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Chronic pain to fuel complaints

Patients need information about risks of pain

By David Leggatt, Partner, and Kristy Cappellotto, Solicitor, DLA Phillips Fox

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Pain. It's the new black. At least in the world of general damages. In Australia, patients can sue their doctors or other healthcare professionals for damages if they have suffered an injury due to negligence.

If a court establishes negligence, the patient will usually recover all out-of-pocket expenses due to the injury, including reimbursement for past treatment, provision for future treatment and a sum for lost income.

If patients have suffered a significant injury, they are also entitled to general damages, which can be substantial. General damages are for pain and suffering. A claim for general damages makes a civil claim worthwhile, for both the patient and the patient's no-win no-fee lawyer.

A significant injury is determined by both medicine and the law.[1,2] Thresholds must be met for an injury to be significant. In Australia, a physical injury must result in an impairment greater than 5% of the whole person. A psychiatric injury must be above 10%. The psychiatric injury cannot be secondary to a physical injury. An impairment must be permanent. The thresholds apply only to a patient's right to pain-and-suffering damages, not to their right to sue.

Reduced as they may be, civil claims against doctors for damages are not extinct. And now include pain.

Duty of care, negligence and causing injury

A healthcare professional has to decide which information should be given to a patient about the proposed treatment and its risks. A risk is material if:

- a reasonable person in the patient's position, when warned of the risk, would be likely to attach significance to it, or
- the healthcare professional is or should be aware that the patient, if warned of the risk, would be likely to attach significance to it.

High risks and common risks are material risks. However, a risk's rate of incidence is not the only factor to consider. Its severity also is important. In other words, a doctor's duty is to assist the patient to make a fully informed decision with respect to proposed treatment. This is accomplished through a "process of communication". Failure to warn of a material risk, or inadequately warning of a material risk, is negligent.

Additionally, the advice or warning to the patient should be recorded in the patient notes.

The next question is whether a doctor's negligence has caused an injury. In failure-to-warn cases, the answer depends on whether the patient, if adequately warned of the material risk, would have proceeded with the treatment. This becomes largely a question of fact, where the guide of the law stops and human account takes over.

Patients who have had a life-changing, whole-body impairing, legally defined, significant injury are likely to say that they would never have agreed to the treatment had they been warned about the complication they have suffered, irrespective of how rare it was. This is especially true in cases involving pain where diagnosis relies largely on patients' reports of symptoms.

Pain

Most failure-to-warn cases arise when performance of the treatment itself is not negligent. In the case of dentists and surgeons, inexplicable postoperative pain has the potential to fit into that category. Pain can be a rare consequence of nerve injury. However, the catch is its gravity and potential for mismanagement, rather than its rate of incidence, especially if treatment has been recommended to resolve pain. The prospect of ongoing or worsening pain is a material risk. Therefore, if pain is omitted from the range of risks set out by the doctor, it is likely that a finding of negligence will follow.

If the patient says he would not have agreed to the treatment if the warning of ongoing pain been given, and if ongoing pain exceeds the legal threshold, then a claim for general damages is born. The case of Mr Hookey and Mrs Paterno illustrates the point.

The case of Hookey v Paterno

In 1997, Mrs Paterno, 47, was referred to Mr Hookey, an oral and maxillofacial surgeon, for advice and treatment to correct her unusual malocclusion.

Mrs Paterno had complained to her dentist of difficulty in chewing, sinus/dental pain, and cracks and redness on the corners of her lips that did not resolve. Concluding that Mrs Paterno's condition was worsening, her dentist referred her to an orthodontist. The orthodontist reported that Mrs Paterno would best be treated by orthodontic treatment and surgery, and she was referred to Mr Hookey.

Mr Hookey proposed a five-stage treatment plan, which included:

1. Surgically assisted maxillary expansion
2. Fixed orthodontic therapy
3. Mandibular advancement surgery
4. Post-surgical orthodontics and retention phase therapy, and
5. Full prosthetic work-up with implant placement.

Treatment was estimated to take 18 months to two years to complete. The maxillary expansion surgery was carried out by Mr Hookey in 1997, and the patient recovered well. Orthodontic treatment commenced without issue.

One year later, Mr Hookey performed the mandibular advancement, which was performed competently. Upon waking from that surgery, Mrs Paterno said (in her evidence) that she had unremitting burning pain in the lower right side of her jaw and had continued to have it.

