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Medicolegal Update-Lessons from HRRT and HDPT Concurrent Workshop Repeated

Saturday, 11 June 2011	Start 11:00am	Duration: 55mins	Works
	Start 12:05pm	Duration: 55mins	Works

Rotorua GP CME 2011 NZMA

General Practice Conference & Medical Exhibition

09-12 June 2011 | Energy Events Centre | Rotorua

Rotorua GP CME 2011

MPS Presentation

Health Practitioners Disciplinary Tribunal
Human Rights Review Tribunal
& the Disputes Tribunal

Jenny Gibson & Tim Cookson

Hasty Decisions

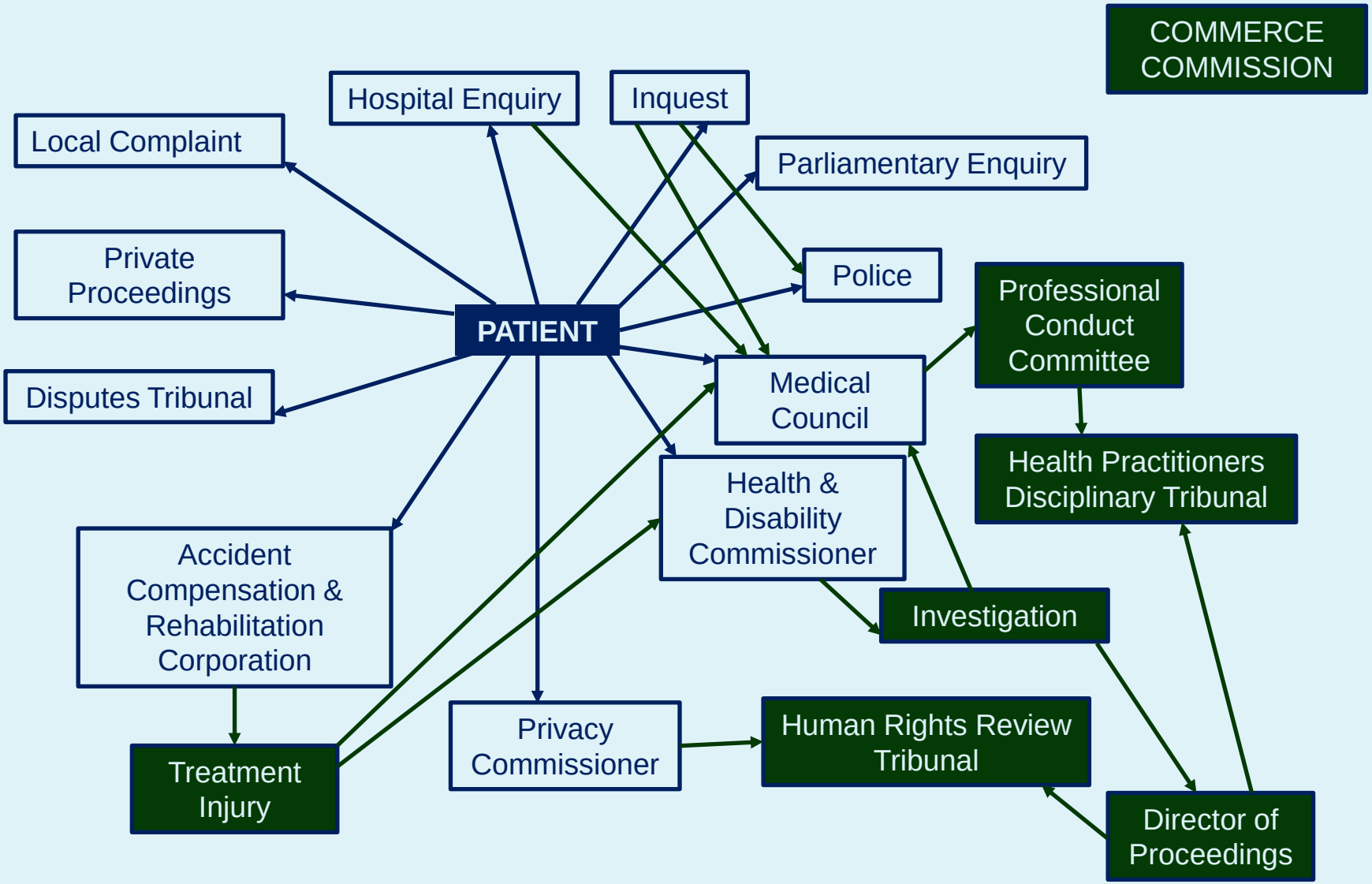

