"AM I COVERED?"

Medicus Workshop

Dr Wayne Cunningham

Dr Peter Robinson

Gaeline Phipps

Conference, Dunedin

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"Learn from the mistakes of others as you don't have time to make them all yourself."

Eleanor Roosevelt

AIM

- To be a grass roots session where we come up in advance with the things you ordinarily would only have the chance to think of after the event.
- To suggest a 21st century way of managing patient / health practitioner relationships / expectations.
- To help you to make sure that the practice is covered

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OUR EXPERIENCE

- We have a combined experience of over half a century in helping doctors manage medico-legal risk.
- The skills a doctor can offer, compared to those of a lawyer, are different, separate and highly specialised.
- The key point is the greater the effort put in early, the less the effort required later.
- Proactively vs reactivity.

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SUCCESS IS JUDGED BY LAWYERS NOT NEEDING TO APPEAR AT A HEARING

"Nothing in life is so exhilarating as to be shot at without result."

Winston Churchill

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STARRING …

The characters:

Dr Johnny Cuthbert Lately – General Practitioner

May Lingerer – long term patient of Dr Lately – solo mother, beneficiary,

Beatrice, the receptionist

and

You managing the practice as the case unfolds

The cast:

Dr Peter Robinson, medico-legal adviser of 30 plus years experience

Wayne Cunningham General Practitioner

Gaeline Phipps, barrister, regular columnist for *NZ Doctor*, legal adviser to the medical profession for over 24 years

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THE PERSONALITIES

- Dr Johnny Lately – professional and caring, but overworked.
- May Lingerer – solo mother, struggles financially, lonely, prefers alternative treatments.
- Beatrice – a lovely, warm person, affectionately called “Nana” by many of the patients, but a notorious gossip. You have had to be performance managing her regarding this because, well-intentioned though she is, she has been breaching patients’ privacy.

YOUR DAY

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TUESDAY

You overhear the receptionist saying it would be a good idea to have note paper below the H&DC poster so that patients can easily write down the number, commenting that May Lingerer was in a foul mood after seeing Dr Lately, and asked for pen and paper to write down the 0800 number of the H&DC's office.

WHAT SHOULD YOU DO?

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THE COMPLAINT

On Friday 9 July I was kept waiting one hour to see Dr Lately. He did not even apologise. While I was waiting to see him, Beatrice the receptionist announced to everybody in the waiting room that I had bowel cancer and should not be kept waiting. I consider this to be a breach of my privacy and it was a distressing way to find out that I had cancer.

I repeatedly saw Dr Lately because I was tired, and my bowels were playing up but he never took my symptoms seriously. He always fobbed me off and criticised my thereapist

I understand that this cancer is fast and that it should have been picked up earlier. Now there is every chance that my children are going to be orphaned. I can't even get in for a colonoscopy for another two months. This is not good enough. The medical profession has failed me.

May Lingerer

ISSUES

ISSUES

1. Breach of privacy.
2. Right 4: Whether more proactive steps should have been taken.
3. Right 4: Failure to exercise reasonable skill and care
4. How will you deal with the complaint?
5. What might solve it?
6. Is this covered by you indemnifier?

CASE 05 HDC 00814
OPINION: BREACH – THE MEDICAL CLINIC

…*Vicarious Liability*

- **Employers are responsible under section 72(2) of the Health and Disability Commissioner Act 1994 for ensuring that employees comply with the Code. Under section 72(5) it is a defense for an employing authority to prove that it took such steps as were reasonably practicable to prevent the employee's act or omission that breached the Code.**

- **The medical clinic advertises that it is able to provide "care of acute and chronic conditions such as … heart conditions". Staff who provide clinical care at the Clinic should have available to them a chest pain management protocol, to guide them in the provision of services.**

….While the medical clinic are not responsible for Dr C's individual choices regarding Ms A's management, it was the Clinic's responsibility as his employer to ensure that appropriate systems and policies were in place and accessible to all its staff.

…. I believe that having collegial support and appropriate oversight are insufficient…

…In my opinion, the absence of such as policy makes the medical clinic vicariously liability for Dr C's beach of the code.

