Medi-tation MCA

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'Bolam According to Carr'

Legislating the lowest standards possible

Removing citizen rights

Last year saw the rapid passage into law of the NSW Health Care Liability Act that introduced statutory limitation on damages for medical negligence. For many thousands of victims each year the new thresholds imposed mean a practical economic end to court access.

But it seems that even this joint action remedy by the major parties did not cure 'the illness' of patients suing doctors. Now additional legislation will attack from another angle. New laws will modify the legal definition of negligence and be a return to the strict application of what is known as the Bolam test.

Industry Protection

The medical industry in Australia has a very basic problem. It is much more unsafe for patients than medicine is in the USA. This was exposed in 1994 by The Quality in Australian Health Care Study (QAHCS). The Australian 'Health Care' industry kills and injures rather a lot of people, 18,000 dead and 50,000 permanently injured each year.

Interestingly because of industry power in covering up what is actually going on QAHCS could not be designed to actually measure how much of this death and injury was due to negligence in a strictly legal sense. With politicians said to be scared stiff of industry power QAHCS was specifically designed not to be able to identify negligence, rather it measured 'adverse patient outcomes', that is the unintended injuries and complications due to medical interventions. Essentially then it was a product safety survey.

The QAHCS findings should have caused no real surprise. Unlike the legal situation in the US, where consumers have a constitutional foundation and practical framework for defending their rights as consumers of products, local conditions strongly favour the industry. Thus forces in Australia for risk management and product safety are best viewed as embryonic when compared with the US. In Australia market control has been the central ethic at work, not considerations patient safety – particularly if a budget would be adversely impacted a system change to improve product safety ! Patient life is cheap here and getting even cheaper in NSW thanks to new legislation.

NSW medico-legal reality = Clayton's Standards and Rafferty's Rules

Medical Wars

Government and mass media in NSW clearly do not see the death toll as follows: ' Lots of patients are suing doctors and hospitals in negligence so let's recognize the value of human life by taking firm action to reduce our industry's very high death and injury rates'.
Rather the politically correct view being put into law goes as follows : 'Look this large and important industry is under threat. So let's demonize the patients and plaintiff lawyers via radio and TV stories, mislead the bulk of the lay population and then make new laws to prevent most victims using the courts and make sure the few that do only get much reduced compensation.'

The medical-industrial complex just loves this policy as it invisibly shifts most of the real cost of negligent damage onto the taxpayer and the victim by means of a welfare system that can be anything but generous. The dead and injured actually become a useful by-product of the medical services industry and sustain enlarged allied disability and welfare industries that the taxpayer funds.

This situation also fits well with way other Australian industries operate. Work related injury and disease is suffered by 175,000 Australians each year. Total cost in the Australian economy of work related death and injury is 27 billion dollars per year according to the Safety Commission. Such figures are an order of magnitude higher on a per capita basis than some first world developed nations, and no one in Australia has gone to jail for causing these injuries and deaths. A benefit of using a rather antique version of English Law, which has been called a rule of law that protects the property of the rich.
Industry profits are maintained at the cost of workers lives and so Australia can be kept more competitive with third world nations where human life is even cheaper.

The Profession Strikes Back

Understandably in such a climate "negligence" is almost a taboo word. Hence the type of phraseology well used by the ABC's medical reporter Ms Scott

such as : "when things go wrong" plus a focus on "accidents" as the cause of high death and injury rates. Such 'newspeak' conditioning serves to stop the word negligence being used. Negligently injured patients can be transformed into selfish and greedy disrupters of Health Care services who by their selfish actions are forcing well meaning doctors to leave their profession. Such propaganda efforts have even given rise to propaganda in the form of a new weekly soap opera on ABC TV, the Government owned TV channel. ***"MDA"*** pretends to look inside a mythical medical defence organisation or MDO.

Real MDOs actually employ top legal firms to defend doctors. Negligently injured patients discover that MDOs are the fully doctor owned 'Death Star' weapons that get used against them if they seek compensation at law.

Cast in the role of the main ***MDA*** character is a sensitive caring female doctor (Princess Leia stereotype) who is pitted against the plaintiff lawyer, 'Richard Savage', an aggressive bearded male character (Darth Vader stereotype).

What a co-incidence ! Just at the time when new legislation is ripping the legal rights of patients apart this propaganda arrives at prime time on the government's national broadcaster.