FFH733
DISCOVERY 4
TDV6

Significant Problem

Expert Advisers

Additional Assistance

Safe Outcome

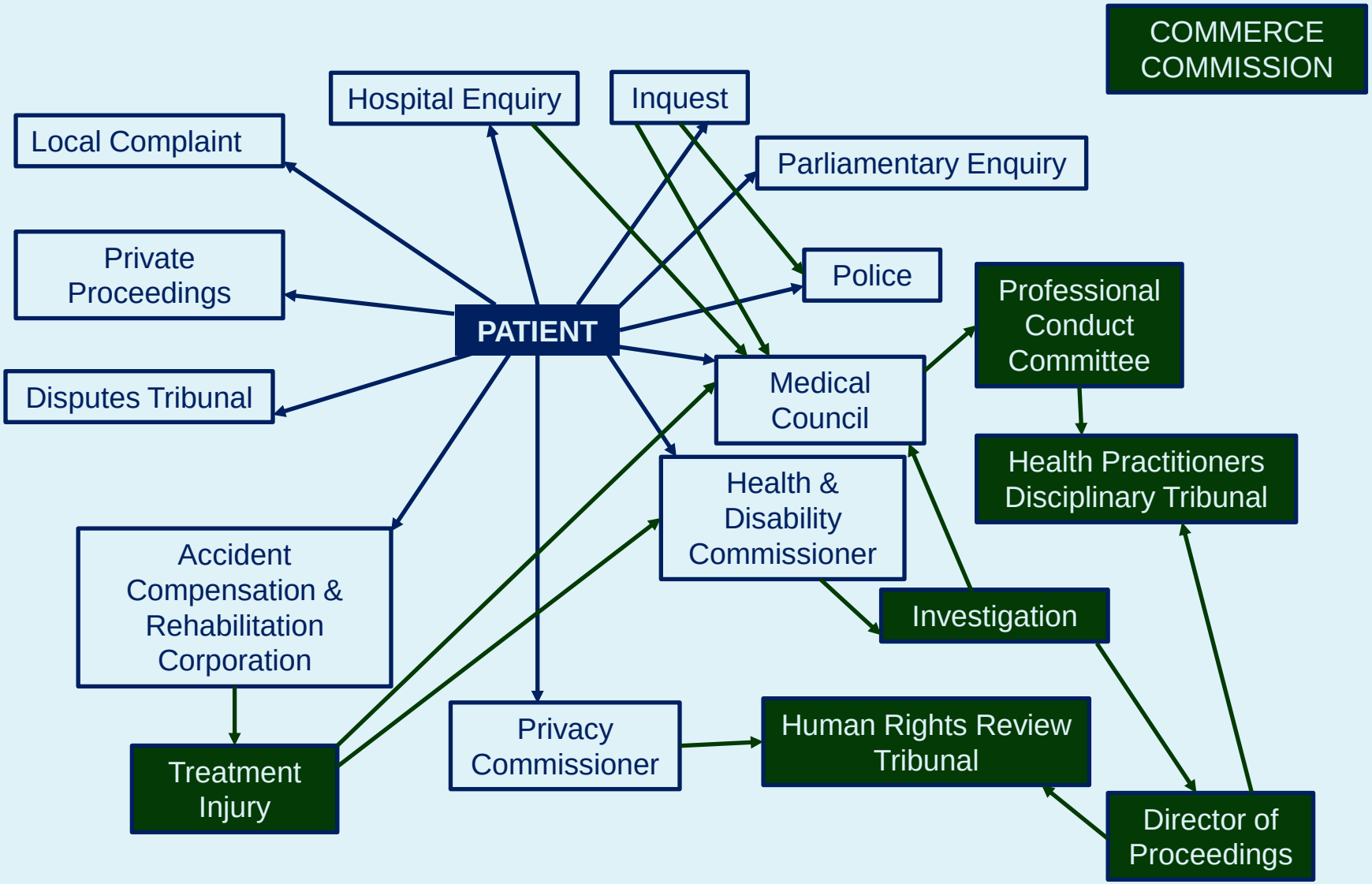

COMMERCE COMMISSION
Hospital Enquiry
Inquest
Local Complaint
Parliamentary Enquiry
Private Proceedings
Police
PATIENT
Professional Conduct Committee
Disputes Tribunal
Medical Council
Health Practitioners Disciplinary Tribunal
Health & Disability Commissioner
Accident Compensation & Rehabilitation Corporation
Investigation
Privacy Commissioner
Human Rights Review Tribunal
Treatment Injury
Director of Proceedings

