The medical attack on the legal profession: an update

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In December 1995, Jack Rush detailed in APLA Update the medical attack on the legal profession. In a more recent paper, he again detailed that campaign and updated it.

Traditionally the legal profession and the medical profession have enjoyed a reasonably close relationship.

However, one can detect a sharp change in the approach of the various groups that are the public face of the medical profession. The Australian Medical Association (AMA) and the College of Surgeons for example have taken up an obvious and concerted campaign against the legal profession and the Courts.

In the media we have read the headlines "*Epidemic in Medical Litigation*" - "*Legal Claims Hit the Community*" - "*AMA Push for Expert Court Panel*" - "*Law Suits Inflate Surgery Bill*". The media has been used to create a mentality of crisis.

The statements these days of the so-called leaders of the medical profession are more akin to those of rogue union leaders than responsible heads of professional bodies.

Dr David Wheedon, President of the AMA, wrote to The Age on 12 July 1995. He referred to medical litigation being directed by lawyers "to win the lottery for their clients". Recent Judgements had extended the concept of "duty of care to ridiculous levels." Courts, ie Judges, had even made findings that "conflict with the views of expert medical witnesses and learned colleagues". How dare the Courts take an objective view if the evidence of a medical witness!

Attacking the Courts means attacking the lawyers: this is the medical profession's answer to medical negligence. Those that read the newspaper might wonder if medical negligence exists at all.

The extension of the duty of care that is referred to by Dr Wheedon is the High Court Judgement of *Rogers v Whittaker* (1992) 175 CLR 479. The High Court clarified the legal responsibility of a doctor to properly warn patients concerning the risks of proposed medical treatment.

The context of the case

An ophthalmic surgeon failed to warn a very concerned patient for many years almost totally blind in one eye of the small risk that surgery to that eye may lead to loss of sight in the patient's good eye. The patient developed sympathetic ophthalmia consequent upon the surgery and as a result the patient was rendered almost totally blind. The High Court determined that despite evidence from a body of medical practitioners that they would have acted in the same way as the surgeon involved, the surgeon was negligent for not giving the patient all the information - particularly as to the risk of blindness. The patient's evidence was to the effect that she would not have had the surgery of she had been informed of that risk.

The High Court rejected the legal approach contended for by the surgeon set out in the English decision of *Bolam v Frierin Hospital Management Committee* (1957) 1 WLR 582 at 584:

"*A doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular act.*"

In other words, medical defence could no longer trot out a witness or two to say the practice was acceptable and therefore not negligence.

The argument that Dr Wheedon would contend for is that the standard of care is a matter for "*expert witnesses and learned colleagues*". They should set what is reasonable. In this scenario it seems the plaintiff's witnesses are mere hacks of no standing. One may well ask, what is it about a section of expert medical evidence that should give it such unquestioned authority? Should an action fail because a medical witness testifies the particular practice under question is acceptable? Why should the law sanction an outdated or inherently bad medical practice?

The High Court states:

"*Whilst the evidence of acceptable medical practice is a useful guide to the Courts, it is for the Courts to adjudicate what is the appropriate standard of care after giving weight to the paramount consideration that a person is entitled to make his own decisions about life.*" (*Rogers v Whittaker* at 487)

Is this concept of duty unreasonable or unfair? Is it a statement that should cause the union leaders of the medical profession to attack the Courts so vehemently? The fact is that the High Court applied a standard to the medical profession that is the same as for any other profession. The problem is that the public face of the medical profession is beyond criticism.

The medical beat up was continued later on in 1995.

Professor Fiona Stanley, Director of the Western Australian Institute for Child Health, enjoyed a high media profile in the eastern states in August 1995. Her brief it seemed was to malign the Courts, lawyers and the legal system.

The fact that her attack was inaccurate and unfair of course was irrelevant to those organising her media time - those responsible for creating a mentality of crisis.

In the second Eleanor Shaw lecture in Melbourne on 29 August 1995, she referred to "Debendox" litigation to show that "clever lawyers" are in some way or another "manipulating the system". Manipulation is a favourite word of the critics. I understand Professor Stanley is not a Professor of Medicine, but that her speciality interest is statistics and

epidemiology. In this context one could expect informed comment and analysis of case statistics.

Has there been one "Debendox" trial in Australia? In stating, "*30 trials over 13 years from 1700 suits with many being settled out of Court resulted initially in a 30% success rate for the plaintiffs. One as recently as 1991*", Professor Stanley failed to mention that these figures had no relevance to this country at all. These were statistics apparently from the USA. They were used (quite disgracefully) to form a plank of attack against the Australian legal system.

