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Medicolegal Update-Lessons from HRRT and HDPT - Concurrent Workshop Repeated

Saturday, 30 July 2011	Start 2:00pm	Duration: 55mins	Lounge Room
	Start 3:05pm	Duration: 55mins	Lounge Room

South GP CME 2011

MPS Presentation

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

Dr Tim Cookson

Hasty Decisions

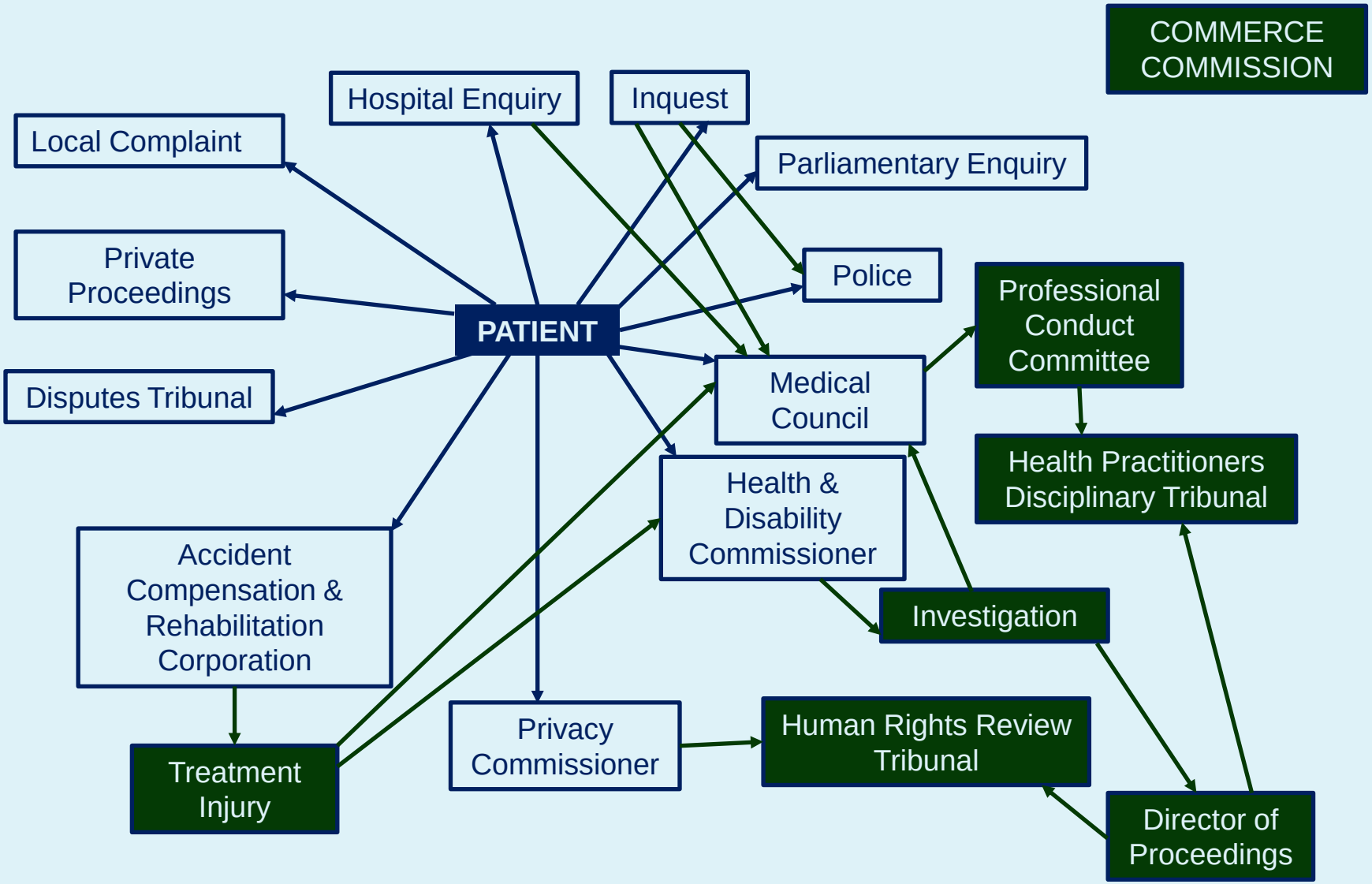
Significant Problem


FFH733