Mrs Paterno had further surgery to resolve the pain, and eventually, non-union of the mandible was diagnosed; that is, the lower jaw had not healed. Further treatment resolved the non-union but did not resolve the pain. As a result of the onset of pain in 1998, Mrs Paterno's pain had been managed with morphine, which created consequences for her gastrointestinal system.

Proceedings

Mrs Paterno issued proceedings against Mr Hookey in the County Court of Victoria in 2003. These were issued before the introduction of the thresholds for general damages, but there is no doubt that Mrs Paterno would have exceeded the 5% impairment threshold.

Mrs Paterno claimed that Mr Hookey's treatment plan was inappropriate and that he had failed to warn her of the "high" risks of non-union of bone and of nerve damage.

In 2007, after 18 sitting days in Court and almost 10 years after the surgery, Her Honour Judge Cohen found that the treatment plan was inappropriate and that Mr Hookey had failed to adequately warn Mrs Paterno of the risk of permanent nerve damage (but not non-union since it could not be established as a high risk, as pleaded by Mrs Paterno).

Mrs Paterno was awarded a total of $1,057,833 plus interest. $350,000 was awarded for general damages, and the remainder was related to past and future dental treatment, surgery and pain treatment.

The appeal

The decision was appealed. The trial judge's conclusion about the appropriateness of the treatment plan was overturned by the Court of Appeal. Expert evidence in favour of the treatment plan was overwhelming. On the question of warning about permanent nerve damage, the trial judge's decision was upheld.

Observations

Even though it was not conclusive that Mrs Paterno's pain was caused by surgical injury to a nerve, the Court of Appeal agreed with the trial judge that the warning given by Mr Hookey about permanent nerve injury was inadequate. The strongest link established between the pain and the nerve damage was that nerves can behave unexpectedly, including by causing chronic pain. It is on that link that Mrs Paterno's case succeeded.

With regard to "failure to warn", Mr Hookey did in fact warn Mrs Paterno about permanent nerve damage. He likened it to pins and needles in one's foot in the long term. The issue for the judges was that his warning:

- did not include the possibility of ongoing pain
- significantly underrated the significance of the long-term effects of nerve damage, even if they were more likely to be altered sensation rather than chronic pain.

Mrs Paterno's evidence was that she would not have agreed to the treatment if she had known of the rare outcome of nerve-related pain. Consequently, judgment was in her favour.

The message

The specific message for dentists and oral and maxillofacial surgeons is that information for patients about jaw surgery, including third molar surgery, must include reference to the possibility that damaged nerves can behave unexpectedly and cause pain, even though that outcome is rare.

For doctors and surgeons in general, regarding patient information about risks, they must consider the incidence of a risk as well as its gravity, when considering whether it is material or not.

Keep warnings simple but comprehensive, and within the context of the benefits of the treatment.

While a warning (such as unremitting pain from nerve injury) may cause a patient to walk away from the treatment, that is a risk a doctor should take.

References
1.Guides to the Evaluation of Permanent Impairment, Sixth Edition, ISBN: 978-1-57947-888-9 , American Medical Association, AMABookstore.com, Item#: OP025407
2. Since 1 October 2003, in Victoria, the legal process of assessment has been governed by Part VBA, Division 2 of the Wrongs Act 1958.

What the Justices said

As a guiding light from the Court of Appeal, Justices Nettle and Redlich set it out as follows:

"In this case, the risk of permanent nerve damage needed to be given. In order to convey to the lay patient the gravity of the possible consequences of that risk, it was necessary to outline them in sufficient detail and simplicity to be comprehensible. That does not mean that the appellant was bound to itemise every possible symptom, no matter how remote the chance of occurrence. But it does mean that he had to take care not to mislead the respondent as to the scope of the possible consequences. And, plainly, to refer to numbness or similar sensation without mentioning the possibility of other neurological consequence was likely to mislead. Such is the natural aversion to pain of most human beings that a patient could well take a different view of the risk of nerve damage according to whether it carried with it even an outside chance of causing permanent pain. Consequently, like the judge we consider that the appellant was bound to warn the respondent that, although numbness or similar sensation was the most likely consequence of permanent nerve damage, it was not the only possible consequence of it; there was also an outside chance or, if you like, rare possibility, of it resulting in continuing pain."