CASE 03 HDC 03134
OPINION: BREACH – THE ACCIDENT AND MEDICAL CENTRE

…*Vicarious Liability*

- ….The Medical Centre was required to ensure that all its clinical staff (whether employees or contractors) were practicing competently, and familiar with relevant protocols and guidelines. The Centre informed me that "it did not occur to us to take steps to satisfy ourselves" that Dr B was competent, and that "this is the job of the regulatory authorities". I reject this submission for the following reasons.

- **The Royal New Zealand College of General Practitioners publication ‘Aiming for Excellence’ (2002) provides guidelines to medical practices and states that performance reviews should be carried out on an annual basis for all practice team members. The information from these reviews should be used to address individual and practice training needs. In addition, all practice team members should participate in continuing professional development, which should be planned and documented, and should include structured peer review.**

- **Although not specified in the College’s indicators in relation to patient information, regular audit of medical records should also be undertaken….**

RIGHT 4

Right 4(5):

“Every consumer has the right to co-operation among providers to ensure quality and continuity of services".

WHERE THE CLASHES OCCUR

- Patient chooses or is advised to seek, treatment you believe has little efficacy/is dangerous. Sometimes at some profit to the person making the recommendation
- Patient put at risk by declining conventional treatment
- Patient receiving care from a number of sources which are not fully integrated

WHAT SHOULD YOU DO?

C CUBED

- Stop the complaints culture.
- Focus on improvement and learning that is not kept secret from patients.

"Criticism may not be agreeable, but it is necessary. It fulfils the same function as pain in the human body. It calls attention to an unhealthy state of things."

Winston Churchill

COMMENTS, CRITICISMS, COMPLAINTS AND CONGRATULATIONS

- We want to hear them all.
- This way, we will learn what we are doing well and what we can do better.
- Most importantly, if we have let you down in any way it gives us a chance to put things right.
- Any comments, criticisms, complaints or congratulations that you wish to make are most welcome and should be passed on to **[insert name]** on **[phone number/e-mail]**.
- For a full copy of our comments process, please ask reception for a handout.

C 4

- Gives you a psychological advantage. It feels underhand to go behind your back with a complaint when your practice has invited its patients so strongly to engage.
- It creates a momentum of agreeability.
- It keeps the power of resolution in your hands not with external lawyer-driven processes.

CHANCE ENCOUNTER WITH MAY'S SISTER

- May Lingerer's sister catches you over the fence (she is a neighbour). She wants to know why May is so uncommunicative and down. She wants to help.
- What should you say?

WHAT SHOULD DR LATELY DO?

- Is there anything you or Dr Lately should do following that encounter?

LETTER FROM H&DC

- Please find enclosed, Ms lingerer's letter which explains her concerns, along with a copy of the brochure *"Code of Health and Disability Services Consumers Rights"*
- Please send your response to this office

DRAFT RESPONSE

Dear Health and Disability Commissioner,

Ms May Lingerer has been a patient of this practice for 15 years.

During that time she has had to cope with her husband leaving her, financial struggles and being constantly fatigued, understandably as a result of working and looking after pre-school children, one of whom has Asperger's Syndrome. Fatigue is a common symptom which does not necessarily mean a patient has cancer. Had she mentioned that her mother's death was due to bowel cancer earlier then I would have had a higher index of suspicion.

A constant frustration in providing care for May is that she prefers to seek advice from her naturopath. If she had let me do my job then there is every chance we would have taken steps earlier.

She was not offered specialist referral because I know she cannot afford it.

It is not certain that she has cancer but test results indicate the need for further investigation.

The receptionist should not have said what she did. She has been given a formal warning. I unreservedly apologise for her conduct.

We try to run to time but are at the mercy of our patients' needs. Waiting lost times are beyond my control.

Yours sincerely

Johnny Lately

Dr J C Lately

ALTERNATIVE RESPONSE

Dear Health and Disability Commissioner

May has been a patient of this practice for 15 years. I have had the privilege of looking after her since she was a teenager, and was devastated to receive her lab results which raised the possibility that she had bowel cancer. However, it is important to stress that this is a possibility only and is not definite, and that even if she is found to have a cancerous tumour there are treatments available. This is a very important message that I want May to have at a time when she is clearly frightened and feeling despair. Therefore I would be most grateful if your office would provide her with a copy of this letter so she can receive this information direct and early from me.

