What I didn't learn at the bar!

Reflections by Chris Lekich

What I did learn at the bar

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The origins of Law

Common Law Country

Courts
- Jurisdiction
- Types

Legislation:
- Federal Parliament
- State Parliament

Legislation

The following are but **some** examples of legislation that impacts on the health professionals:

1. *Nursing Act* 1992
2. *Medical Act* 1939,
3. *Dental Practitioner's Registration Act* 2001,
4. *Disability Services Act* 1992,
5. *Medical Practitioners Registration Act* 2001,
6. *Transplantation and Anatomy Act* 1979,
7. *Registration of Births, Deaths an Marriages Act* 1962,
8. *Health Rights Commission Act* 1991,
9. *Gene Technology Act* 2001,
10. *Research Involving Human Embryo and Prohibition of Human Cloning Act* 2003,
11. *Criminal Code Act* 1898, *Civil Liability Act* 2002, *Health Practitioners (Professional Standards) Act* 1999,
12. *Coroner's Act* 1858,
13. *Freedom of Information Act* 1992,
14. *Guardian and Administration Act* 2000,
15. Anti Discrimination Act,
16. *Health Drugs and Poisons Regulations 1996,*
17. *Privacy Act* 1988 (Cth),*Privacy Amendment (Private Sector) Act 2000 (Cth),*
18. *Occupational Health and Safety Act (Cth),*
19. *Therapeutic Goods Act 1989(Cth),*
20. *Health Insurance Act 1973 (Cth),*
21. *Workplace Relations Act 1996 (Cth)*

Not an exhaustive list!

Courts/Tribunals

- **Courts**:
  - Civil
  - Criminal
  - Family
  - Environment
  - Bankruptcy
  - Maritime
- **Tribunal**:
  - Administrative Appeals
  - Tenancy
  - Small Claims
  - Professional Regulatory
    - Panels,
    - Tribunals
    - Courts

Tribunals

Enabling Legislation

Specialised areas

Disciplinary Tribunals : Health Practitioners (Professional Standards) Act (Qld)

The Courtroom Theatre

1. The adversarial process
2. Role of the Judge
3. Role of the Jury
4. Role of duelling experts

How to become a good performer-
give them what they want to see

Law requires documentation of consent and competence

Impact of Rogers v Whittaker

Documentation

FUNCTIONS

- 1. ACCOUNT OF ONGOING CARE
- 2. TRANSFER OF INFORMATION
- 3. RESEARCH
- 4. EVIDENCE

Documentation

In reality

- 1. Merely a record.
- 2. Itself does not constitute consent.
- 3. Patients do not understand documentation presented without the opportunity to digest and clarify.
- 4. Time constraints not a defense.

Documentation

FORMAT

- DATE / TIME /IN INK
- IDENTIFIED
- CONTEMPORANEOUS
- LEGIBLE
- DO NOT WRITE FOR OTHERS
- WRITE ONLY WHAT YOU KNOW
- CLEAR, CONCISE, ACCURATE.
- ISSUE OF ABBREVIATIONS
- SIGNATURE / COUNTERSIGNING

Documentation- "E Health"

- 1. Confidentiality of information .
- 2. National electronic health records task force.
- 3. Better medication management system.

Documentation-Ownership

The author has copyright-

- The Records Belong To The Individual Or Institution That Created Them.
- FREQUENT QUESTION- "they want the records"→NO COMMON LAW RIGHT TO ACCESS

(*Breen's Case*)

Documentation- Access via FOI

Freedom of Information Act Qld

Freedom of Information Act Cth

Documentation per Dr. Loizou

•120 venous history questions filled out *prior* to visit

•Questionnaire coded, keystrokes generate notes for record and letters for communication.

•Information sheet mailed.

•Computer Generated Keystroke Short Cuts.

•Record of consultation and letter for referrer- venous and general history, examination, investigations, discussion of treatment options.

Documentation per Dr. Loizou An Example

The patient presents with a completed questionnaire and has read the information brochure which was sent to them prior to this consultation. The patients presenting complaint and history includes varicose veins of the legs/ spider veins of the legs/ recurrence of veins after surgery/ lymphatic problems of the legs/ there was no other presenting problems. The patients presenting symptoms included pain in the legs/ heaviness in the legs/ burning sensation in the calf/ itchiness of the legs/ swelling of the legs/ tiredness of the legs/ there were no other symptoms.