Also present is mass media comment presenting road accident claims, general public liability, and medical professional negligence as being the same issue. The public is being conditioned to see the matter of an exercise of skill on the part of those responsible for any damage as being irrelevant. A path is opening to true third world conditions as Australian professionals are provided with special market protections at law against the public, that make their dollar risk in negligence when practicing their profession less than that owed by one ordinary lay member of the public to another lay member of the public.

The game afoot is about producing a new legal landscape in NSW. What industry seeks is a situation where it is not financially accountable in civil law for its actions, and certainly not able to be found criminally accountable over the supply of any service.

Pressure has been applied on medical professionals and government for some years via the device of medical indemnity insurance cover. Owing to a number of aggressive and financially risky takeovers control of this market in NSW effectively ended up in the hands of just one MDO.
Back in 1995 the Final report of the Professional Indemnity Review (see *) had exposed a potential unfunded liability of between $100 million and $250 million. (at page 255) By the end of 2000 and with new federal government insurance regulations in place this exposure had grown to around $450 million and the industry in NSW was in crisis. This has been used to get the NSW government to strip away consumer rights to sue medical service providers. The NSW Labor Government is the leader in such action.

To force the issue the major insurer that had captured the bulk of the NSW market put itself into receivership. It may well trade out of the present situation as the problem was only a technical one until the failure of the reinsurer HIH.

What needs to be understood is that the supposed $450 million will only exist as a real debt if a very strange thing should happen. A large number of negligently injured consumers would have to get their cases into the courtroom and win large amounts in damages.

This would have always been unprecedented and now appears quite impossible in the light of the new laws put in place by the Carr government.

However the game of brinkmanship has been played hard by the industry and continuing pressure on government is evident.

A possible outcome could be a situation where doctors will still have to pay massive indemnity cover premiums but total compensation payouts will be very small. And the use of commercial-in-confidence could continue to mean that payouts and costs will be kept secret.

The PIR failed to find out what the financial situation of the MDOs actually was. Much data was never able to be obtained by the PIR, it being classified as being commercial in confidence by the MDOs. And the PIR did not even release the limited data it did manage to obtain. (PIR, Interim Report page 251).

A central question for medical consumers who, via taxation and fees paid directly to doctors, actually pay all of the medical indemnity premiums must be: Would consumers be better off if the government were to takeover the whole of the medical indemnity industry? Consumers would then at least have a right to know where their dollars were going.

Since government already provides indemnity insurance cover for all of its doctors and other provides working within the public hospital sector via a Treasury fund it already has the needed infrastructure to do this.

Putting the civil negligence clock back to 'prior to Chelmsford'

The Bolam test

In common law nations reasoning over medical negligence has revolved around what is known as The Bolam test. (Bolam

*** The Professional Indemnity Review***

The PIR existing from 1991 to 1996 and exposed just how unsafe the medical services industry was in Australia. It was set up by a Federal Labor Government to look into medical professional indemnity arrangements and experience with compensation for medical misadventure.
It produced a number of major reports: The Health/Medical Care Injury Case Study Project Feb 1993. Defensive Medicine and informed Consent May 1993. Compensation and Professional Indemnity in Health Care (Interim Report) Feb. 1994, (Final Report) Nov. 1995. The final Report of the Taskforce on Quality in Australian health care, June 1996. These reports were effectively the first study ever about Australian health care as a consumer product.
The findings were so unpleasant and dramatic that for some years they were ignored by government .
Indeed government seem to have "shot the messenger' as the chair of the review lost her job. The reports remain a very important resource for consumers.

v Friern Hospital Management Committee (1957) 1 WLR 582.)

The test is the standard of the ordinary skilled man exercising and professing to have that special skill. This can be demonstrated in the courtroom by calling expert evidence to show what other doctors, of similar standing and exercising that particular skill, would have done for the patient, in that situation.

The problem for consumers with this test is that if a doctor can find a number of other suitable doctors (and in practice one respected doctor) who will say that they would have done the same then the patient's case in negligence is automatically lost whatever the logic of the case.