DISCOVERY 4
TDV6

Expert Advisers

Additional Assistance

Safe Outcome

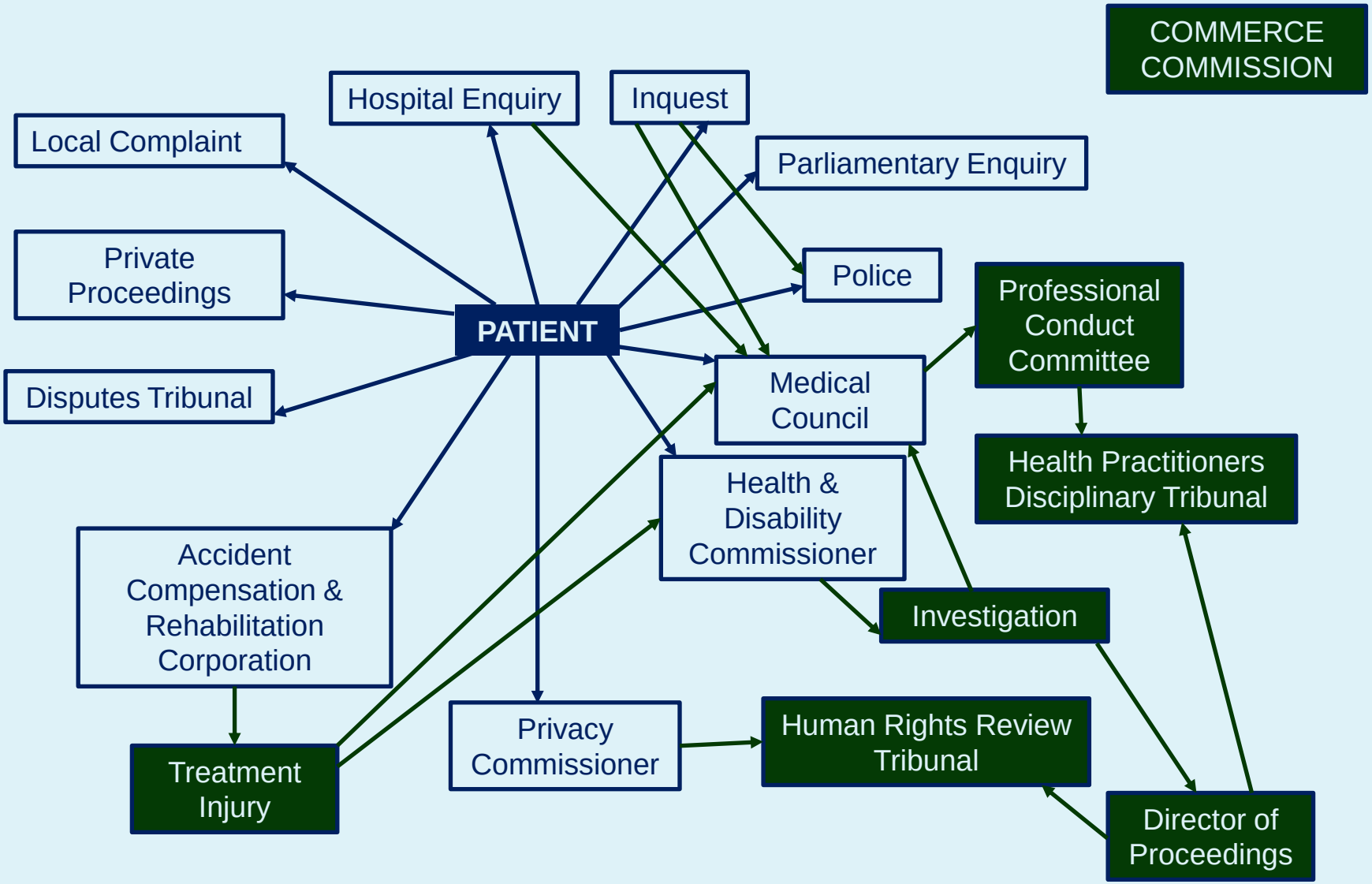

COMMERCE COMMISSION
Hospital Enquiry
Inquest
Local Complaint
Parliamentary Enquiry
Private Proceedings
Police
PATIENT
Professional Conduct Committee
Disputes Tribunal
Medical Council
Health Practitioners Disciplinary Tribunal
Health & Disability Commissioner
Accident Compensation & Rehabilitation Corporation