As part of replying to this complaint, I have carefully reviewed the notes and looked at all the things we could have done better. May has mentioned that her mother died from bowel cancer. This is not recorded in the notes until 18 June. Her mother's bowel cancer is not even recorded in the history part of our notes. I am usually very careful about recording the patient's family history. I respect that May says I was told of this earlier, and cannot explain why this is not in the notes. I sincerely apologise for this.

I note that in the history section of our notes it is not even recorded that her mother has died.

May came to see me primarily because of her asthma on 23 January and for a sore back on 13 March. She contacted the practice for a phone script for asthma medication on 20 March, and again on 18 June. It was on three occasion that May mentioned fatigue when seeing me. This is a common symptom that can be explained by a number of causes. In her case, her pre-school son was disturbing her sleep, she had pain and asthma, all of which she informed me were impacting on her sleep. Because of this reasonable explanation, I was not unduly concerned about her fatigue, but it was something that I considered on each consultation.

May mentioned altered bowel habits, which I was keen to investigate. My notes record for the March consultation: "Some constipation lately but under control. Seeing naturopath. Not wanting to discuss."

My notes also record her comment to me that "I know doctors don't like patients going there.

When I saw May in June, my notes again record “Doesn’t want to discuss naturopath.” It was at this consultation that I have recorded for the first time a reference to her mother having bowel cancer. This immediately prompted me to arrange blood and faecal occult tests.

With the benefit of hindsight, I wish that I had been more proactive in trying to persuade May to let me carry out conventional tests earlier, or at least write to her naturopath to see whether together we could persuade May to have further tests carried out in conjunction with the complementary medicine she wished to engage in, which is of course her right.

The blood tests came back and showed anaemia which is a symptom that requires further investigation and could mean that May has cancer. This is not definite, but a possibility. I was concerned to receive those results, and asked reception to arrange for her to see me as soon as possible.

Because of the care and concern that I felt for May, I was keen that she was not kept waiting when she came to see me and that she was given priority to come in.

I am very sorry that May had such a long wait in our reception area. That Friday was an extraordinary day as the result of a car accident occurring right outside the surgery. A number of the doctors in our practice attended. As a result, all of us were running behind time.

I have spoken with our receptionist. She says that she learned of the possibility that May might have bowel cancer from overhearing a conversation between May and someone else in the waiting room. She is someone who has known May for many years and is deeply sorry that what she has said added to May's distress. She, like I, would welcome the opportunity to be able to meet with May and talk through these issues and offer her support. Both of us admire May and all that she manages to do, being the sole provider for her children. We want to be able to help her in any way possible.

I have run the specialist again to see if is any possible way that May can be seen earlier for a colonoscopy. The surgeon is doing all he can. I am hopeful that May will not have to wait the full two months to be assessed.

I and the others at the practice value the professional relationship we have had with May for a long time. If there is any way we can help May during these difficult times, we would very much like to be able to do so.

Yours sincerely

Johnny Lately

Dr J C Lately

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STATEMENT FROM PRACTICE NURSE:

On 9 July I was in the office by the receptionist, preparing some mail. I overheard our receptionist, Beatrice, dealing with an angry man. He came up and complained about how long he had been kept waiting. I am pretty certain that what Beatrice said was:

"The doctors are doing their best. At least you haven't been kept waiting as long as May with all her worries of cancer."

Beatrice's indiscretion has been a constant source of concern. I didn't do anything at the time. This seemed typical of her lack of judgment.

Florence N T Gale

Practice Nurse

THE POLICY OF *MEDICUS*

1. Call *Medicus* early.
2. Talking through the issues and strategies can often be that stitch in time that saves nine.
3. Even if not a member of *Medicus*, you can access their advice line.