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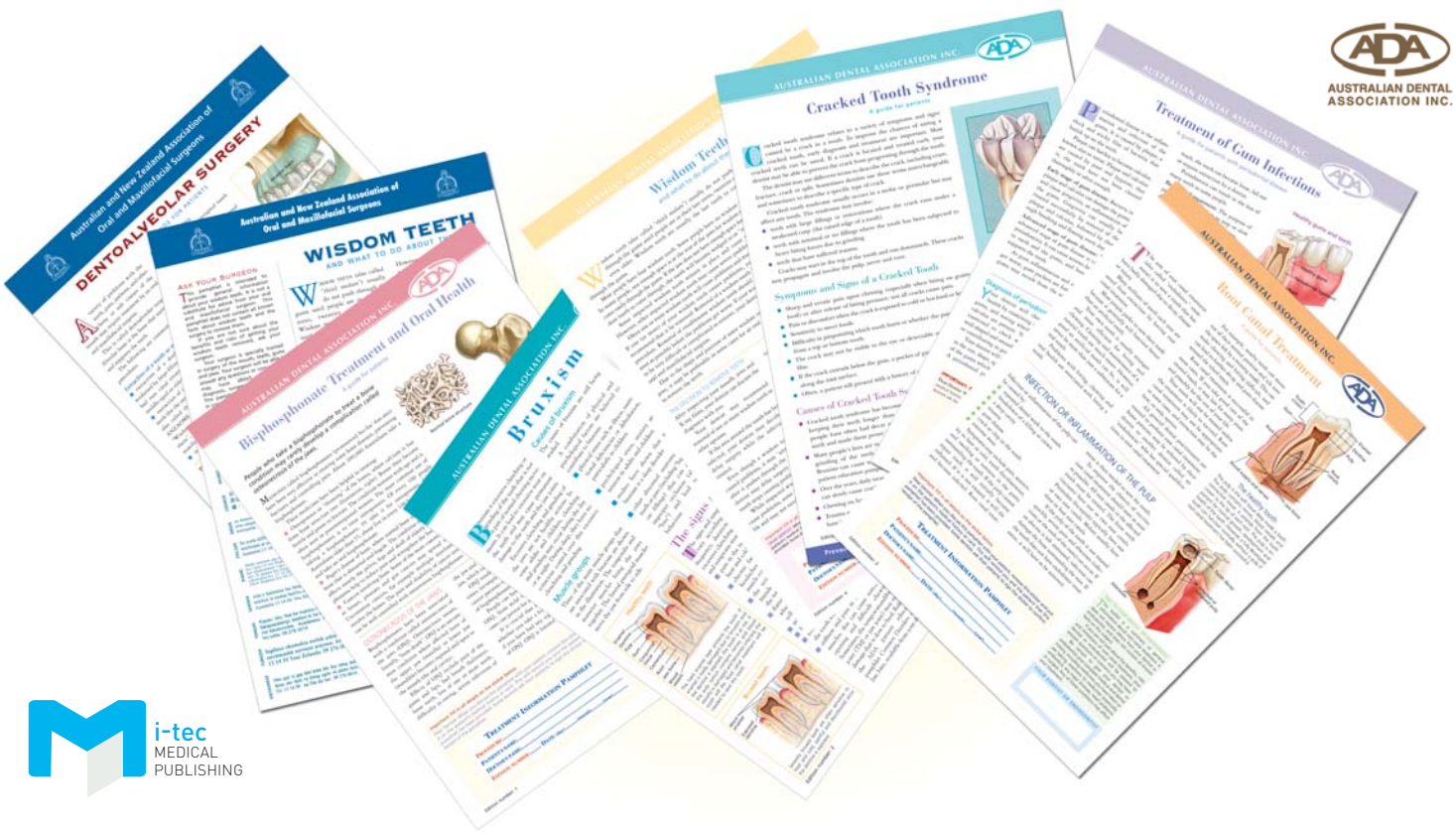

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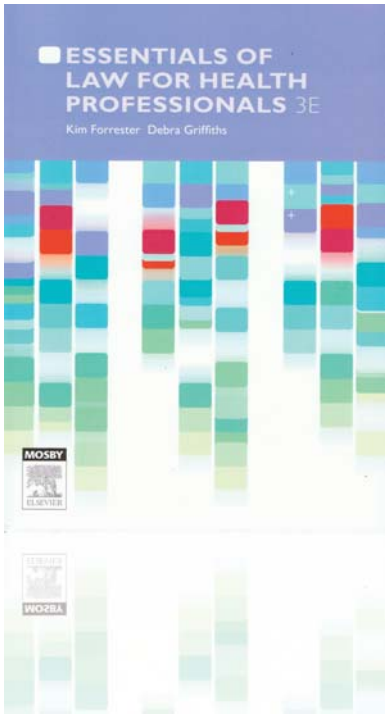

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- Discussion on the implications of evidence-based practice on the standard notionally attributed to the duty of care.

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