"I will do no harm": medical negligence actions in the Northern Territory arising from gynaecological treatment

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Medical negligence in the specific context of gynaecology raises some particularly blood-curdling and horrendous issues. Courts in the Northern Territory have been very sensible in their dealings with such cases, and have evolved some simple statements under the accepted law of medical negligence that raise fascinating collateral issues.

It is proposed that firstly an average course of medical treatment from the cases be described, followed by detailed examination of what the recent cases are disclosing. It should be stressed at the outset that what is described is a typical treatment regimen culled *from the medical negligence cases*; it in no way is intended to suggest that all gynaecological patients presenting in the way described are treated in this manner or with these results. Although future case notes forwarded to APLA will deal with several cases on which the following melange is based, no comment on those cases or their adjudication to date is offered here.

The course of medical treatment

Diagnosis of PID. (pelvic inflammatory disease), ovarian cysts and reanastomosis follow an initial contact at which the female patient in her early to mid-thirties complains of severe pain during sexual intercourse and excessive irregular menstrual bleeding. The patient is in such pain that her life has been entirely altered from its normal course, with a range of activities totally circumscribed either because of the pain or the effects of pain-killers. In addition, the excessive bleeding symptoms have made life very difficult in a range of practical ways. Of major concern to most of the patients is the long-term health effects of their condition, especially on their fertility and "femininity".

After a laparoscopy is performed, exploratory surgery is recommended, sometimes with the assistance of a visiting microsurgery specialist. In most of the cases, the patient has experienced a long delay between initial diagnosis and the scheduled operation. Post-operative care is disturbingly haphazard, and the patient is sent home while still in severe pain. Bleeding is still occurring but this is explained as being a side-effect of the operation and the patient is reassured that the bleeding will stop as her body recovers from surgery. Another treatment procedure is also recommended, namely the immediate "queue jumping" placement of the patient on an IVF programme, as the drugs used on an IVF programme will, it is hoped, alleviate some of the symptoms and restore the balance of inter alia the patient's sexual reproductive and endocrynological systems. The patient however assumes that her attendance at the IVF programme is primarily to realise her ambition to have children.

The bleeding does not stop after the operation. In addition, the pain, which was always crippling, is now more localised, and still severe. There is thus little apparent result that the patient perceives as flowing from their surgery.

Already, a divergence has appeared between the understanding of the patient and the intentions of her treating physician. The doctor is prepared to contemplate at an early stage a total hysterectomy, or at the very least the removal of at least one ovary. The patient on the other hand is unable to accept that her reproductive capacity is likely to be permanently adversely affected by the treatment she receives. On the basis of her own unqualified impressions and the insufficiently careful statements of her treating physician, the patient assumes that there is some treatment option other than hysterectomy or excision of one or both of her ovaries that will sustain her fertility and remove her perennial discomfort. In this, she is incorrect.

Alternative medical advice routinely consists of plans for a total hysterectomy followed by hormone treatment and long term observation for liver degeneration, osteoporosis and cancer.

With little other option presented, the patient reluctantly undergoes the hysterectomy, and is mentally demolished by the early onset of menopausal symptoms, together with the effective total loss of childbearing ability. The patient consistently complains that she "no longer feels like a woman", "is getting hairy like a man", "is ugly like an old woman". At this point, the patient becomes a lawyer's client.

The iron shield

Because Health Care is a government-administered phenomenon, a lawyer in a city with one newspaper such as Darwin encounters a ruthless government policy of refusal to comment publicly on health related problems, not solely those arising from current litigation but also problems of almost fatal magnitude that are reported on a weekly basis in the community, but which are kept out of the newspaper. This creates a false impression of safety.

The overall responsibility for the medical welfare of Territorians nevertheless rests with the government, and it is rare for the government not to be implicated at some point in the gynaecology medical negligence area. The public and private hospital resources overlap and exchange personnel and logistics, so it is not convincing for government to say, as it sometimes does, that once a patient is referred from a public facility to a private clinic for a procedure, the general and specific duties of care are somehow interrupted. This contradicts commonsense as well as current medical negligence law.