Specifically the pain in the legs had the following associations. Seemed worse after extended periods of standing. Seemed worse in hot weather. Pain was always worse towards the end of the day. The pain had the following relieving and aggravating factors. Seemed better with rest. Better when elevating the legs. Improved with the wearing of elastic stockings.

The veins first appeared in the following circumstances. The veins appeared aged 35.

The veins appeared after taking the pill. The veins appeared before pregnancy. The veins further appeared during pregnancy.

On specific questioning regarding pelvic congestion syndrome the patient revealed that there was no heaviness in the abdomen/no pain in the abdomen/no burning sensation in the groin/intercourse was not painful/no hemorrhoids/no urinary urgency/ and no constipation.

On specific questioning regarding past venous history the patient revealed no history of phlebitis/ or DVT/ or pulmonary embolism/or leg ulcers/ or any bleeding disorder/or easy bruising/ and has never required warfarin or injections in the tummy.

The patient revealed a history of having previous vein treatment by Surgery with high ligation and stripping bilaterally in 2001.

On specific questioning regarding past medical history the patient revealed there was no history of AIDS/HIV/ no hepatitis A,B or C/ has never had a blood transfusion/ no asthma/ not diabetic/not hypertensive/ no history of epilepsy or seizures/ no stroke or TIA/ no cancers/ no arthritis or autoimmune disease/ no thyroid problems or heart disease/ no previous lower limb fractures.

The patient revealed she has been pregnant 3 times. She has 2 children. The patient is not currently pregnant. There are no plans for further pregnancies. The patient has an intact uterus. The patient is not taking the contraceptive pill.

Specific questioning regarding family history revealed the following. There is a family history of Varicose veins. There is a family history of spider veins. The patient revealed no family history of phlebitis or blood clots/ no bleeding disorders or leg ulcers and no family history of bad circulation.

Specific questioning regarding psychological history revealed no history of anxiety/ depression/claustrophobia/ needle phobia or any other psychological problem.

The patient is not taking iron tablets. They are not taking NSAI or aspirin. There is no allergic history of any note. In particular have not had the following allergic type reactions. Eczema. Hives. Hay fever. Anaphylactic shock.

Discussion relating to allergic tendencies revealed no known allergies to foods/iodine/shellfish/ radiology injections/sulfur drugs/local anaesthetics or adhesive tapes.

The patient is opposed to having surgery to the varicose veins. There are pending travel arrangements to Europe in early June. There have been no problems with previous travel.

Documentation per Dr. Loizou
Additional Notes

•Information sheet not a substitute for face to face consultation and does not discharge the duty of care to consent.

•Opportunity to identify *material risks (Rogers v Whittaker).*

•Rapid record of consultation and proposed and actual treatment.

•Leaves time to clarify with patient "Is there anything that is not clear"

•Allows time for thorough discussion of through proposed treatment outlining risks *and* material risks and benefits.

•Consent form sent home with patient to sign at following visit just before treatment.

CONFIDENTIALITY

- GENERAL RULE – NEVER DISCLOSE WITHOUT THE CONSENT OF THE PATIENT.
- CONFIDENTIALITY IS FUNDAMENTAL TO THE RELATIONSHIP.

PRIVACY PROTECTION
Enforcement

- NEGLIGENCE
- BREACH OF CONTRACT
- EQUITY
- DEFAMATION
- PROFESSIONAL CODES OF ETHICS
- LEGISLATION:
  - *Health Administration Act*
  - *Human Tissue Act*
  - *Privacy Act*

WARRANTED DISCLOSURE

- 1. DUTY TO THE PUBLIC
- 2. CONSENT - EXPRESS / IMPLIED.