As hard as it is for Professor Stanley and others to understand, Australia is not the USA. Our system is different. Of course if misinformation fits in with the scare-campaign - if it assists in the object of discrediting - use it.

The fact is that Dr William McBride at the time of his "Debendox" research was a famous Australian medical researcher. He linked Debendox with birth defects. It was left to Norman Swann, doctor/journalist at the Australian Broadcasting Commission to expose McBride's fraudulent data. Perhaps it was McBride's previous work on thalidomide that blinded the Australian medical profession. So much for medical panels and peer review.

Stanley in passing referred to AIDS but of course not the Australian litigation. That perhaps would have been embarrassing. What did we as a community learn from that litigation? That a vacillating medical approach was countenanced to a serious public health issue and as a consequence innocent people died and continue to die. That was the lesson of the Australian litigation. It's not a lesson that Professor Stanley chose to refer to.

"Alarming" is a word that punctuated Stanley's address. It is also a favourite of the medical defence unions in the context of litigation. Stanley used it to describe the increasing number of cerebral palsy cases coming before the Courts due to obstetric negligence. Her statistics form the major plank in her attack on lawyers and the Courts. The facts are: of 250,000 babies born in Australia each year, "*500 will ultimately show features of cerebral palsy that obstetric negligence will be the cause in only 15-20. About 5 of these will seek and receive compensation by way of legal action.*" (Dr P Niselle, *The Age* 1995). That is the context that Professor Stanley failed to give. Of course, if the facts get in the way of a good story it is sometimes better to ignore them.

Professor Stanley's attack was simply wrong in some of its assertions and criticisms. It was mostly irrelevant. Yet those running the propaganda campaign put her forward, using her academic status to further the mentality of crisis.

It was Dr Wheedon's turn again in February 1996. "*AMA Chief Takes Lawyers to Task*" (*The Age* 16.2.96). This time the "truth was being compromised by some lawyers who shopped for "experts".

"....Incorrect evidence had been given in recent Court cases and had resulted in rulings that did not reflect desirable medical practice".

Just what does Dr Wheedon mean? Perhaps he means the font of desirable medical practice lies only with those doctors that are prepared to give evidence for a defendant medical practitioner.

Of course, what he does not refer to is the extreme reluctance of the medical profession to publicly recognise the patient who is the victim of medical negligence.

If anything demonstrated the change in attitude since that time, it was the address by Mr Brendan Dooley of the Royal College of Surgeons splashed over page 6 of *The Age* on 7 May 1996, "*Law Suits Inflate Surgery Bill*".

The inflammatory attack on the legal profession reached new heights. According to Mr Dooley the "*definition of malpractice had been manipulated by unscrupulous lawyers and extended to cases where there has been none*".

In 1995 Professor Stanley's manipulating lawyers were "clever". In 1996 we are "unscrupulous" - the decline has been very rapid. Unfortunately the newspaper did not report the cases Mr Dooley was referring to that substantiated this astounding claim.

Mr Dooley was further reported as follows: "*Australian courts were far too liberal - Sydney was a cowboy town - like the wild west second only to California, I understand.*"

Mr Dooley then adopted the medical trade union line - medical negligence really does not exist.

"*Very few cases against doctors involve true malpractice. More often a bad result for a patient was due to the natural progress of an illness or risk inherent in any operation.*"

Mr Dooley seems to have backtracked on his position as expressed in a letter to *The Age* on 6 July 1995. Then he estimated "10-15%" of adverse medical outcomes were the result of "bad medicine". The statistics seem to have dramatically changed along with the manipulating lawyers!

Mr Dooley concluded his letter with the desire for the medical and legal professions to work together: "*The debate in medical negligence and medical litigation, like the doctor patient relationship can benefit from simple, honest communication*".

That plea was cast asunder by the very person who made it with an outrageous and unsubstantiated attack which was hardly based on honest communication.

I wonder if it has occurred to Mr Dooley that any increase in medical litigation may be due to a general deterioration of standards in the medical profession.

When I see billboards offering laser eye surgery I probably feel the same as he does on seeing "no win no fee".

When Mr Dooley claims that medical negligence is "*corrupting the very basis of medicine - the trust between doctor and patient*" I realise from my professional experience as a patient he is in an ivory tower - not the real world.

Does the doctor-patient relationship exist in a surgery where a so-called leading surgeon sees well over thirty women for breast examinations, advice and counselling in a morning, where to achieve the ultimate in production-line technique there are two examination rooms and the surgeon runs between them? Is it medicine or is it greed? Do we have an under-supply of doctors?

Where is the doctor-patient relationship in the radiological clinic? For the doctor certified by a specialist college admission to a partnership to one of these clinics/businesses guarantees income straight out of the

public purse? For some doctors it seems the bottom line in modern medicine is the dollar.

