9 Negligence, professional liability and adverse events

The discomfort the medical profession has with the legal concept of negligence was succinctly expressed by Justice Michael Kirby in 1995 when he wrote:

> Medical practitioners tend to see malpractice cases as involving a moral blight or stigma upon the practitioner concerned. From the point of view of the patient (and most lawyers) however, the issue is usually much more basic. It is whether a person who has suffered in some way as a result of medical or hospital procedures will be cast upon the genteel poverty of the social security system or be entitled to recover compensatory damages from the medical practitioner's insurance [1].

He went on to add:

> To gain insurance the practitioner must pay premiums. These premiums become part of the costs of medical practice. In this way, all patients bear the cost of, and contribute to, the fund from which are paid damages when things go wrong [1].

Many have argued that the current system of the use of civil action by way of claims for negligence should be replaced by a no-fault compensation scheme [2-4], as exists in New Zealand, Sweden, Finland, Norway, Denmark and France [3,5]. Others have pointed out how fraught is reliance on the concept of independent experts judging the cause of a poor or unexpected outcome after the event, decried the gradual change in the notion of what represents negligent conduct, and demonstrated that there is no evidence that such litigation prevents medical injury [6-8]. It has also been demonstrated that the current system of medical negligence claims contributes to unnecessary health-care costs by promoting defensive medical practice [9-11]. More recently, the Australian Productivity Commission, in its report recommending a national disability insurance scheme, flagged the possibility of moving to a no-fault compensation scheme for medical injury [3].

However, these issues are not addressed in this chapter. Instead, the chapter is designed to assist doctors to better understand our current legal system for handling claims for damages and the closely associated system of professional medical indemnity (both of which have been the subject of considerable change in recent years). In addition, the chapter addresses the topics of adverse events, risk management and prevention, and the concept of open disclosure. Receipt of a notice of action for negligence is a very stressful experience for

doctors [12], and the chapter also provides information on sources of support to help handle this stress.

9.1 Causes of action against doctors

The four most usual grounds for legal action that a dissatisfied patient may take against a doctor are:

1. *Negligence*. Negligence actions often arise from matters of diagnosis or subsequent procedures or management. The failure to obtain consent may also result in actions in negligence (see also Chapter 6). Negligence is discussed in more detail below. A failure to sufficiently inform about risks that materialised can be grounds for a claim in negligence.
2. *Trespass.* If a doctor undertakes medical treatment involving touching a patient, without the consent of the patient, the doctor is technically guilty of an assault (or more precisely in legal terms, a battery), for which an action in trespass to the person may be brought. Examples of such actions are not common because of the recognition of the need for consent. Once the patient is informed of the broad nature of what is proposed and on this basis agrees, no action for trespass remains. However, if systemic mistakes occur in the identity, or needs, of a patient so that a procedure is conducted on the wrong patient or at the wrong site, that patient would not have consented to the procedure and so could make such a claim. Developments in law relating to consent now focus on the duty of doctors to inform their patients fully about the nature and risks of any proposed treatment or procedure and to obtain their consent. These are fully discussed in Chapter 6.
3. *Breach of contract.* By itself, this action is uncommon but it is often combined with actions in negligence. The basis of such a claim is that, between a doctor and patient there is a contract, essentially an agreement between two people, supported by a consideration—that is, the exchange of money or something else of value. A breach of contract claim alleges that the defendant has failed to fulfil an obligation that the contract required. Between a patient and a doctor, a claim might be that the doctor failed to provide the treatment at the promised standard.
4. *Breach of fiduciary duty*. This is an unusual cause of action and is a duty claimed to arise from the special relationship which exists between doctor and patient, the word ‘fiduciary’ signifying a relationship of ‘utmost good faith’. In *Breen v Williams*