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

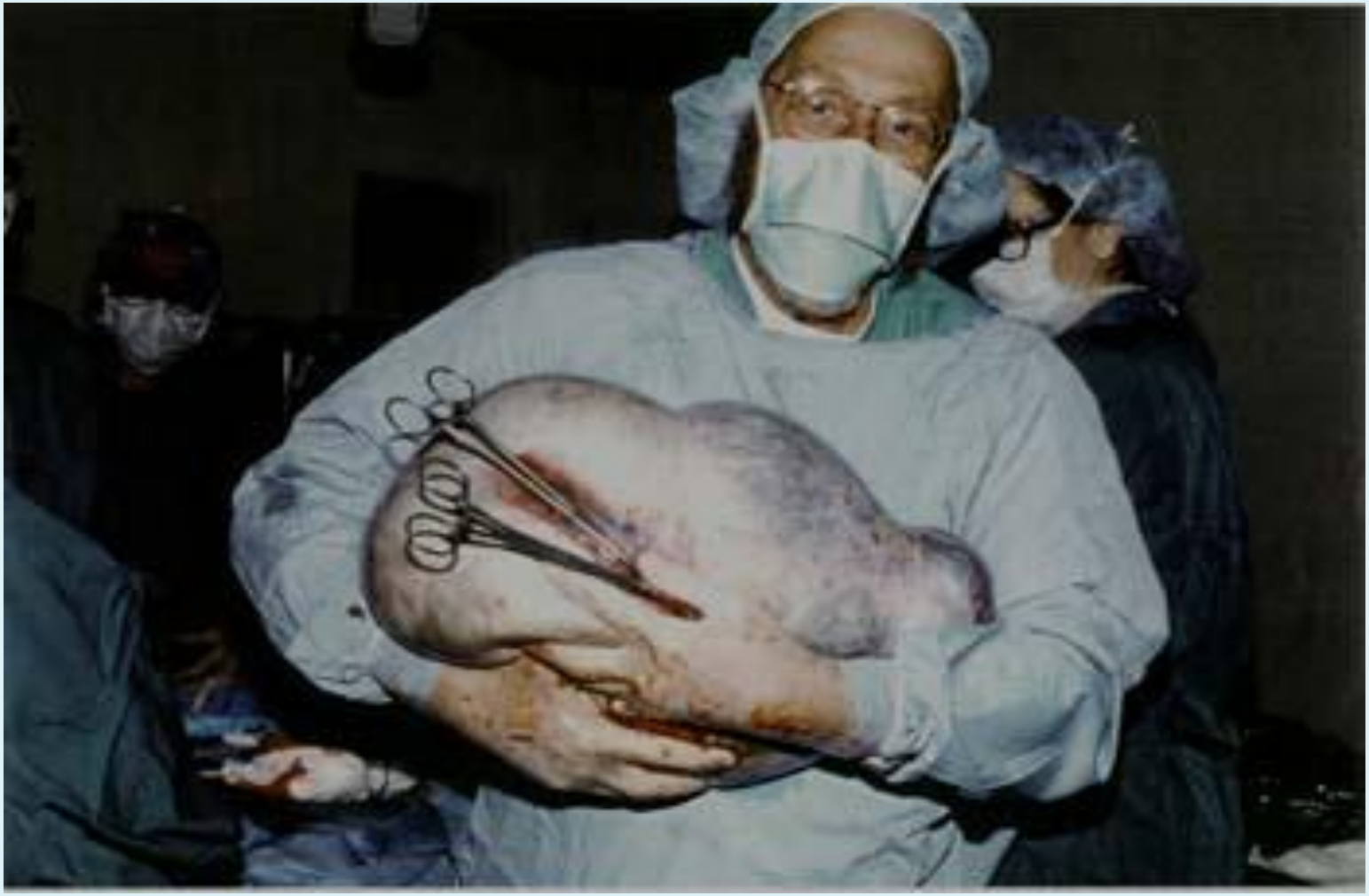
- 1 – solo GP, longstanding female patient, series of presentations over 4/12 for abdominal discomfort, bloating & complaints of being fat.
- Clinical notes in earlier years had been good, over the final year were brief/inadequate.
- Charges of inadequate notes/consultation/history taking & ordering 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.

