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Practical and Defensive Medicine

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to Consumer, Regulator and Practitioner Expectations'

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"Conventional medicine says take aspirin. In the absence
of tort reform, defensive medicine says MRI and Cat Scan."

Starting Point



Duty to exercise reasonable care and skill in the provision of professional medical advice and treatment.

Rogers v Whitaker (1992) 175 CLR 479 at 483

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Agreed Definitions



Defensive Medicine	Active Clinical Risk Management
<p>1 Clinical decision making motivated primarily by the desire to protect oneself from a medical malpractice suit or disciplinary or professional action.</p> <p><small>De Ville, K. Theoretical Medicine and Bioethics 1998:19:569</small></p>	<p>2 Practice and procedures directed at identification, management and reduction of clinical risk.</p>

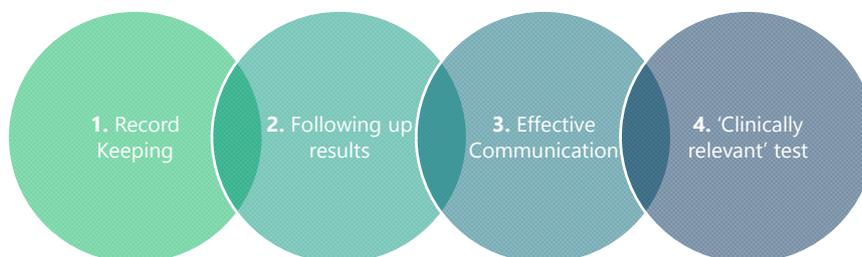
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The Issue



How can medical practitioners fulfil their duty of care to patients and clinically manage medical and legal risks, without falling into the pitfalls of Defensive Medicine, such as over servicing or avoiding complex cases?

The Possibility of 'Positive' Defensive Practices



1. Record Keeping



- The better the note, the better the legal defence
- Obligation to maintain **accurate and up to date medical records**: *National Law Act 2009, s 39; Good Medical Practice: A Code of Conduct for Doctors in Australia, clause 8.4*
- Records must contain:
 - up to date patient contact details
 - relevant details of clinical history
 - clinical findings
 - investigations
 - information given to patients
 - medication
 - other management issues

1. Record Keeping



- Record all discussions with a patient including unsuccessful attempts to contact the patient: *Kite Malycha* (1998) 71 SASR 321
- Practitioners must ensure that their records are sufficiently detailed to facilitate continuity of patient care: *Idameneo (No 123) Pty Ltd v Gross and Another* [2012] NSWMA 423

1. Record Keeping



Case Study

Idameneo (No 123) Pty Ltd v Gross and Another [2012] NSWMA 423

- Three doctors carried on practice as general practitioners in a large medical practice in Eastern Sydney in 2004
- Between March and April 2004 a patient consulted the various doctors in relation to testing for HIV
- Due partly to poor record keeping the patient was not informed that the tests for HIV were unresolved and had unprotected sexual intercourse with the plaintiff, resulting in transmission of the disease

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1. Record Keeping



Case Study – Continued

Idameneo (No 123) Pty Ltd v Gross and Another [2012] NSWMA 423

- The patient's partner sued the treating doctors and the medical practice for negligence
- Settlement of the proceedings between the plaintiff and Drs Gross and Johnson was reached in July 2009
- Drs Gross and Johnson filed a cross-claim against Idameneo on the basis that the employees of the company were negligent in failing to maintain proper records, namely the current address of the patient

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2. Patient Follow-up



- Doctors also have a duty to ensure that there are practice systems which ensure that they follow up on investigations, referrals and procedures: *Tai v Hatzistavrou* [1999] NSWCA 306 and *Kite Malycha* (1998) 71 SASR 321; *Rogers v Whitaker* (1992) 175 CLR 479 at 483

2. Patient Follow-up



Case study

***Tai v Hatzistavrou* [1999] NSWCA 306**

- Doctor ordered a number of tests through a local hospital to exclude cancer in the patient
- There were delays at the hospital in arranging and completing the tests
- Neither the doctor nor the patient followed up the tests
- The tests were not done
- It was later found that the patient did have cancer

2. Patient Follow-up



Case study – Continued

***Tai v Hatzistavrou* [1999] NSWCA 306**

- The doctor raised the defence that in circumstances where the patient had not followed up the tests, he assumed that the patient had decided not to pursue the tests and was exercising her autonomy
- The Court was highly critical of the doctor for failing to follow up the hospital and the patient to ensure the tests were completed
- Doctor/patient relationship continues until treatment is no longer required, or the relationship is properly terminated

2. Patient Follow-up



Case Study

***Kite Malycha* (1998) 71 SASR 321**

- Doctor failed to follow up a patient's biopsy results
- The doctor said that he never received the results
- Court was critical of the doctor's failure to implement a system to alert him to the need to follow up the results with the pathology provider
- Drs should keep notes detailing their attempts to contact and follow up patients

3. Communication



- Effective communication with a patient will inevitably reduce the risk of a subsequent claim or complaint
- Also required the *Good Medical Practice: A Code of Conduct for Doctors in Australia*, clause 3.3



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3. Communication



- *Good Medical Practice: A Code of Conduct for Doctors in Australia*, clause 3.3: Good 'communication' involves:
 - Listening
 - Seeking information
 - Providing information
 - Discussing options, including potential benefit and harm
 - Confirming instructions
 - Responding to questions
 - Keeping patients updated
 - Meet any specific language / cross-cultural requirements

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4. 'Clinically Relevant'



- "Inappropriate practice" in relation to a medical practitioner is defined under the *Health Insurance Act 1973 (the Act)* as "conduct in connection with rendering or initiating services that would be unacceptable to the general body of members of that profession"
- May also amount to Unsatisfactory Conduct or Professional Misconduct under the *Health Practitioner Regulation National Law*
- **Example:** 'Screening' all patients for iron deficiency regardless of their risk factors

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Take Away



- Make excellent and thorough patient notes
- Ensure system in place to remind you to follow up pathology and test results
- Ensure your practice maintains up to date patient contact details
- Always advise patients of problematic test results
- Practice evidence based medicine and only order tests or write scripts that are clinically relevant

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Questions?

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