Health Practitioners Disciplinary Tribunal

- Covers 22 categories of Health Practitioners
- Doctors, Nurses, Pharmacists, Physiotherapists Dentists, Psychologists, Chiropractors, Osteopaths etc.
- Created under section 84 of the Health Practitioners Competency Assurance Act 2003

HPDT

- Cases come from -
- Professional Conduct Committee of the Medical Council of New Zealand
- Director of Proceedings following H&DC investigation
- Power to order suspension of doctor before hearing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HPDT Disciplinary Grounds

- Professional Misconduct – malpractice or negligence, bringing discredit to the profession
- Convicted of offence
- No APC
- Practising outside scope
- Failure to observe previous conditions
- Breach of Tribunal order

HPDT Process

- Usually public hearings, name suppression may be granted
- Can accept evidence not admissible in court of law. Civil (not criminal) criteria.
- Hearing – prosecution statement & witnesses, defence statement & witnesses, final submissions
- Decision – oral & written

HPDT Penalties

- Cancellation of registration
- Suspension for up to 3 years
- Conditions on APC
- Censure
- Fines to maximum of $30,000
- Costs

HPDT Recent Case Summary

- HPDT hears 30-35 cases per year average
- Doctors involved 5-7 cases per year
- 1-3 from Director of Proceedings, rest from PCC.
- Of the last 15 cases, 10 had MPS assistance, 5 other or self.
- Of the 10 MPS cases, 3 withdrawn or overturned.

HPDT Summary

- 3 – sexual relationship with patient
- 2 each - no APC, false documentation, faulty documentation, breach privacy.
- 1 each – directly related to medical care & 1 possession objectionable material.
- Maximum costs - $256,000 to doctor with no legal representation – result – registration cancelled.
- Message – very uncommon to get to HPDT due to medical care issues.

