

MEDICAL MALPRACTICE FREE ZONE?

REFLECTIONS FROM NEW ZEALAND'S ACCIDENT COMPENSATION SCHEME

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Overview

- Disciplinary case
- Why NZ adopted ACC
- Significance of ACC for medical malpractice
- Overview of patients' rights and disciplinary regime

The case of Dr N

- Dr N administered unapproved medicine Novielle Gel Plus as dermal filler without informed consent regarding its: unapproved status and side effects
- Patient experienced swelling, inflammation and formation of granuloma
- Dr N did not ensure it was safe to use as dermal filler
- Failed to refer to specialist in timely fashion
- Without justification, prescribed further medication and treatment
- Failed to adequately document
- www.hpdt.org.nz Med 12/225

Legislation

- Health Practitioners Competence Assurance Act 2003
 - S 100 malpractice and negligence
 - Health Practitioners Disciplinary Tribunal
- Medicines Act 1981
 - Patient was not known or identifiable to Dr N under the requirements regarding unapproved medicines by the Medicines Act 1981

Section 100 HPCAA 2003

- Two step process for discipline
 1. Whether acts/omissions reasonably regarded by the HPDT as constituting malpractice or negligence, or otherwise meets standard of having brought or was likely to bring, discredit to the profession
 2. Whether the HPDT was satisfied that acts/omissions require disciplinary sanction to protect the public and/or maintain professional standards and/or punish the practitioner

Dr N's penalty

- Censured
- Subject to conditions on practice for 3 years
 - Medical consultation
 - Ensuring compliance with medication regime
- Fine \$8000 NZ (\$5972 US)
- Costs \$9400 (\$7020 US)
- What would be the likely result in the US?

Accident compensation

- Sir Owen Woodhouse chaired the Royal Commission on Accident Compensation 1966-67
- Two key principles
 - Community responsibility
 - Comprehensive entitlement
- Comprehensive and equitable scheme of social insurance that would enable personal injury claims to be managed "speedily, consistently, economically and without contention "

Woodhouse Report

Comprehensive and equitable scheme of social insurance that would enable personal injury claims to be managed "speedily, consistently, economically and without contention".

However, currently, **2 to 3 year back** log of cases in District Court appeals, in part due to number of adverse decisions issued by ACC (Peart, 2014)

ACC progression

- Came into force in 1974
- Medico-legal system influenced by Cartwright Inquiry and Cull Report
- **How do patients who experience treatment injury caused by a registered health practitioner obtain accident compensation?**

Accident Compensation Act 2001 Treatment injury

- (1) **Treatment injury** means **personal injury** that is—
- (a) suffered by a person—
 - (i) seeking treatment from 1 or more **registered** health professionals; or
 - (ii) receiving treatment from, or at the direction of, 1 or more registered health professionals; or
 - (iii) referred to in subsection (7); and
 - (b) **caused by treatment**; and
 - (c) not a necessary part, or ordinary consequence, of the treatment, taking into account all the circumstances of the treatment, including—
 - (i) the person's underlying health condition at the time of the treatment; and
 - (ii) the clinical knowledge at the time of the treatment.

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- (2) **Treatment injury** does **not** include the following kinds of personal injury:
- (a) personal injury that is wholly or substantially caused by a person's **underlying** health condition;
 - (b) personal injury that is solely attributable to a **resource allocation** decision;
 - (c) personal injury that is a result of a person unreasonably **withholding or delaying their consent** to undergo treatment.
- (3) The fact that the treatment **did not achieve a desired result** does not, of itself, constitute treatment injury.

What ACC scheme achieved

- Reduced tension between compensation and accountability
- Separated compensation from complaints and disciplinary regime
- With establishment of "treatment injury" category, fault-finding removed from accident compensation scheme under ACA 2001
- ACC designed for accident compensation and rehabilitation, not fault-finding

How to redress **patients'** complaints regarding personal injury?

- Compensation: ACC since 1974
- Other protections/responses through:
 - Health and Disability Commissioner Act 1994
 - Code of Health and Disability Services Consumers' Rights (10)
 - www.hdc.org.nz
 - Health Practitioners Disciplinary Tribunal www.hpdt.org.nz
 - Human Rights Review Tribunal with residual claims for exemplary damages
 - Criminal justice system
 - Employment law

HPDT statistics: registered health practitioners to 23/1/15

Summary of charges for all Health Professions since 2004

Charges Received:	342
Number of Practitioners Charged	300
Guilty - Professional Misconduct	218
Guilty - Conviction	63
Not Guilty - Professional Misconduct	16
Not Guilty - Conviction	2
Not Guilty on appeal	2
Withdrawn	8
Struck Out	
Stayed	1
Not completed	32

Critique: Wallis 2013

- Accountability via compensation decreased following the 2005 'no-fault' compensation reforms, contributing to an overall **decrease** in medical professional accountability for harm.

Counter-argument Collins and Brown 2009

- The Cartwright Report instigated a profound change in [thinking](#) about patient-doctor relationships and the need for public involvement in the processes by which doctors are censured. It was also the key catalyst to legislative reforms designed to ensure the accountability of practitioners to their patients. Perhaps contrary to expectations, the statistics show a pronounced **decline** in disciplinary hearings. The authors argue this should not necessarily be considered an adverse outcome; **the statistics in fact reflect the working of multi-layered, more constructive and open processes for regulating doctors and holding them accountable.**

Discussion

- Does this type of medico-legal regime achieve:
 - Speedy, efficient and comprehensive compensation?
 - Preferable legal response to medical malpractice and negligence?
 - Adequate patient safeguards?
 - **Is New Zealand's response the solution?**
- We welcome debate. kdiesfel@aut.ac.nz

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