

# Criminal Prosecution of Medical Practitioners

**BILL MADDEN**

NATIONAL PRACTICE GROUP LEADER, MEDICAL LAW  
SLATER & GORDON LIMITED

## Measurement

*R v William Valentine* [1843] TASSupC 2 well known

Recent article listings vary

- Hard to get complete data?

What is the pattern of cases  
where prosecutions are brought?

**Bailey & Gill** 1977/1992: Chelmsford matters, manslaughter, suicide / stay.

**Pearce** 2000: Manslaughter, convicted.

**Reimers** 2001: Manslaughter, acquitted.

**Ward** 2007: Manslaughter, abandoned.

**Gow** 2006: Manslaughter, guilty plea.

**Sood** 2006: Manslaughter (abortion), acquitted.

**Pegios** 2008: Manslaughter, acquitted.

**Peters** 2013: Negligent serious injury, plea.

**Patel**, rehearing re scope of evidence.

**Reeves**, special leave application re consent direction.

**Istephan**, 2013: Consent re dental treatment.

## The line between conduct & crime?

---

***Health Care Complaints Commission v Dr Tat Kong Joseph Tiong*** [2012] NSWMT 6

Informed consent issues

The practitioner inappropriately and / or improperly suggested breast uplift surgery in circumstances where

- no inquiry or request had ever been made by the patient for such a procedure;
- the procedure was not indicated;
- the patient's breasts had not been examined by the practitioner prior to the suggestion being made;
- the practitioner telephoned the patient at home suggesting and recommending the procedure; and
- the patient was informed that the procedure would be at no additional expense to the patient.

## The line between conduct & crime?

---

***Dean v Phung*** [2012] NSWCA 223 - Ostensible consent issues

***HCCC v Phung*** (No. 3) [2012] NSWDT 4 – Supervisory orders 2 years, ‘temporal element’

[54] However, the Tribunal’s jurisdiction is protective of the community not punitive of the practitioner. Accordingly, it must have regard for the maintenance of professional standards to protect the standing and reputation of the profession further to its protection of the community. Its protective jurisdiction is also intended to serve as a deterrent—on the particular practitioner and on the profession generally.

## Fundamentally different? Consent & treatment

### Reeves

Direction to jury - Consent or Informed consent

### Istephan

“Within minutes of meeting his elderly patients for the first time, a Sydney dentist allegedly began grinding down their teeth as part of procedures they had not consented to and, in some cases, did not need, a court has heard.

Andrew Istephan is facing 12 counts of assault occasioning actual bodily harm over major dental work he undertook in 2011 on 12 elderly patients at nursing homes in the inner west ...”

### Issues

Lack of consent, with awareness

Lack of consent, with fraud

Lack of consent, with recklessness

## Fundamentally different? Consent & treatment

### Peters

“On 55 occasions you injected yourself with Fentanyl using the same syringe that was subsequently used to supply Fentanyl to your patients.”

As a medical practitioner and specialist anaesthetist he well knew the risks of transmission by injecting himself with Fentanyl and proceeding to use the syringe for his patients.

- *Peters v The Queen* [2013] VSCA 222

### Issues

“Your conduct fell so greatly short of the standard of care expected of the reasonable anaesthetist and involved such a high risk of serious injury that punishment under the criminal law is merited.” (at [3])

Relevance of awareness?

## All changed, changed utterly...

“Speaking of the public response to the deaths of children at the Bristol Royal Infirmary before 2001, the *BMJ* commented that the NHS would be ‘*all changed, changed utterly*’. Today, two inquiries into the Mid Staffordshire Foundation Trust suggest nothing changed at all.”

- C Newdick & C Danbury, *Culture, compassion & clinical neglect: probity in the NHS after Mid Staffordshire*. Journal of Medical Ethics 2012



## Berwick report, 2013

### BERWICK REPORT

We do not need to recite the details of the tragedy of Mid-Staffordshire in this report. Many people probably died from avoidable causes, and many more suffered unnecessary indignities and harm. The details are catalogued for posterity in Robert Francis's historic report; and the story is now indelibly part of the history of the NHS in England...

....the point now is to move on.

### RECOMMENDATION 10

We believe that **legal sanctions in the very rare cases where individuals or organisations are unequivocally guilty of wilful or reckless neglect or mistreatment of patients would provide deterrence** whilst not impeding a vital open, transparent learning culture. Our **proposals aim to place wilful or reckless neglect or mistreatment of all NHS patients on a par with the offence** that currently applies to vulnerable people under the Mental Capacity Act.

## Berwick recommendations

### Recommendation 10

We support responsive regulation of organisations, with a hierarchy of responses.

Recourse to criminal sanctions should be extremely rare, and should function primarily as a deterrent to wilful or reckless neglect or mistreatment.

...We do not support the punishment of organisational leaders, Boards and chief executives, or others for poor performance that occurs for reasons beyond their control.

We do recommend penalties for leaders who have acted wilfully, recklessly, or with a "couldn't care less" attitude and whose behaviour causes avoidable death or serious harm, or who deliberately withhold information or provide misleading information.

(page 33)

## Systems, corporations & crime



**The Guardian, 29 August 2013**

### Mid Staffs trust to be prosecuted over death of diabetic patient

*Health and Safety Executive to bring criminal proceedings over death of Gillian Astbury, 66, in 2007*

The Mid Staffs NHS foundation trust, castigated for providing appalling care for years to patients, is to be prosecuted over a diabetic patient who died after falling into a diabetic coma – an unprecedented change in criminal accountability in the health service.

When released in February, the Francis report looked in considerable detail at the Astbury case and criticised the HSE for having "to this day an inability ... to decide whether it should prosecute the trust over the deficiencies shown up by the case".