Unfortunately for any strapped-for-cash medical consumer up against a large city law firm backed by the millions of dollars in a professional indemnity fund all is fair in love, war, and civil case preparation. Medical victims find expert evidence to be one of those products where it can be said that 'money talks'. And such evidence must be presented within the context of an Australian legal system that has often been observed as being 'the best that money can buy'. (Costs of $10,000 per day for the plaintiff are now typical to run such a case in a NSW court. How long does it take you to save $10,000. How would you feel about the federal government taking 10%, via the GST on legal fees, of the hard earned money you would have to use to thus defend your civil rights ?)

Also remember that the common law's view on human and civil rights moves backwards and forwards with time depending on what opposing forces are available to slug it out in long court battles lasting up to 20 years. In the Supreme Court, Court Of Appeal, and then High Court. In all these courts, to a first approximation, might (i.e. dollars available to fund the action) is right.

The courts are not scientific and they do not seek the truth. They know all but nothing about commonsense, consistency, or that a central concept in scientific truth is that the universe has only one past.

In contrast logical contradiction about the past is exactly what a court case is about. Opposing barristers go to battle with two contradictory stories about the past.

In such wars truth can die on day one of a case, as 'evidence' becomes whatever the party with the most dollars to spend forces it to be. Perjury also becomes logically impossible since the legal warrant for evidence in court is the eminence of the person maintaining it.

In a case reported in the UK publication ***The Spectator*** a doctor recognised as having specialist expert medical knowledge on a condition and its treatment gave evidence in court, as an expert called by a plaintiff, maintaining that a certain medical procedure was the correct treatment to provide. When it was pointed out to him that just a few weeks before in an identical case (when appearing as a witness for the defence) he had held to the opposite view he answered that all he could do and what he had done in both case was to provide a court with his expert opinion and that in the intervening weeks he had a change of mind over the matter as to what was the correct treatment. This explanation did not seem to have troubled the judicial mind.

In Hart v Herron (1980) in the NSW Supreme Court, Justice Fisher used legal logic finding that since the Chelmsford doctors said they were the only doctors practicing a particular treatment (that they had named 'Deep Sleep Therapy') that they must thus set the standard over that treatment, and that thus their evidence in the matter was the only medical expert evidence available to the court. It thus followed that since these good doctors had not given evidence that they had been negligent in the application of the therapy unique to them that they were thus not negligent in its application!

Beyond Bolam : Faced with illogicality in medical expert evidence can a court use logic ?

In Bolitho v City & Hackney Health Authority (1997) ALL ER 71) the defence were able to fully provide a body of professional opinion supporting the conduct of both doctors over treatment and diagnosis which was thus said to be in accordance with sound medical practice.

However the court took the view that should a professional opinion not be capable of withstanding logical analysis then a court would be entitled to hold that the body of opinion was not reasonable or responsible, and rejected the professional opinion from the defence.

In legal argument of the form that applies to medical negligence cases the warrant for a claim made as a subjective opinion often reduces to the relative standing of experts. Under such conditions Bolam allows implicitly for contradictory views to be held by various experts. This arrangement does sit well with the needs of the adversarial system of law but would not be acceptable in scientific circles. However Bolitho opened the possibility of a court, in the face of such expert medical opinion, being able to apply at least a limited measure of logical deduction to its decision making.

And now ... 'Bolam According to Carr' … into Mr Carr's Parallel Universes

Now by the draft proposed amendment to the NSW Civil Liability Act such efforts to introduce logic into the courtroom will be totally frustrated.

Via this proposed legislation Mr Carr's government (and presumably Opposition parties as well) seem to be moving fully into a realm of parallel co-existing contradictory universes as acceptable at law in NSW courtrooms, and a total rejection of Bolitho.
The amendment will open up further that possibility allowed by Bolam, a multitude of logically contradictory opinions.

Mr Carr's new legislation must wind the clock back past 1957, and Bolam, to a place where illogical opinion can safely be used to defend any case in negligence.

No standards - just opinions

Bolam is the very embodiment of industry self-regulation via industrial politics. Under Mr Carr's new legislation industry expert opinion looks like achieving the legal status of 'word of God' in court.

Should subjective expert opinion have any common place in the courtroom in relation to any professional discipline that likes to trade on an image of being a science ?

At the heart of this issue is the long ongoing failure of medicine to become a 'written science' at the point where the scalpel cuts the patient, as it were.

Non binding guidelines may be seen at times but binding standards are vigorously opposed by the industry.

