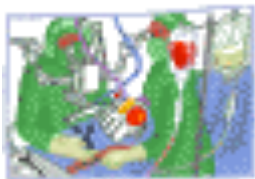




PGES - Management Course 2004



Hyder Gulam LLB, RN, Accredited Mediator, FRCNA



Objectives:

- Provide an update on selected current issues in Victoria: Cases & Outcomes
- Legal Safety and Quality Improvement issues



The Specifics:

- Inquiry into the Camden and Campbelltown Hospitals and Macarthur Health Service
- BMV - Refusal of Medical Treatment
- Wrongs Act Amendment 2002 (Vic)
- Wrongful Life Claims
- Unusual and Interesting Cases



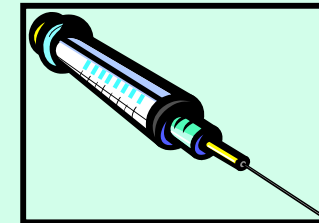
Inquiry into the Camden and Campbelltown Hospitals and Macarthur Health Service

- Entire Board of the SW Sydney Area Health Service has been dismissed.

- 19 Deaths reported to the State Coroner

- 11 MO's reported to the NSW Medical Board

Why?



Prevailing culture and lack of openness in dealing with complaints.

Lack of feedback from management to staff who reported issues of safety and quality.

Failure of clinical governance, risk management, performance and incident reporting and investigation.

Lack of appropriate clinical skills - working outside area of expertise

BMV - Refusal of Medical Treatment



You are caring for a Mrs X, a 68 year old woman suffering from a progressive and fatal form of dementia, Pick's Disease.

- Does not appear conscious
- No displayed any cortical activity for more than three years
- No cognitive activity at all, has absent bodily functions excepting for those that are reflexive
- No conscious perception of any input from her sensory pathways

Mrs X is doubly incontinent, requires regular pressure care, and transfers via a hoist. She has a PEG insitu, via which she receives fluid and nutrition, as well as medication. Medical evidence is that the damage to the cortex is irreparable. Mrs X's family have been consulted and have formed the view that it would be contrary to the wishes of Mrs X to continue to receive nutrition and hydration through the PEG and that the continuation of these measures constitutes a continuing denial of her wishes. **What do you do?**

Please note: Refusal of Treatment Certificate: Competent Person - Section 3, 5(2) Schedule 1 - Medical Treatment Act 1988 and Section 42K of the Guardianship and Administration Act 1986

BMV - Refusal of Medical Treatment-cont



The case before the Supreme Court of Victoria was whether tube feeding was medical treatment or palliative care. If it was medical treatment it could be refused under Victoria's *Medical Treatment Act 1988*. But if the provision of food and water via a PEG tube was considered palliative care, then under the same Act it could not be withdrawn from the dying. Under the Act, palliative care was defined to include 'the provision of medical procedures for the relief of pain, suffering and discomfort; or the reasonable provision of food & water'

The Supreme Court found that the use of a PEG for artificial nutrition & hydration, or any other form of artificial feeding, was a 'medical' procedure. The administration of artificial nutrition & hydration via a PEG was not palliative care as this procedure was to sustain life, and not a procedure to manage the dying process. The Court determined that the exclusion of food & water from medical treatment was to ensure that a dying person would have food & water available for oral consumption, if the person wished to consume food & water. It was unreasonable that dying patients should be forced to consume food & water.

Wrongs Act Amendment 2002 (Vic)

Reduced Limitation periods:

- ▼ From 6 to 3 years from the date on which the cause of action was 'discoverable'.

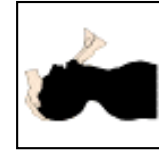
Limitation period is still 6 years for Plaintiff who was under a disability at the time of the injury

Claim is statute barred 12 years after the event regardless

Minor - 6 years from the date of discoverability, also up to a maximum of 12 years from the date of the injury.



Wrongs Act Amendment 2002 (Vic)-cont

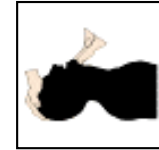


Section 31B - Protection of Good Samaritans:

A good samaritan is an individual who provides assistance, advice or care to another person in relation to an emergency or accident in circumstances

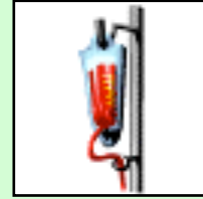
- expects no money or other financial reward for providing the assistance, advice or care; &
- as a result of the emergency or accident the person to whom, or in relation to whom, the assistance, advice or care is provided is at risk of death or injury, is injured, is apparently at risk of death or injury, or is apparently injured.
- A good samaritan is **not** liable in any civil proceeding for anything done, or not done in good faith...