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R V HUGEL

- Date: 20 October 1998, High Court – Rotorua Judge: Paterson J File no: T99/97

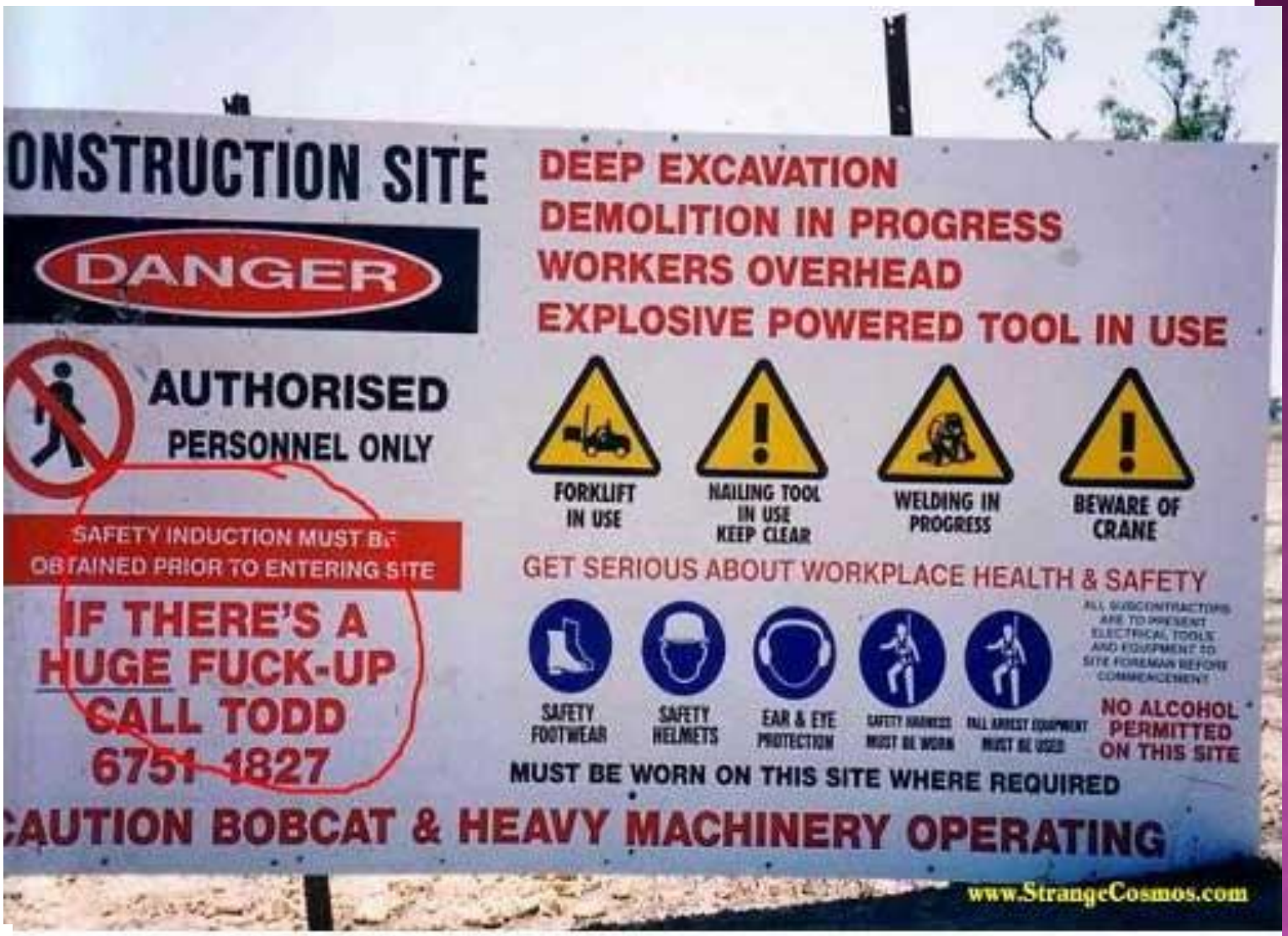
- Successful application for costs under Costs in Criminal Cases Act 1967; H anaesthetist acquitted of manslaughter for failing to discover anaesthetic circuit blocked; 13 year old boy died after knee surgery; H sought order that fixed costs be paid by Chief Executive of Department for Courts and/or police;
- Held, Crown's approach overly simplistic in complex, difficult case; no consideration by prosecution that problems with patient may have caused death; no evidence of prosecution acting other than in good faith; noted that two Crown witnesses had supplied affidavits in support of H's application; costs in excess of scale ordered; of $285,000 incurred, $80,000 to be awarded

