Medical negligence: crisis or beat-up?

Paul Henderson, Slater & Gordon, Melbourne

Medical negligence litigation is important, rewarding and challenging. It is fundamentally different from any other kind of personal injury litigation. To be conducted successfully it requires professional commitment and significant resources.

Is there a crisis?

The preliminary results of the Quality in Australian Health Care Study, published by the Commonwealth Professional Indemnity Review in 1995, contained several unexpected findings. There was surprise and concern that over 10% of hospital submissions surveyed in 1992 involved an adverse event, of which over half were strongly preventable. It was estimated that in that year throughout Australia, 35,000 adverse events resulted in death or permanent disability, while 178,000 caused disability of one month's duration or death.

However, one figure did not surprise lawyers who act for plaintiffs in medical negligence litigation. Only 1,500 tort claims were thought to have been initiated. That is one writ for every 160 strongly preventable adverse events, or one for every 23 people who died or suffered permanent disability as a result of a preventable adverse event. These low figures suggest that the loss caused to many, perhaps most people who suffer injury as a result of a preventable adverse event is borne by the injured person and his or her family.

The Final Report of the Review of Professional Indemnity Arrangements for Health Care Professionals ("the Final PIR Report") provides considerable additional evidence that there is simply no explosion of medical negligence litigation in Australia, as claimed in the media. Data obtained throughout the compulsory reporting provisions of the *South Australian Medical Practitioners Act* 1993 showed fewer than fifty settlements and judgments against medical practitioners in that state per year, with no pattern of increase. Only four plaintiffs in a five year period obtained more than $500,000, while over 60% received less than $60,000. This is a long way from the dramatic portrayals of multi-million dollar pay-outs and unaffordable premiums. [1] It is true that medical defence organisations have produced data showing a much increased frequency of claims notified to them. It is likely, however that this reflects changes in claim notification practice brought about by the MDOs, rather than a significant increase in litigation.

To be effective as a plaintiff's solicitor, it is essential to develop a comprehensive database and to have ready access to medical research.

Why are there relatively few tort claims?

While the medical defence organisations may have difficulty in accepting that the PIR's figures are a true reflection of Australian reality, plaintiffs' lawyers do not. One significant reason for the discrepancy between the high number of preventable adverse events causing death or serious disability and the relatively low number of tort claims is the great difficulties plaintiffs face in proving their case to a court.

Investigating claims

There may be some medical negligence claims which require little investigation, but in my experience these are rare exceptions. The investigation itself is time-consuming. Medical records must be obtained, read and understood; no easy task even for experienced litigators. The solicitor must understand enough about the patient's medical condition and treatment to be able to formulate the specific questions to be put to medical experts and to evaluate their response. To be effective as a plaintiff's solicitor, it is essential to develop a comprehensive database and to have ready access to medical research. Most critical of all is the necessity to invest considerable time and effort in the development of formal and informal networks within the medical profession to properly evaluate claims. The investment in these resources is necessarily substantial.

Finding expert witnesses who are prepared to give evidence against medical colleagues, especially senior ones, is a difficulty. However, obtaining such evidence is crucial. I am not aware of any case in which a plaintiff has succeeded without reputable medical support.

Those experts who undertake the evaluation of potential claims on behalf of plaintiffs are, in my experience, unswervingly committed to quality of healthcare. The common description of these persons as mercenaries or hired guns could not be further from the truth. Might it not be said that those who shun this work because of the potential economic effects of its pursuit upon them are the true mercenaries? Expert witnesses who assess a claim on behalf of plaintiffs run the real risk of some financial or professional consequences from their actions, but because of their independence and commitment, are prepared to undertake the work.

There are, of course, proposals to appoint panels of experts either to undertake a certification process for the commencement of medical negligence actions or to be the only expert witnesses able to be called by a party in medical negligence

actions. Such an approach would only reinforce the existing imbalance between plaintiffs' and defendants' access to expert witnesses. At a practical level, this is likely to be fraught with massive difficulties. If any lesson can be drawn from the experience of the Victorian WorkCover medical panels it is the stark demonstration of the fact that it is impossible to neatly subdivide litigation into medical factural issues, non-medical factural issues and questions of law. All these issues interrelate and any attempt to manage litigation by quarantine is doomed to failure. The integrity and independence of any such panel in medical negligence litigation would be seriously called into question.