CONSENT

CONSENT-enforceable

- TRESPASS TO THE PERSON (CIVIL ASSAULT)
- NEGLIGENCE
  - BREACH OF THE DUTY OF CARE → DAMAGE TO THE PATIENT/CLIENT

CONSENT – defense for trespass

VALID CONSENT:

- VOLUNTARY
- INFORMED
- COVERS THE PROCEDURE
- CAPACITY NO DURESS
- NO COERCION
- NO MISREPRESENTATION

Common Law

- "GILLICK" COMPETENCY:
- "*I WOULD HOLD THAT AS A MATTER OF LAW THE PARENTAL RIGHT TO DETERMINE WHETHER OR NOT THEIR MINOR CHILD…WILL HAVE MEDICAL TREATMENT TERMINATES IF AND WHEN THE CHILD ACHIEVES A SUFFICIENT UNDERSTANDING AND INTELLIGENCE TO ENABLE HIM OR HER TO UNDERSTAND FULLY WHAT IS PROPOSED…HAS A SUFFIENT UNDERSTANDING OF WHAT IS INVOLVED TO GIVE A VAILD CONSENT AT LAW…*"

REQUESTS FOR INFORMATION BY OTHERS

- 1. RELATIVES
- 2. POLICE
- 3. MEDIA
- 4. SOLICITORS
- 5. INSURANCE COMPANIES

PATIENT'S RIGHTS

- Right to reasonable care.
- Right against abandonment.
- Right to prompt treatment.
- Right to informed consent
- Right to confidentiality.
- Right to access medical record.
- Right to access medical files.
- Right not to discriminated against.
- Right to lodge a complaint.
- Right to stay with your child.
- Right to refuse treatment.

PATIENT'S RIGHTS

IINDIVIDUAL RIGHTS cont.

- Right to access qualified professional.
- Right to a second opinion.
- Right to an interpreter.
- Right to know the costs "financial consent"
- Right to know the available services **Doctor Beware*
- Right to seek legal advice

PATIENT'S RIGHTS

COMPLAINT MECHANISMS

- *Health Rights Commission Act* 1992
- Alternate dispute resolution.
- Role: investigate complaints, increase quality of health care.
- Stages:
  - Assessment by Health Rights Commissioner.
  - Direct.
  - Informal involvement of HRC.
  - Conciliation.
  - Investigation.

COMPETENCE

Then came MATERIAL RISKS (Rogers v Whittaker)

s. 21 Civil Liability Act Duty of doctor to warn of risks (Rogers and Whittaker legislated)

- The doctor does not breach the duty…to warn of risk before the patient undergoes medical treatment…that will involve a risk of personal injury…unless the doctor at the time fails to give or arrange to be given to the patient – information that a *reasonable* person I the patient's position would, in the circumstances, require to enable the person to make a *reasonably* informed decision about whether to undergo the treatment or follow the advice; information the doctor knows or ought to have known the patient wants to be given before making the decision.

Queensland: *Personal Injuries Proceedings Act* 2002, *Civil Liability Act* 2003

- Duty and Standard of Care:
  - *A person does not breach a duty to take precautions against the risk of harm unless – the risk is foreseeable (it is a risk of which the person knew or ought reasonably have known), the risk is not insignificant, in the circumstances a reasonable person in the position of the person would have taken precautions.*

What did I learn at the bar?

1. Horror stories involving doctors/practitioners.
2. Ignorance of the law is no defence
3. The wheels of justice-spin of a lucky wheel
4. Function of the law complex

What I didn't learn at the bar? (I learnt in the MBA) Optimising patient Outcomes Risk Mitigation

HEURISTICS

Definition- applying perception, memory, and context and formulating psychological rules to simplify decision making processes

1. Anchoring Trap

Bias attached to the perception first formulated

- Solution- Pre-empt the bias

2.The Status Quo Trap

Change is not natural, if it isn't broken, don't fix it

- Solution-The status quo is in fact not the case

3. Sunk Cost Trap

Present decision protecting previous decision

- Solution-

4. The Confirming Evidence Trap

Seeing information that strengthens our own argument

- Solution- Recognising the trap

4. The Overconfidence Trap

Too confident about predictions

- Solution- implement control mechanisms

5. The Recallability Trap

Disproportionate probability/ belief to personal experience

- Solution-

6. The Framing Trap

The way a situation or problem is defined

- Solution-

CONCLUSION

Thanks