Patient fault

Blaming the patient for a condition

she suffers has occurred fairly regularly, in terms of an infection or disorder being attributed to a previous lifestyle, eg. the attribution of STD infections and severe weight loss to a previous lifestyle as a "junkie" or an "IV drug user". Once a doctor makes such a note on a file, it is much more difficult to fight the pejorative effect of such false statements.

Unnecessary operations and illusory success

A universal complaint from ex-gynaecology patient claimants is that operations and procedures were carried out on them, that, even when successful per se in terms of the physical operation, were never going to produce the result the patient desired. For example, reversal of tube clipping or tying, of which there are several current examples before the Courts, is a procedure that one specialist has said he doesn't and wouldn't do, because although the operation has a success rate of 80% it does not restore the original fertility to its patient; in fact there are other complications including ectopic pregnancies that have an increased chance of occurring because of the scar tissue on the falopian tubes. It is a similar story with operations to remove benign cysts from the ovaries. Such damage can be done to ovaries in the process that fertility is not positively affected at all, in fact quite the reverse.

Can they do no harm?

In conclusion, it can be said that although doctors in the field of gynaecology have a duty to their patients and indeed a very sensitive field of practice, they may fall well short of the standard of care the law requires of them when they become too hypnotised by the desire to microsurgery for its own sake, and when they fail to properly understand the indissoluble and fundamental link between the female psyche as it is dimly understood and childrearing. Anything that separates a woman from her fertility is an area laden with dangers for a treating physician, and they must obtain full detailed consent and in particular warn the patient of the small prospects of success attendant on some procedures. ■

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Office of the Protective Commissioner

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The Office of the Protective Commissioner (OPC) is a NSW statutory body which provides estate management services for people who are incapable of managing their financial affairs.

The Protective Commissioner may be appointed as manager of the financial affairs of incapable persons pursuant to orders made under the Protected Estates Act 1983, or under the inherent jurisdiction of the Supreme Court of NSW. The evidence required before the Court will make a management order is set out in Part 76 of the Supreme Court Rules. The Court also has power to appoint a private manager who acts under the supervision of the Protective Commissioner. Similar orders may be made by the NSW Guardianship Board.

The powers of the Protective Commissioner in relation to the estate of a protected person include:

- Retaining the services of legal practitioners
- Entering into cost agreements
- Giving instructions for the commencement of legal proceedings
- Giving instructions for the compromise of actions for damages

The Protective Commissioner has a statutory obligation to consult with the protected person and relatives prior to making major decisions unless it would be inappropriate or impossible to do so.

The Protective Commissioner will usually be appointed tutor for the protected person in the proceedings. The management fees charged by the Protective Commissioner are prescribed by the *Regulations to the Protected Estates Act*. The management fees may be claimed as a head of damage in a personal injury action.

Case study: OPC working with plaintiff lawyers

Ms R suffered relatively minor injuries in a motor vehicle accident. Some years later she developed a severe neurological condition which rendered her totally incapacitated. Medical opinion was divided as to whether the neurological condition was causally related to the accident.

Ms R was unable to give instructions. Her father, who had been appointed tutor, refused to accept the advice of his legal representatives, including senior counsel. Ms R's father refused to give instructions to compromise the claim even though there was a 90% chance of a finding in favour of the defendant on the causation issue. After payment of the defendant's costs, no damages would have been recovered.

The Protective Commissioner was appointed prior to the hearing and gave the necessary instructions to compromise Ms R's claim. The Court subsequently approved the settlement, which resulted in Ms R recovering a significant amount by way of damages plus costs. ■

The NSW Protective Office can be contacted at PO Box A235 Sydney South, NSW 2000. **Phone** 02 9265 3131.