Plaintiff lawyers' role

Medical negligence litigation places great obligations upon the plaintiff's solicitor. It is important to determine when assessing claims whether it is possible to meet the client's expectations. There is even a risk that a client will be exposed to a contrary costs order. Clients must also be warned of the inevitable stress that results from litigation and asked to consider whether the effect on their quality of life outweighs the benefit of obtaining a judgment or settlement. The client must understand the extent of all the risks.

I am aware of the fact that both the professional reputation and, in some cases, the sense of self worth of the defendant are at risk in medical negligence litigation. Our experience of mass tort litigation has seasoned us to the potential effects of large media campaigns, emanating from public relations departments of multi-national corporations. In those circumstances, we have an obligation to our clients to predict those responses and pursue appropriate counter-strategies. The type of case where this approach is appropriate is extremely limited and certainly does not apply to individual actions against medical practitioners. Indeed, in medical negligence litigation against individual practitioners, publicity can have the unfortunate effect of diverting the dispute from the question of the existence of error to the question of reputation. Plaintiff lawyers have an obligation to ensure the proceedings against individual medical practitioners are not publicised in a manner which may unfairly or unreasonably reflect on the medical practitioner.

As fellow professionals, lawyers can identify with doctors' strong emotional response to the prospect of being sued. This prospect may result in the doctor refusing to acknowledge to the patient or anyone else that something has gone wrong, or that the medical treatment was responsible. Failing to respond to a patient's request for information is an effective way of encouraging the patient to seek legal remedies. When these attitudes are shared by the controllers of medical defence organisations, they may impede a quick and realistic settlement.

The most constructive approach for any professional to take is to accept that even a competent and conscientious person will inevitably make mistakes. Most of these mistakes will not result in any serious harm. Many of them cannot be characterised as negligence. Occasionally, the mistake will be one that should not have been made, and which must be regarded as conduct falling below the level expected of a reasonable practitioner. In those cases, the professional should attempt to focus on the question of whether the client should be compensated for the loss resulting from the error, rather than seeing the issue as whether he or she is competent to continue to practice the profession.

Although some doctors do not appear to accept this, medical negligence cases cannot be won without clear proof of substandard care. Although one representative of a medical defence organisation has asserted that *"Judges make determinations against doctors regardless of fault"*[2], in professional negligence cases, the distinction between a preventable error and a negligent error has not been blurred. The need to prove that the error was not only preventable, but one which a reasonable medical practitioner should not have made, makes it particularly difficult for plaintiffs in medical negligence cases to succeed.

One needs to keep the whole subject of litigation in perspective. No more than 25 medical negligence cases would go to verdict in any year throughout Australia, less than 2 per cent of all claims issued. What little information is available from medical defence organisations suggests that the majority of these are resolved in favour of doctors[3]. These cases are not untypical of medical negligence litigation. Usually, they will have failed to settle because the plaintiff and the defendant have irreconcilable views concerning the doctor's conduct. They are, by definition, the controversial cases, where feelings are likely to run high on both sides. They may make good headlines, but tell us little about medical negligence litigation as a whole. The community will suffer if a doctors' perception of being under threat lead to ill-considered and unjustified curtailment of the rights of patients to obtain compensation for medical negligence.

Paul Henderson is a Partner from Slater & Gordon in Melbourne. **Phone** (03) 9602 4855, **fax** (03) 9600 0290. Paul presented a paper on the medical negligence so-called "crisis" at a Melbourne medico-legal conference in May 1996.

1 Final PIR Report, AGPS, Canberra, 1996, page 74

2 Megan A. Kearney, "Is Litigation increasing" M.J.A. (1996) Vol. 164 page 178

3 Final PIR Report, AGPS, Canberra, 1996, page 168