HPDT cases – the range

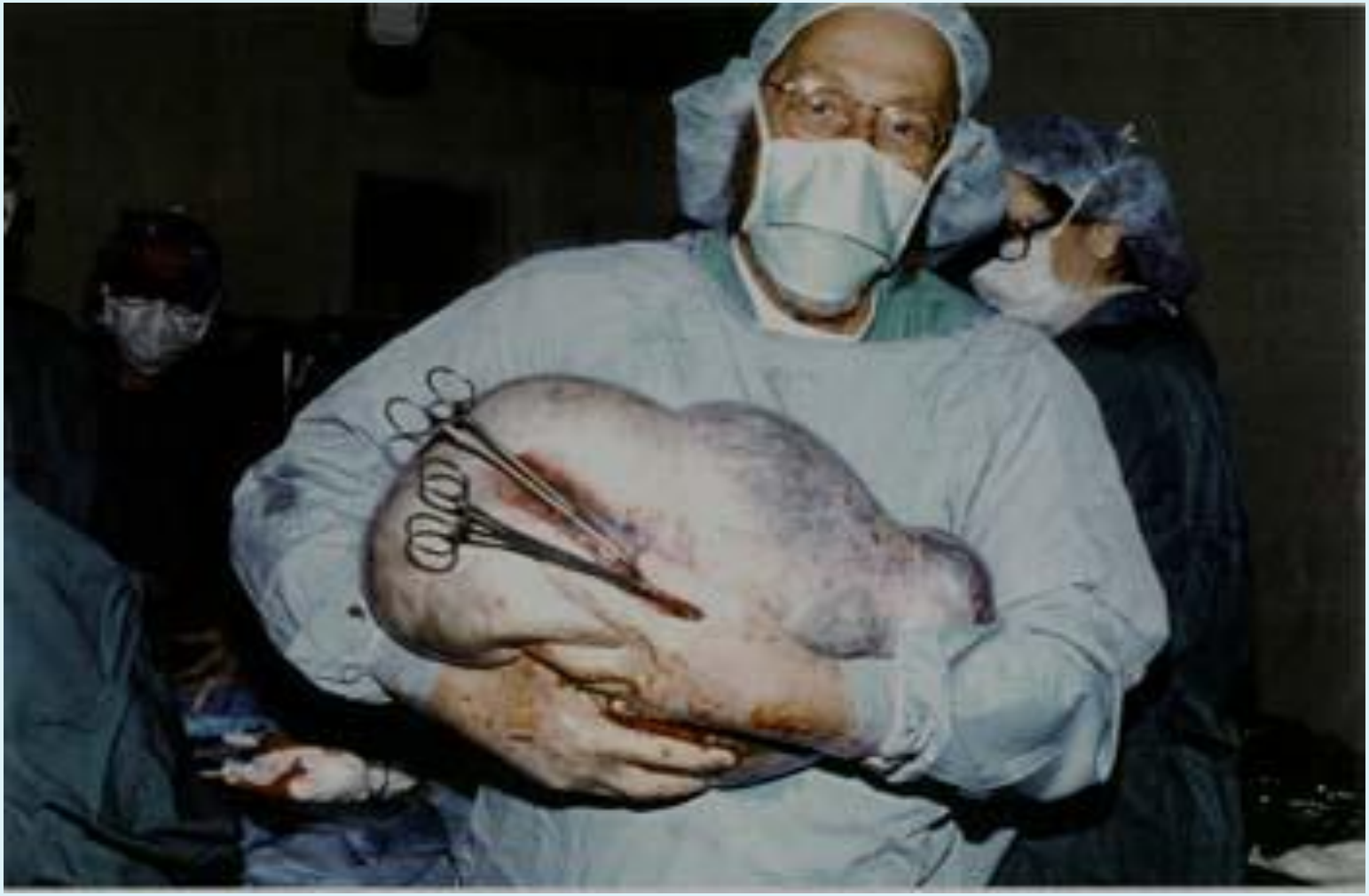
- 1 – solo GP, longstanding female patient, series of presentations over 4/12 for abdominal discomfort, bloating & complaints of being fat.
- Clinical notes in earlier years had been good, over the final year were brief/inadequate.
- Charges of inadequate notes/consultation/history taking & ordering investigations.
- GP claimed had performed abdominal examinations, but no notes and patient adamant did not.

GP 1

- Guilty of failing to examine on 3 occasions, failure to do adequate checks & monitoring for phentermine (Duromine) prescribing,
- Adverse findings found to be cumulative & acts & omissions well short of standards.
- Penalty – attend professional development course, censured, costs, permanent name suppression

GP 1

- Decision seems fairly tough – why?
- Elephant in the room –



- the diagnosis was a 14.7 kg mucinous cystadenocarcinoma.
- Tribunal stated important to emphasise doctor not charged with failing to diagnose the cyst & not criticised for this.

The lessons

- Do the basics properly – history, examination etc.
- Record what you have done.
- Follow guidelines when prescribing, particularly phentermine
- If you get the above 3 wrong, don't do so with a patient who has an undiagnosed 15 kg intra-abdominal mass.

GP 2 – Dr Vatsyayann

- The other end of the spectrum –
- 4 charges
- – enrolling patients without their knowledge
- - consulting with a patient while another was in the same room
- - allowing his wife to do smears, remove IUCDs and give injections when she had no relevant qualifications to do so
- - false recording including that he had performed clinical treatment when he had not.

How Deep?

GP 2 – Dr Vatsyayann

- Dr Vatsyayann was represented by his daughter.
- Tribunal required QC as Technical Adviser
- Dr V declined to give evidence
- His actions prolonged the hearing from 5 days to 3 weeks
- All 4 charges found proven – professional misconduct for each.

Suspicious evidence

- ‘Value of Cx smear + cost of ThinPrep procedure and actual procedure & possible discomfort during it xpland (sic), verbal consent taken, chaperoned by Sue, high vaginal swab + Cx smear taken using cervibrush, no complications, ‘ll (sic) inform ABN result.’