If binding standards were to become the norm then in the courtroom plaintiffs would not have to suffer the slings and arrows of outrageous expert opinion but rather would be able to rely on accepted, logical, and **already written down,** binding standards of practice and health service management. Fatal 'accidents' at the end of a 36 hour triple shift would not be treated by the judicial process as an act of god but rather be actionable at law - perhaps definable via a standard as being manslaughter on the part of the hospital management.

An end of the age of mysticism in health care would have indeed arrived.

If medical science exists as other than a marketing slogan, medical consumers should also reasonably have the expectation that a court, in the vast majority of medical negligence cases, would operate without having the hands of logic tied behind its back, asked to blindly accept two mutually contradictory flights of fancy posturing as expert evidence.

Because the truths of a science are codified, considered, consistent, tested, and written down prior to the start of a legal battle a court should be able to embark on a rational and logical search for the truth by examining the historical evidence in a case set against written standards already promulgated.

A major problem does however exist in NSW in proposing such an undertaking. A search for truth in such a manner may be second nature for a lawyer practicing under the inquisitorial system of law but may strike terror into the minds of those trained in the British adversarial system.

So medical consumers may have to conclude that the present age of medical mysticism in the NSW courtroom is a product of two systems of thought – namely the thinking of the Local Chapters of the religions of both Law and Medicine.

Bolam according to Carr will add yet more magic to the mysticism in allowing not just for double standards to meet the needs of just one adversarial courtroom but rather as many standards as it takes to defend any actions brought.

Bolam according to Carr to an industry struggling to contain rising costs will be welcomed as it will allow operators to use the lowest standards possible in medicine without financial risk.

And as for patient safety ? …

'Not an issue ! You see we don't have to pay for stuff-ups and negligence via the courtroom any more. The welfare industry and taxpayer look after all that now.'

Does MCA have any solutions to offer ?

1) Key concepts

Past editions of *Medi-tation* have listed the following :

1) Consumers would rather not be injured than be compensated for injury.
2) Quality in medical care can save money, not cost money. (see ***Quality is Free*** by Phillip Crosby of ITT)
3) Compensation for injury should be available for all, not just the rich.
4) Social security should not be expected to subsidise malpractice and negligence as it does at present.
5) The practice of medicine should be under the law, not external to it.
6) Plaintiff verdicts in medical malpractice cases are a principal impetus to change and improvement in the medical care delivery system.
7) Doctors need to be educated that bad outcomes are due in part because of such things as under-funding and the acts of negligent doctors and not because lawyers are unscrupulous.
8) True Complaints Management is part of Total Quality Management and must:
a) Set a climate so consumers (and staff!) do not fear to come forward with complaints and service inquiries.
b) Use affirmative measures to ensure that complaints are collected and documented in an honest way.
c) Use visible and accountable quality assurance feedback methods. Medical service problems must no longer be treated as if they were military secrets.
9) Self regulation has failed. Collection, assessment , and documentation of consumer complaints by consumer linked systems independent of the health industry are essential pre-requisites for the development of customer focused, economically sane, quality health services that will negligently injure and kill a minimum number of consumers.

2) Legal system reform

What keeps the cost of using the adversarial courts high and quality in medical care low is the way that what passes for 'due process' can be used to destroy cases with true merit. Plaintiffs are told they have a good case but cannot match the resources of the defence and thus lose a war of attrition in the courts. In 1994 MCA proposed a more honest court system, (see attached sheet after page 8) adding a system of independent expert opinion, public pre trial alternative dispute resolution and equal funding for medical negligence plaintiffs to bring into being a 'level playing field' system in the adversarial courts. Such a system would reduce total legal costs. Most cases would settle fast and assist realistic risk management by medical service providers and so produce safer service delivery

What does another consumer group have to say about Bolam ?

