping shake-up of health services that could end more than a decade of fierce rivalry over funding, resources and recognition.

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AMA calls on Canberra to fund hospitals

The Australian Medical Association has stepped up pressure on the Federal Government to take full responsibility for funding public hospitals by calling for the landmark reform to be included in the May budget.

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Pathology

Pathology to be tested

The Federal Government has signalled changes may be made to the way the Government pays for pathology services under Medicare.

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Tendering for pathology services a disaster


Pathology giants may be headed for a clash with the Federal Government over its move to explore other ways of paying for medical tests, including a tender process the industry claims has proved a "disaster" overseas.

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Pharmaceuticals

E-scripts to be used

Pharmacists will be funded 15 cents per script completed electronically - up to \$36 million annually - while pharmacy software vendors will be compensated to incorporate e-prescribing features into dispensing systems.



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Preventative Health

Government to fund heart disease prevention

The Federal Government will spend \$2.5 million to combat a fatal heart disease that is predominantly found in Indigenous Australians.

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Alcohol review spells tax hike on beer and wine

Wine and full-strength beer would become more expensive under an overhaul of Australia's complex alcohol tax regime being considered by the Federal Government.

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Privacy

Doctors call for patient privacy protection

A group representing general practitioners has called on the Federal Government to ensure patient confidentiality is maintained when privacy laws are reformed this year.

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New privacy guidelines for health practitioners on disclosing genetic information

The National Health and Medical Research Council, in cooperation with the Office of the Privacy Commissioner, released new guidelines to assist health practitioners in making decisions about disclosing genetic information to their patient's genetic relatives.

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[Click here for guidelines](#)

New Zealand

Parents win disabled care case

Parents who care for severely disabled adult children should be eligible to receive payments from the Government, the Human Rights Review Tribunal has ruled.

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NZ urged to shift stress on drugs as first option

The Australian Government's move away from drugs as the first treatment for ADHD sufferers has prompted New Zealand to review its own recommendations.

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Ryall exaggerating health savings, says Labour

Labour is accusing Health Minister Tony Ryall of exaggerating the potential savings from his flagship health reforms by up to \$350 million.

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Long-term ACC client list pruned

More than 700 people have been cut from ACC's long-term client list in six months as the organisation moves to slash costs.

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Painkillers with codeine may face controls

Painkillers containing codeine may soon be moved behind the counter due to the increasing number of reports about misuse and addiction to the drug.

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Psychologist struck off for discussing patient

A psychologist who disclosed confidential information to a patient's ex-husband, who had allegedly abused the patient, has had his registration to practise cancelled.

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