- 5 representative cases – wording in notes identical for each

Tribunal's Findings

- Facts of the case were unique in terms of the range of conduct for which the Tribunal had made a finding of professional misconduct.
- Registration cancelled
- Censured.
- Costs awarded at 50% - $256,000 still highest costs award.

The Lessons

- Take proper care with enrolments
- Some doctors do things most of us would find unimaginable.
- Treat ‘hot keys’ the way you would material of a highly toxic nature.

Human Rights Review Tribunal

Operation

- The HRRT operates in panels. The Chairperson is generally a senior lawyer.

Powers

- Award compensation for losses suffered and/or lost benefits (usually claims for injury to feelings, humiliation and/or loss of dignity)
- Maximum of $200,000
- Highest award to date is $40,000 for a privacy case (*Hamilton v The Deanery 2000 Ltd* HRRT decision 28/03, 29 August 2003)
- Punitive damages can be awarded under the Health and Disability Commissioner Act 1994 if a flagrant disregard of claimant's rights is demonstrated.
- Restraining orders to prevent repeats of contravening conduct.
- Can order that a healthcare provider undertake remedial training.
- Can award costs.

Ability to bring an action

To bring an action following an HDC investigation:

- A breach must have been found

To bring an action under the Privacy Act:

- No breach is required. An investigation must have been conducted by the Privacy Commissioner with no settlement.

Examples of allegations which have gone to the Privacy Commissioner:

- The original of a patient's notes were provided to the patient's wife in a sealed envelope to transfer to another medical centre. The patient was separated from his wife and only a verbal request for a transfer was received.
- Information regarding an off work certificate was given to an overseas employer, without the employee's consent.
- A doctor checked a colleague's health records using a DHB Healthlink because he had concerns about the colleague's health reported to him.
- Information was provided to a mother in response to her concerns about her adult daughter's (patient) health and likely deterioration, setting out possible recommendations for the daughter's immediate care when the doctor could not get hold of the patient.

Examples of allegations which have gone to the Privacy Commissioner cont:

- Practice manager photocopied all patient notes, not only ACC notes in response to a request from ACC.
- Reception staff failed to appropriately address a patient's ACC Sensitive Claim, resulting in the letter being opened by the New Zealand Post to ascertain a mail address.

The discretionary cover of the MPS extends to practice managers under the HRRT, illustrated by *Coates v Springlands Health* (a Human Rights Act alleged discrimination case) where the Society supported the practice manager.

Common themes in the HRRT-families

SBD v FM 2006 NZ HRRT 33 (7 September 2006)

- Plaintiff 25 years of age, mental health history
- Seen by the doctor since he was 5 years of age, often taken by his mother
- Mother took an interest in the patient's health
- The patient had developed a series of difficulties with depression but declined referrals to a psychiatrist
- Doctor was also the family doctor
- On 31 January 2003 the patient's mother went to see the doctor in considerable distress regarding his mental health. The patient alleged the doctor had disclosed

  (i) his anxiety condition

  (ii) that she had given him a prescription

  (iii) that he had not attending a psychiatric appointment

What may seem good practice may not be viewed that way by the HRRT

- The Privacy Commissioner submitted "*to the extent that a disclosure of any of the kinds alleged has the capacity to undermine the confidence of a doctor/patient relationship there is a potential for significant injury to feelings, loss of dignity or humiliation simply because if is the confidentiality of a doctor/patient that has been compromised*".

- The doctor was found to have breached Rule 3 in that she had never advised the patient that he was entitled to access or correct his health information.

Still on families

Director of HRRT v QD – Principle 6

- Practice treated the complainant, husband A and two children. Parents in the midst of an acrimonious separation and custody hearing
- Husband A gave information about the complainant to the doctor in exchange for a promise of confidentiality. Complainant found out as she was shown her computer records by the receptionist/nurse when completing an insurance form.
- The doctor refused to give the information for 2 ½ years and only did so after being released from the promise of confidentiality by the husband.

The HRRT view

- If an individual's personal information is held by an agency and is readily available then with certain exceptions, an individual is entitled to access it.
- "*An assumption that doctor/patient confidentiality ought somehow to prevail over the Privacy Act is a recipe for trouble"*.
- The underlying problem was:

(i) The doctor agreeing to accept personal information about the complainant from A on the promise of confidentiality. The doctor was not in a secure position to give this promise.