Sufferers of Iatrogenic Neglect ,SIN (URL: www.sin-medical mistakes.org) is a patient support and pressure group for sufferers of iatrogenic neglect throughout the U.K.
SIN reports only a very small percentage of cases yielding compensation, and the problem Bolam presents: "One member has recently informed us that his ten year battle for compensation, at a cost of £36,000 and six solicitors down the line, has just collapsed following a very favourable expert witness withdrawing his support at the last minute once the expert witness had discussed the matter with the Health Authority. When the Bolam test is employed in any current medical negligence case, it should be obligatory for any defendant expert witness acting on behalf of a fellow clinician who has digressed from standard practice, to justify and confirm his testimony to the court, with medical papers published at the time of the incident. A major disempowerment to patients in any medico-legal case is securing the services of an expert witness because of the professional 'closing of ranks'. *SIN* has anecdotal evidence that, whilst consultants are prepared to acknowledge verbally that negligence was the cause of iatrogenic damage they invariably refuse to put anything down in writing because of their professional relationship to colleagues. This really constitutes a withholding of medical expertise and a thwarting of natural justice, and explains why so many patients are forced to consider seeking expert witnesses from abroad."
Meanwhile (just as in Australia) SIN says the "... British public are being mislead that damaged patients are financially bleeding the NHS through irresponsible medical-litigation claims. The cruel facts are that only a tiny proportion of patients receive justifiable compensation for their iatrogenic injuries. Considering that almost 100,000 patients are either fatally injured or suffer serious irreparable damage in the UK each year, it is amazing that only 15,000 medical legal actions are currently on-going . Therefore only 1.5% of victims actually proceed through the legal route. It is apparent that only a fraction of the present £2.8bill. per year now spent in the UK on litigation, reaches the damaged patient, the vast majority going into the pockets of the legal profession and the medical expert witnesses. Medical litigation is a £multi-million industry for all concerned except for the patient. *SIN* members have come to the conclusion that professional confidentiality within the medical and within the legal professions and between the two professions is a myth. ... The acknowledged denial and cover-up culture which permeates the present NHS poisons the whole patient and doctor relationship.
The iatrogenic patient is the modern day leper, an unwanted commodity in medical circles: they remind the profession of its own failures and consultants develop a defensive 'nimby' (not in my back yard) syndrome."

> ***" The main stumbling block to cases alleging medical negligence is the Bolam test which is over forty years old."*** *[from the SIN website]*

Reports and Discussion Papers Received

From NSW Health : Discussion Paper Regulation of Complementary Health Practitioners:
They ask for our response by 15 January 2003 and wish to know if we feel regulation is needed. And if so what regulatory models should be used; which types of treatment should be covered ; what registration criteria should be adopted ; how initial registration should be allowed ; what herbs should be made restricted prescription and how; and should all such practitioners have to have first aid qualifications.

From CHF: 2001-02 Annual Report
... that notes they supply over 200 consumer representatives to committees and boards , and amongst other things have developed with the NH&MRC on the Statement for Consumer and Community Participation in Health and Medical Research and held workshops with the Dept of Health and Ageing.

The NSW Nursing crisis

Poor wages and conditions are causing an acute shortage in hospitals and even more so in nursing homes. The NSW Nurses' Association is running a campaign to inform the community about the nursing crisis. Their campaign slogan is:

'A FAIR SHARE FOR AGED CARE'

They are seeking your signature on a petition. Contact details are:

NSW Nurses' Association
phone 1300 367 962
Email: lridge@nswnurses.asn.au

Or you can visit the website of the Health Committee of CP&SA (which is maintained by MCA) at :

http://healthcpsa.8k.com

From where you can download a petition form and so collect some signatures from your family and friends as well.

Perhaps this death was a result of the crisis ?

In the first week of November MCA got a phone call asking what to do about this :
A man was in a Sydney hospital for lung cancer surgery. He had the operation and soon afterwards with family members present was told by the surgeon that the operation had been fully successful. All the cancer had been removed and he could look forward to a full recovery. Moved rapidly from intensive care to main wards when his family visited over the next few days it became clear that matters such as a pain relief drip were not being attended to, and nurses were nowhere to be found. He also said that he was being given a handful of tablets to take with meals but no one had told him what they were for. Then suddenly his family were told he was dead. On asking why, they were introduced to another specialist who said that there had never been any real chance of survival as his body had been riddled with cancer.

Unavoidable collateral damage of a 'War on Terrorism' or State approved Child Abuse ?

Bank tellers realise that one day at work they may find themselves facing a gun at their head while being shouted at to obey instructions. Even so bank robberies cause some tellers to suffer long term disabling health effects of post traumatic stress disorder (PTSD). If medical treatment via counselling is started soon after damage can be reduced or reversed. However PTSD can also end up being a permanent disablement.

