

The Patel Case – Implications for the Medical Profession

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She came to prominence when she prosecuted a series of highly publicised paedophile and gang rape trials, including Bilal Skaf, Robert 'Dolly' Dunn, Michael Guider, pedophiles Colin Fisk and Phillip Bell, rapist Quoc Vinh To.

Dr Patel was working in a regional area, without supervision, was completely reluctant to seek second opinions or assistance from other people, had an absolutely toxic ego, treated nurses and junior doctors disparagingly, and was madly keen on surgery for everything – even if people didn't need it.

The difficulty in prosecuting doctors criminally

It is really very difficult to prosecute medical practitioners criminally. I guess that that is good news for medical practitioners. It is difficult in Queensland and I dare say it is difficult here in NSW, for reasons I will come to. The criminal law in NSW and Queensland is not geared to the prosecution of doctors. They are always expected to be well-meaning but, of course, they sometimes make mistakes; but mistakes are not, as a rule, crimes. That's the fundamental difficulty.

Of course we know that doctors are subject to civil suits in contractual matters and negligence, but lawyers in criminal cases try, for a lot of good reasons, to keep the court away from those considerations. We try not to have any overlap because of the confusion it causes.

Errors and consequences

Even highly trained, intelligent and generally well-motivated professionals interacting with powerful drugs and complex technologies can make errors. Because life is so fragile, particularly for people at any age in life who find themselves in need of medical assistance, a mistake can be irreversible and catastrophic. Lawyers don't have that problem – not at least since the abolition of capital punishment, so they can't end up killing anyone; and, of course, lawyers as you know, don't make any mistakes. They are in the very comfortable and luxurious position of being able to justify any behaviour whatsoever at the sacrifice a lot of the time, of course, of one's conscience.

We can generally be certain that medical practitioners don't choose to commit errors, even though, as human beings involved in fine judgments in situations where each individual is unique, they will almost all do so. You would probably agree that medical errors are intrinsic to the way doctors work; they can be minimised, but never eliminated. The best thing, for a committed professional, about a mistake is that it won't be repeated, at least not by that person.

While there may be many negligence cases about doctors in civil cases, criminal negligence cases are exceedingly rare. The prosecution of doctors for maliciously inflicting grievous bodily harm, with intent to cause grievous bodily harm, or for manslaughter, are extremely rare. I have come to realise why that is and just how hard it is to prove these issues to the criminal standard – beyond reasonable doubt – a massively high standard.

Dr Patel's troubled background

[Jayant Mukundray Patel was born in 1950 in Gujarat in India.](#) He obtained a Master's degree in surgery at the [MP Shah Medical College at Saurashtra University](#) and moved to the United States after graduation. There he became a surgical intern and resident at the [University of Rochester School of Medicine](#) in New York state.

We don't know too much about him until 1984, when he was disciplined by the New York State Board for Professional Medical Conduct for entering patient histories and physical examinations without

examining them, performing surgery without first examining patients, failing to maintain patient records, harassing a patient for co-operating with the Board's investigation and other sundry matters. [The Board ordered a six-month licence suspension with three years' probation and a fine of \\$5,000.](#)

So Dr Patel applied for a medical licence in the State of Oregon. Oregon received letters of recommendation regarding Dr Patel, some from the chief of surgery at Rochester in New York and one from Buffalo in New York state. Clearly these people were very keen to get rid of him. The same problem would ultimately occur in this country. Dr Patel got superlative reviews in 1989 from New York and so ended up ensconced in a Portland hospital, [Kaiser Permanente Portland.](#)

Between 1989 and 1998 staff noticed that he was a prodigious worker. He liked to perform surgery on absolutely everyone, everyone needed surgery for something; even people who weren't his patients on his days off needed surgery for something; and he was the one who did it. When that was noticed, after a peer review of 79 patient cases handled by him, a consultant investigated the cases. Many operations were found to have been unnecessary and the cause of serious injuries and deaths.

[In September 2000, the Oregon Board disciplined him](#) for gross and repeated acts of negligence and unprofessional conduct; and this was the important thing – [the Board restricted his ability to perform particular operations.](#) In fact, he was restricted from any surgery involving the pancreas, liver, ileo-anal pouch constructions and, in particular, oesophagectomies, one of his favourite operations. He thought it was good for everyone, whether other people thought they needed them or not. He was also restricted to obtaining second opinions before all complicated surgical cases.