The fact of the matter is in many of the cases where there is medical negligence, the patient has been treated with a flippant arrogance and disdain by his or her doctor.

Mr Dooley was quoted as follows:-

"Some cases, such as the Nadia Maffei suit against two prominent breast cancer specialists should never have been allowed in Court."

Why not? Because Nadia Maffei took a case against prominent breast surgeons? Is "prominence" to be some bench mark?

Nadia Maffei accepted the verdict of that jury with grace and composure. As her barrister I accept the verdict without hesitation.

For a year following the outcome of that case, I resisted the temptation to comment publicly on it. But how dare Mr Dooley assert that the case should never have been allowed to go to Court. Has it come to the stage that the medical trade unions would even deny citizens access to the Courts?

Nadia Maffei was a highly intelligent and articulated woman. Nadia Maffei was referred by her surgically qualified general practitioner to a specialist because of a lump in her breast. It was her claim that the lump persisted through 1992. The surgeon who saw her in March, May and November, 1992 claimed that examination in November 1992 demonstrated an area of induration in a different part of the breast to the first two presentations. He wrote to the general practitioner in the following terms that on one view were contradictory to his evidence in Court:

"It is clinically quite benign and has not changed since I first saw her in March when she was breast feeding at the time. It is if some concern but as I say it is clinically benign and I think that observation is appropriate".

The question of whether there had been any change in the lump was a highly significant one.

By letter dated 22 March 1993, Nadia Maffei was referred back to this surgeon by her obstetrician and gynaecologist - she was pregnant. The obstetrician and gynaecologist in his referring letter described a three centimetre lesion in her left breast that required further opinion.

Aspirate was taken from the breast on 16 April 1994 by the defendant surgeon. It demonstrated cancer. The surgeon stated he was surprised by the finding and it was *"a matter of luck that I struck the area of in situ disease".*

Nadia Maffei claimed it was the same lump throughout - so did her mother who had examined her breast. Nadia Maffei's case relied on this evidence. It was hotly in dispute. It is difficult to recount after a case the many factors that in a Court are important. However, I have been a barrister long enough to know that Nadia Maffei had a case that was entitled to be heard. The prominence of the surgeons involved should not have impacted on that right.

The statement of Mr Dooley that her case should not have got to Court indicates a general ignorance that tends to explain his more outlandish comments.

Lawyers belong to a conservative profession. Lawyers have been reluctant to answer the campaign of abuse and dis-information - yet surely that time has come for the professions' representative bodies. It has to be appreciated with the AMA and like organisations we are dealing with well-funded, well-staffed and highly active trade unions vociferously promoting members' welfare arguably at the expense of the rest of the community.

In this context let us reconsider the published Tito report studiously ignored by the medical advocates.

1. There is not a strong pattern across the various jurisdictions of a massive increase in claim numbers. The number of claims reaching Court is in fact very small. (There are 172,000,000 medical services a year. Approximately 1,500 of these result in Court cases.)
2. Premiums for insurance cover have increased (but not for the reasons put forward by the AMA and others). The major factor is the crisis, due to the under-funding during the 1980's which left medical defence organisations without funds to meet their liabilities.
3. Research demonstrates the positive effect of the common law. Litigation has caused doctors to inform and consult patients: doctors speak with patients more; doctors keep better notes and records; doctors seek second opinions when not sure of what they are doing; doctors are not practicing outside their specialties.

These are all significant matters: conduct that leads to better patient care. Have we heard anything about this in the "medical attack"? Of course not: it is not in the doctor's interests to refer to the positive.

Unlike the medical profession, the legal profession has been the subject of great scrutiny in recent years. Many changes through competition policy and trade practices have occurred. I for one do not agree with all the change. Nevertheless as the Federal Attorney General, Darryl Williams QC, pointed out in 1996, the legal profession has reacted positively and co-operatively.

Our Courts have actively encouraged mediation and pre-trial negotiation. Specialist Court Lists have been established in an effort to obtain speedier and less expensive justice. The Victorian Bar in its submissions to the Victorian Law Reform Commission has supported structured settlements.

Our profession must continue to self-criticise, adapt and change. While we do we will reman responsive to the needs of the community, and the common law will remain the system best equipped to deliver rights, justice and compensation to persons injured and maimed through irresponsible acts of others.

Whilst the medical unions continue to trot out propagandists like professor Stanley and the recently radicalised Brendan Dooley, the medical profession will become increasingly isolated and removed from the real situation - blinkered and irrelevant with little insight into the problems affecting average Australians.

For a profession funded by the taxpayer to the tune of hundreds of millions of dollars a year, this is a highly unsatisfactory state of affairs.

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