So what can be expected to be the medical effect on children when doors and windows of their family home are smashed in and armed intruders threaten them and their parents with guns what will be the medical effects on innocent children so threatened ?

We are now told by the mass media that such events are now quite normal here and that good Australians support such action by government.

"EVERY day around Australia police interrogate people and raid their homes. We see and hear little of this. The secrecy and the frequency don't make such tactics right every time, but at times they are necessary. People who endure such actions by agents of the state are innocent until proven guilty and have recourse when things go wrong - no question. But their individual inconvenience and distress is the price society is prepared to pay in the pursuit of security for the greater number of its citizens."

['ASIO raids the price of vigilance' Editorial November 01, 2002 The Australian]

"Victims told how their homes were invaded at dawn by around 20 ASIO, Australian Federal Police and Tactical Response Group officers wearing balaclavas and carrying submachine guns. Parents and children were forced at gun-point to lie on their stomachs and were then handcuffed for over an hour before being allowed to sit up. ... ... The meeting decided to set up a hotline to report attacks on Muslims and offer counselling for victims of the ASIO raids." …

[WA Muslims in fear of further ASIO raids , Green Left Weekly, November 6, 2002.]

'The Suparta family, comprising two adults and four children aged between four and 17, have been living in Australia for 14 years, with the three youngest born in this country. The oldest child, Yulyani Suparta, said the dramatic raid had left her younger siblings traumatised and they would be haunted by it for a long time.

"We heard windows breaking, including my bedroom window, we were all sleeping when these men with sub-machine guns came barging in our house," she said. "They pushed my dad on to the floor, they handcuffed him and one of the police officers stepped on his ear and told him not to move, he cannot hear properly out of that ear. "They grabbed my mum, they told us to get on the floor and pointed guns at us, I was really scared. ... "One of them pushed me and told me to put my hands on the floor and lay on my stomach."

['Agents pointed guns in children's faces', by Karen Valenti, ***The Sunday Times***, 31Oct02]

Minister Daryl Williams Federal Attorney-General authorised these raids. On the ABC TV program ***Insiders*** of 3 November he said of the raids: "... I don't think there's any doubt they're justified."

An interview followed with Labor's Shadow Minister for Foreign Affairs, Kevin Rudd, who said he had "no reservations about the way the raids had been carried out."

The ***West Australian*** newspaper noted that no arrest was made and no charges were laid and reported that a neighbour, Helena Joyce said she was awoken at 5.15am by the sound of the raid. … "It was really scary. I couldn't go back to sleep. I'm a wreck ... nervous and shaky. …They're a family of six and they've always been good neighbours in the 10 or so years they've lived here - we've eaten with them, ... They're just really nice people." The ABC ***Insiders*** TV program filmed Helena Joyce explaining her views; that she could not understand why "such a heavy-handed approach had been used to find information out"; that she had expected ASIO would "have every surveillance device on the planet, why didn't they use them?" , that she did not understand why guns were drawn on families She said "... my heart goes out for anybody who has lost somebody through terrorism. But you have to understand that we must catch as a society - we must catch the right people - we must catch those who did it and to do that we don't need to terrorise whole communities."

Then three senior journalists in the ABC ***Insiders*** studio were asked to comment on what Helena Joyce had said. In summary they attacked the views expressed by Helena Joyce saying of her :

Piers Ackaman: "Well it beggars belief that you got a woman here who hasn't understand what has been taking place around the world since September 11th 200. But here she is, she's making all kinds of unjustified claims that whole communities are being terrorised. Well they patently haven't. ... Does this woman seriously want to see a bomb blow up in the middle of Hay Street Mall in Perth ? Or is she more upset about a raid that is gathering intelligence on people that have some suspected connection with Islamiah Jemaah!

Jill Singer: … I think one of the points in that is that she is actually saying here they have to attack the right people. Who are the right people ? How does she know ? We don't know on what information they were acting. We've seen other people saying well these are violent raids on apparently innocent people. How do they know they are innocent ? We don't know this.

Greg Hywood: "... we're in a conflict now and we're not … the community is not going to cop the sorts of easy going approaches to these issues that it has in the past. And Helena's view is a minority of a minority view I would consider at the moment.

Piers Ackaman: I would really hope that the sound of the sledgehammer you know knocking on the door next door to Helena has woken her up to what's happening in the real world.