Wrongs Act Amendment 2002 (Vic)-cont



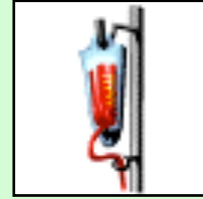
- One factor which appears to impact on a patient's decision to commence legal proceedings is the perception that the medical practitioner did not care.
- Section 14J - An Apology is not admission of liability
(1) In a civil proceeding where the death or injury of a person is in issue or is relevant to an issue of fact or law, an apology does not constitute - (a) an admission of liability for the death or injury; or (b) an admission of unprofessional conduct, carelessness, incompetence or unsatisfactory professional performance, however expressed, for the purposes of any Act regulating the practice or conduct of a profession or occupation.

Wrongful Life Claims



- Claims for wrongful birth are brought when it is claimed that there has been negligence in cases involving contraception, sterilisation or abortion. A plaintiff can take action against the medical practitioner who failed to prevent conception and subsequent pregnancy. Damages can be awarded to the mother for the birth of the child born as a result of the failure of contraceptive advice or for failure of the sterilisation procedure. It is irrelevant whether the baby is born perfectly normal or has birth defects.
- On 13 March 1992, Dr Cattnach performed a tubal ligation on Mrs Melchior in a public hospital in QLD. Mrs Melchior became pregnant at age 44 and gave birth to a son on 29 May 1997.

Wrongful Life Claims



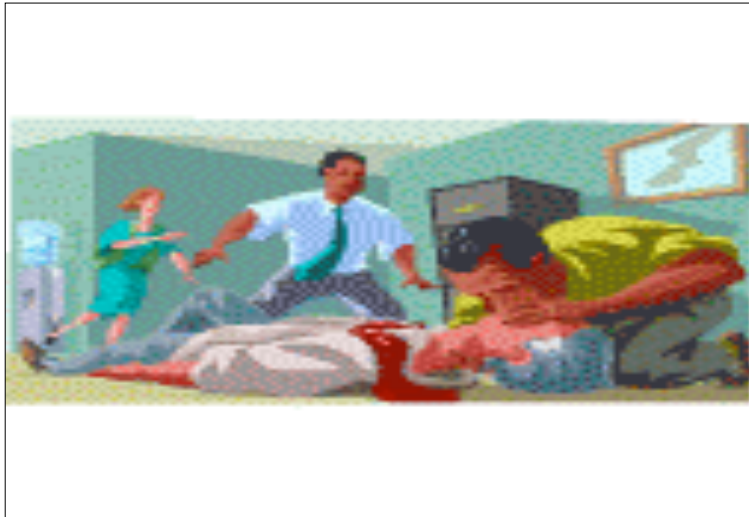
- In 2003, the High Court determined *Cattanach v Melchior*. The case was decided as one of negligent advice and failure to warn in relation to a sterilisation procedure.
- By a 4 to 3 majority, the High Court allowed the parent's claim of awarded damages \$212K. The HCofA rejected the 'blessing' argument that the benefit of a child outweighs the damage which the parents suffer. They held the appellants liable under ordinary negligence principles for the foreseeable consequences of the doctor's negligence. The doctor's duty of care was not in dispute, nor was his liability for some heads of damage.

Unusual and Interesting Cases:



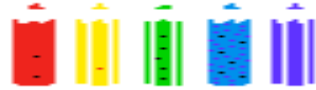
- Finch v Rogers [2004] NSWSC
 - Need for follow early appropriate follow up of surgical cancer patients.
- Thompson v Cannon (2001)
 - Suspected sexual abuse - Child examine by HP - Duty of Care owed to potential suspects.
- Shakoor v Situ [2000] 4 All ER 181
 - TCM - Failure to warn of drug interaction - Liabilities of alternative medical practitioner.

REFERENCES



- Forrester, K., and Griffiths, D. 2001, *Essentials of Law for Health Professionals*, Harcourt, Sydney
- McFarlane. P 2000, *Health Law in Australia and New Zealand: Commentary and materials (3rd edn.)*, The Federation Press. Sydney.
- Wallace, M 2001, *Health Care and the Law*, Lawbook Co. Sydney

USEFUL WEBLINKS:



- Australasian Legal Information Institute:
www.austlii.edu.au
- Australian Nursing Federation:
www.anf.org.au
- Royal College of Nursing Australia:
www.rcna.org.au
- La Trobe University Library Health Law
Link: www.lib.latrobe.edu.au/reference/dw-healthweblaw.html

QUESTIONS?