PG here it comes

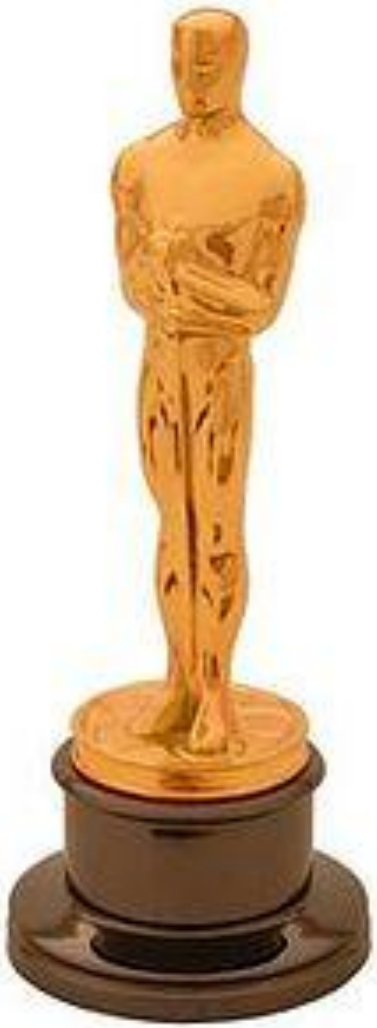
GIVE WARNING TO BEATRICE FOR BREACH OF PATIENT'S PRIVACY

"A lie gets halfway around the world before the truth has a chance to get its pants on."

Winston Churchill



Only in Australia



- This means that for patients receiving orthodox and non-orthodox health care, co-operation is a two-way street. My GP should not make it difficult for me to see a chiropractor or an osteopath for my lower back pain. Equally, my naturopath should not prevent me from seeing my GP to obtain a prescription medicine. Indeed, the duty of co-operation between providers many entail a level of co-ordination of care, so that my GP can be assured that my homeopathic potion will not counteract my prescription medicine, and vice versa.
- **Medicine for today - Professional Responsibility and Complementary Medicine**
- **Presentation to Otago University , Dunedin**
  1 June 2000
- **Ron Paterson**
  Health and Disability Commissioner

COMMUNICATION - RELATIONSHIP

- Superficial.
- Lawyers like it because it provides fodder for cross-examination
- Our knowledge has moved on from this.

- It is the whole depth and richness of the health practitioner/ patient encounter that protects against or enhances the likelihood of complaint.

CONSUMERS' RIGHTS

Rights of Consumers and Duties of Providers:

Right 1 - Right to be treated with respect.
Right 2 - Right to Freedom from Discrimination, Coercion, Harassment, and Exploitation.
Right 3 - Right to Dignity and Independence.
Right 4 - Right to Services of an Appropriate Standard.
Right 5 - Right to Effective Communication.
Right 6 - Right to be Fully Informed.
Right 7 - Right to Make an Informed Choice and Give Informed Consent.
Right 8 - Right to Support.
Right 9 - Rights in Respect of Teaching or Research.
Right 10 - Right to Complain.

RIGHT 10: RIGHT TO COMPLAIN

(1) Every consumer has the right to complain about a provider in any form appropriate to the consumer.

(3) Every provider must facilitate the fair, simple, speedy, and efficient resolution of complaints.

(4) Every provider must inform a consumer about progress on the consumer's complaint at intervals of not more than 1 month.

(6) Every provider, unless an employee of a provider, must have a complaints procedure that ensures that—

(a) The complaint is acknowledged in writing within 5 working days of receipt, unless it has been resolved to the satisfaction of the consumer within that period; and

(b) The consumer is informed of any relevant internal and external complaints procedures

(7) Within 10 working days of giving written acknowledgement of a complaint, the provider must,—

(a) Decide whether the provider—

(i) Accepts that the complaint is justified; or

(ii) Does not accept that the complaint is justified; or

(b) If it decides that more time is needed to investigate the complaint,—

(i) Determine how much additional time is needed; and

(ii) If that additional time is more than 20 working days, inform the consumer of that determination and of the reasons for it.

(8) As soon as practicable after a provider decides whether or not it accepts that a complaint is justified, the provider must inform the consumer of—

(a) The reasons for the decision; and

(b) Any actions the provider proposes to take; and

(c) Any appeal procedure the provider has in place.