Victims of gross abuse at the hands of medical authorities will probably not be very surprised at this government position and journalistic reaction. For it has long appeared that the politically correct 'Australian way' to treat trumatised victims of medical services is as un-Australian losers who should just snap out of it and stop seeking redress. MCA will be seeking advice as to what counselling or other help has been made available to the families who have been raided.

“ Trust me I’m a doctor ”

The claimed current crisis in medical indemnity insurance has seen the repeated message in mass media that patients are destroying medical services and forcing doctors out of the profession by suing doctors in the civil jurisdiction at a massively increasing rate each year.

Now not all negligence is of interest to the protective jurisdiction. For some reason doctors killing off a lot of patients by means of various stuff-ups and mistakes is not a matter of primary interest for Australian Medical Boards. (Which MCA feels could be part of the reason that once again an international study has very recently found Australian health care to produce lots more bad outcomes than its UK and US equivalents.)

However even so could one still reasonably expect that the regulators of the profession would be increasingly busy with more medical tribunals being held, as this supposed massive flood of civil litigation we are told exists moved through the system ?

Well now some data is actually available to the public via the Annual Report of the NSW Medical Board (If you can get hold of a copy - MCA has been advised they do not seem ready to let just any old member of the public have a copy.) where actual names are now used and also from the LawLink website which is where the data here is from.

So where is the massive rush of cases we expected to find ?

Is the Medical Tribunal actually accountable in any real way ? News reports must make you wonder. For example :

Sydney Morning Herald Weekend Edition, June 9-10, 2001 News Page 13

FOCUS

Doctor found guilty

A doctor whose 77-year-old patient died from a morphine overdose in 1996 after he prescribed 10 times the recommended amount for her has been found guilty of professional misconduct. The Health Care Complaints Commission appealed against a decision by the Medical Tribunal to dismiss the case last year, and the Court of Appeal upheld the commission’s appeal. The court made no order of penalty against the doctor, who cannot be named.

It becomes very easy to see how the protective jurisdiction works. It protects doctors who (to use the politically correct phrase) create ‘adverse patient outcomes’. Which should come as no surprise at all to MCA members.

Just what can we find out about how these regulators think ? Well the NSW Medical Board has a website and looking at the documents available there we find the first NSW Medical Board was constituted in 1838 by the 2 Victoria, Act No. 22 . We also find: The Minutes of proceedings and registers, 1838-1972. Albums of doctors' signatures, 29 Jan 1870-5 Dec 1917. Photographs of doctors, c.1890-1927 etc. Very nice if you are an historian but of limited use if your father has just died in hospital last week for what looks to you like crazy reasons. Then all becomes clear when the note on public access is found:

Access: Records more than 30 years old are open to public access.

So this path is not going get us get much useful data !

Back at the LawLink URL (http://www.lawlink.nsw.gov.au/caselaw/caselaw.nsf/pages/mt) some tables and names indeed do exist for events this Century:

A massive increase is indeed present, despite 2000 being a quieter year than the others with zero cases. No doubt the mass media account would read something like, **“Shock finding ! Medical Discipline Crisis Confirmed - Tribunal cases up 600% since 1999 !”,** but not give any actual figures ?

2002
7 Dr Juan Sabag [2002] NSWDC 7
6 Dr Michael Ivan Davis. [2002] NSWDC 6
5 Dr Kevan Joseph Fleming [2002] NSWDC 5
4 Dr Henry Liu [2002] NSWDC 4
3 Dr Epifania Sherfan [2002] NSWDC 3
2 Dr Thomas James Atkins [2002] NSWDC 2
2001
4 Dr Alan Campbell Mcleay [2001] NSWDC 4
3 Dr Balasunderam Balakrishnan [2001] NSWDC 3
1999
Dr Chris Tsioutis [1999] NSWDC 2

So what were these 9 cases before the Tribunal (which prosecutes its cases in the district court, the cases normally being brought by the Health Care Complaints Commission) all about ?

In extreme summary it appears, from Tribunal judgements, the following was the essence of the nine cases:

Medical Tribunal of New South Wales Statistics

Number of judgments in CaseLaw NSW

	Year	
New South Wales Medical Tribunal	1998	0
	1999	1
	2000	0
	2001	2
	2002	0

Most recent judgments

	Year	
New South Wales Medical Tribunal	1998	
	1999	15/12/1999
	2000	
	2001	28/06/2001
	2002	

Above data updated last on 2 January 2002

Clearly statistics the regulators care to put up on their websites take some understanding.
Have we any MCA members volunteering to research this issue further ? ? ? (...don’t all rush!)