(ii) that the doctor was the complainant's and husband A's doctor.

And still on families

SC v ADHB

- 14 year old girl under Mental Health Compulsory Assessment and Treatment Act 1992. On admission suffered from self harm and depression and clear homicidal ideation.
- CYFS were involved and ADHB released information about the mother to CYFS which was "*that the psychologist thought that the mother had a personality disorder with severe issues … (and was) caught up in the medical and educational dramas for the children"*.
- Consider case against the background of reporting clauses in section 15 and 16 Children Young Persons and Their Families Act 1989

How did they get there?

So what did the HRRT find?

- Rule 11 allegation of breach covered by section 15 of the Children Young Persons and Their Families Act.
- Section 15 protected not only the report of abuse but information about surrounding circumstances.
- No breach of Rule 11 if the information came from an independent expert.

But then...

- The HRRT considered Rule 8 and found that ADHB had to ensure that the information was accurate, i.e. that the psychologist had made her own judgment and not simply adopted the father's view. Evidence was not called from the psychologist. That matter is still under consideration.

And not on families....

Henderson

- Dr Henderson accepted patient information in his capacity as a complaints officer of an after hours centre
- He received information that a patient of the practice had exhibited drug seeking behaviour.
- He notified a senior nurse who worked at the rest home where the complainant was employed

The Facts

- At the time that Dr Henderson notified the rest home who employed the complainant of her drug history, he:

(i) knew that the patient was on the methadone programme

(ii) believed the complainant to have convictions for drug related offences (there was only one relevant conviction)

(iii) had a reason to believe that in 2002 she had been seeking drugs from a medical practice;

(iv) was told at the time that these concerns were raised by a nurse/receptionist on duty at the after hours that the complainant had at one stage been found in the medicine room at the after hours surgery

(v) made inquiries of the police and ascertained that the complainant had drug related convictions.

The Finding ... and the time

- The HRRT found that it was satisfied that Dr Henderson had reasonable grounds to believe that the complainant represented a serious threat to the safety of patients at the nursing home. The complaint was dismissed. The process and subsequent proceedings went for over 8 years.

The Disputes Tribunal – who uses it?

- Jurisdiction $15,000 ($20,000 if both parties agree)
- A claimant can take a dispute to the Tribunal even if there is an agreement in writing not to, or a contract says "*no responsibility accepted*".

<u>Participants</u>

- No lawyers or judges
- Referees who are trained but do not necessarily have legal experience

Hearing process

- Informal (members of the public and media are not usually allowed – nor are lawyers)
- Agreements and decisions are binding in the same way as a Court hearing
- Non attendance can result in an enforceable Court order
- Representatives can only be appointed in special cases -not a lawyer

Appeal processes are limited:

- It is not a ground of appeal that the referee was ignorant of a relevant piece of legislation, i.e. a referee will only be held to have conducted proceedings in a manner that was unfair to the party and prejudicially affected the result if they fail to have regard to a piece of legislation that was *brought to their attention* during the hearing and the result was *unfair.*

Claims

Claims relevant to medical practice are:

- Whether the service has been provided properly
- Disputes regarding the amount charged for services provided
- Payments for loss caused by misleading advertising or statements made by someone selling services or goods
- Denying that a claimant owes money for an account sent.

Claimants cannot use the Disputes Tribunal to:

- To collect bad debts

Disputes Tribunal Case

- Plastic Surgeon sees patient injured overseas & left with disfiguring injuries.
- Advises patient no guarantee can achieve a lot but patient wants him to try
- First operation technically successful but patient wants more.
- Second operation some further improvement – patient not happy & complains to surgeon.

Disputes Tribunal

- Surgeon refunds fees for second surgery.
- Patient complains to H&DC – doctor contacts MPS
- H&DC mediation – no resolution
- H&DC enquiry– no breach
- Patient now claiming $15,000 through Disputes Tribunal.

Options

- 1 – pay full amount as full & final settlement
- 2 – negotiate a lesser sum & pay this
- 3 – reject the claim on the basis this situation is covered by ACC

How can the MPS help?

- By identifying relevant pieces of legislation for you so that they are identified to the Tribunal
- Advising on precedent cases in the common law area
- Assisting you with your responses

Help is at hand

Only in Australia

Or even better -