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, claims has had further problems as result of the 2nd operation & 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

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.

Common themes in the HRRT-families

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

- Plaintiff 25 years of age, history of mental health problems.
- 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 – attended appointments with him up to age 19
- The patient had developed a series of difficulties with depression but declined referrals to a psychiatrist
- Doctor was also the family doctor

Families

- On 31 January 2003 the patient's mother went to see the doctor in considerable distress regarding his mental health.
- The patient subsequently alleged the doctor had disclosed

  (i) his anxiety condition

  (ii) that she had given him a prescription

  (iii) that he had not attended a psychiatric appointment

And that this had caused him significant harm (Rule 11)

- Doctor denied disclosing (i) & (ii) and stated she had no memory of (iii).
- Mother already knew patient had anxiety condition.
- Mother declined to give evidence to HRRT

Common provisions discussed by HRRT

Limits on disclosure of health information HIPC Rule 11

A health agency that holds health information must not disclose the information unless the agency believes on reasonable grounds that … compliance with the rule is not necessary if the health agency believes on reasonable grounds that it is either not desirable or not practicable to obtain authorisation from the individual concerned ….

(d) the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to –

(ii) the life or health of the individual concerned or another individual

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 it 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 but no penalty – doctor had taken steps to ensure all patients aware of this entitlement.
- No other breach found.

Still on families

Director of HRRT v QD – Principle 6

- Practice treated the complainant, husband A and two children. Parents in the midst of acrimonious separation and custody hearing
- Husband A gave information about the complainant to the doctor after getting a promise of confidentiality from the doctor.
- Complainant found out as she was shown her computer records by a staff member 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.

- Found in breach, significant harm caused, fine $7,500, subsequently reduced on appeal to the High Court.

And not on families....

- Dr Henderson was the complaints officer of an after hours centre and accepted patient information in this capacity.
- He received information that a patient at the afterhours had exhibited drug seeking behaviour.

- He was aware this patient worked at a rest home & had access to patient medication.
- 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.

(vi) There was a delay of 3 ½ days before informing rest home.

The Privacy Commissioner's View

What does ‘imminent’ mean?

- There was some discussion about what the word ‘imminent’ should be taken to mean in this context.
- The word here conveys a sense of something which is about to happen; that which is threatened or impending; something that is near at hand.
- We think it would go too far to say that the word requires proof of that which is critically urgent, or is in the nature of an immediate emergency.
- Nor is it necessary to show that the event that is said to be ‘imminent’ will inevitably occur at some point.
- At the same time, we doubt that an event that is no more than a remote possibility could properly be described as being ‘imminent’.

The Finding ... and the time

- The HRRT found (by a 2 to 1 majority) that it was satisfied that Dr Henderson had reasonable grounds to believe that the complainant represented a serious and imminent threat to the safety of patients at the nursing home.
- The HRRT found that the senior nurse at the rest home was an appropriate person to inform.
- The complaint was dismissed.
- The proceedings went for over 8 years involving the Privacy Commissioner and the Ombudsman.

The Messages

- Privacy issues are complex
- If in doubt about either keeping or releasing information contact MPS.
- Cases can drag on for a long time.
- MPS has a proven record of being there for the long-haul.

Help is at hand

Only in Australia

Or even better -