- HIC fraud and professional misconduct. The matter was an appeal from 3 years deregistration in 2001 and was successful but the Tribunal now placed conditions on the doctor's practice for 2 years.
- Drug addicted doctor - restrictions placed on practice.
- Complaint evidence withdrawn on appeal. - No action taken
- Professional misconduct over eye surgery – Complaints dismissed.
- HIC fraud - Deregistration for 2 years. (The Board noted the doctor had not practised for the past 3 years.)
- Professional misconduct over eye surgery – Complaints dismissed.
- Drink driving by doctor in 1999 - Suspended for 3 months.
- Major incompetence and serious negligence on three eye surgery patients - Severe reprimand plus conditions on practice.
- Application to get reinstatement of registration, refused (original case was one of HIC fraud from 1993).

These cases cover nearly four years of effort by protective jurisdiction systems. Which includes of course the work of the HCCC who are responsible for getting cases before the Tribunal.

Anyway millions of dollars of taxpayer funds must have been spent. The HCCC alone costs us over six million dollars a year. And clearly not all cases were even successfully prosecuted.

What do these cases show in terms of that expected link back to death and injury to patients and the resultant action by a few of such patients seeking redress by suing in civil negligence ?

Clearly cases where the issue was alcohol or other drug addiction on the part of the doctor, and those of defrauding the government's Health Insurance Commission (HIC) do not form any basis for a civil case in medical negligence against a doctor. In fact only one or two of the nine cases relate to matters a patient would have a civil negligence case interest in.

So the plot thickens. And just why does that doctor from June 2001, who cost a patient their life by giving 10 times the recommended amount of morphine, and got coverage in the Herald not get a mention anywhere?

Just what has happened over the past 4 years to NSW's share of those 18,000 dead and 50,000 injured per year that the QAHCS estimated must exist around Australia? What has happened to that supposed massive increase in civil legal cases that have had the NSW Government passing draconian laws to take away basic rights of patients to sue in negligence?

Could it be a case of the HCCC just being asleep ? (Was it ever awake ?)

Perhaps the problem is that both Australian investigative journalists and the HCCC are smarter than in the past and so now know what they are not allowed to investigate, in a changed Australia at war with terrorism ?

So ... where have all the negligence cases gone?

All solutions please to the MCA Post Box 230 Balgowlah NSW 2903.

(Sorry our finances will not run to prizes for the best solutions. But we will publish all suggestions that do <u>not</u> fall into the "They were all abducted by space aliens" type of category.)

Consumer Representative Forum

Sydney, 22 October - Tattersalls on Hyde Park

Hosted by the Health Participation Council and NSW Health

Now that many of the GAP committees have reported and disbanded the Health Participation Council is a major link between the Department and the community and its representatives. This first forum was opened by the NSW Minister for Health and was a showcase, with a full day of case-study presentations, of what has been done in a number of the Area Health Services around NSW that comprise the public hospital and related health services system.

At the 'gold plated' end of participation projects from the north was a cardiovascular patient (heart attack and stroke) support group who were working closely with hospital clinicians to assist fellow patients in understanding their condition and traversing the rehabilitation processes possible. It could be seen from this presentation just what an advantage accrued from having as leading consumers in the project a local council mayor and a CEO of a large local business. Fundraising efforts and getting wide community support were at a 'dream' level that other participation projects could not match.

At the other end of the financial spectrum was a presentation ***"They're all in English, so how do I know?*** about community participation within the Vietnamese community in relation to children's oral heath. It turned out that the project report was not on the web yet. So to assist MCA has now scanned and HTML'ed it. And it can now been found on the web at :
http://teeth.8m.com/UDH report/UDH1.htm

Do you live in Sydney ?
Do you have some spare time available to donate ?
Then consider joining the management committee.
MCA needs to get a full committee elected at the AGM.

The MCA AGM for 2002 will take place at 1pm Sunday 24 November at the Hellenic Club 251 Elizabeth Street, Sydney 2000,
in the club's Boardroom which is on Floor 2.