The surgical errors noted which had brought about these restrictions were wound dehiscence – when the wounds become gaping apart – and deaths soon after surgery; and significant bleeding intra-operatively, which he always failed to notice and failed to fix. He also had a habit of performing colostomies 'backwards' – I'm not certain of the medical significance of that bad habit.

However, the effect of these serious restrictions was to make him unemployable in the United States. That's when he started seeking a job in Australia, and perhaps in other places, too.

Finding a new job

For about a year or 18 months, 2000–2001, nothing much heard was of Dr Patel because he couldn't work in America and hadn't achieved a new job anywhere else. In 2001, a private recruiting firm in Sydney, which made no checks about his restrictions, stood to gain from his employment. They didn't make any inquiries, when any reasonable inquiry would have revealed that Patel had lied in his application for a position in Australia. Anyone could have, or would have, easily found that out, but this private recruiting firm didn't make any checks and, of course, the dishonesty alone should have meant that he was unsuitable for employment in Australia.

Queensland Health made no checks. The Bundaberg Base Hospital made no checks. Dr Patel started working at the Bundaberg Hospital on April 1, 2002, the day after he arrived in Australia. About that time all his medical licences in America were made inactive.

Dr Patel's application for registration

In his application for the position at Bundaberg Base Hospital, Patel had described himself as a general surgeon with experience in paediatric, vascular and laparoscopic surgery. He said that he had been the staff surgeon at the hospital in Oregon for 12 years, head of the surgery residency program, had held academic positions and had been widely published. He produced more glowing references which said, among other things, that he would be impossible to replace. He falsely answered "no" to all the Medical Board's questions about whether or not he had ever been disciplined or restricted in his practice of medicine. So he was offered the position of senior medical officer in the Department of Surgery at Bundaberg Base under the [Area of Need](#) program which recruits overseas doctors to regional positions. The report of the Davies inquiry was later to observe that it really should be expected that working between different jurisdictions would be more pronounced amongst incompetent doctors and

recommended that applicants should produce Certificates of Good Standing from each jurisdiction in which they had practised. The failure of the hospital and of Queensland Health to make these basic inquiries to check his answer of “no” to everything was later found to be negligent.

The Bundaberg Base Hospital

In any event, there he was – working at the public Bundaberg Base Hospital, 385 kilometres north of Brisbane. Bundaberg is a city of 46,000 people, but the hospital services perhaps double that number. He worked there for a week short of two years, during which he operated on over 1,000 people. Obviously he was a doctor in need of really close supervision but, due to staff shortages, he didn’t even have the opportunity to confer with the second staff surgeon on almost any of these operations. His closest peer was a more junior overseas-trained doctor. He had no involvement at all with the Royal Australasian College of Surgeons and hence was receiving no continuing professional development or training, yet he was conducting major operations of many types in a regional setting.

Complaints

The first complaint about him was received as early as 14 May 2003 about an operation done in his first week or two. The patient had consented to a right epididymectomy, but Patel had done a gastroscopy instead.

The next complaint concerned an oesophagectomy on a very sick man, James Phillips, who was suffering from co-morbidities and his dialysis graft was stenosed. Oesophagectomy, as no doubt many of you will know, is a very complicated, extremely invasive, dangerous operation but, as we have found out, it was one of Dr Patel’s favourites. In Mr Phillips’s case, it was said to be fraught with danger because of his many other illnesses and was very likely to end his life. He was one of many cases who should have been sent to Brisbane immediately to be treated by specialist surgeons, well backed up by all the support resources available there, but Dr Patel never permitted that option with his patients. Mr Phillips died. This was one of the cases which later became the subject of a criminal charge.

The next complaint, again about one of his earliest operations, was that he had excised the wrong part of a cancerous ear, leaving the cancer behind.

The fourth complaint was another oesophagectomy which shouldn’t have been performed. That was on Gerry Kemp, rushed into surgery without any proper planning. The operation caused internal bleeding which Patel failed to notice or fix. He was sewn up and basically allowed to bleed to death, also becoming the subject of a criminal charge.

There were other oesophagectomies, each with disastrous results, although they didn’t become the subject of criminal charges.

Then Patel removed part of the bowel of Mervyn Morris, who had presented with rectal bleeding. Patel misdiagnosed the cause of the bleeding and, without doing the appropriate tests, operated unnecessarily. Post-operative care was non-existent; whatever was left of the bowel was not functioning and Mr Morris died from malnutrition after a long stay in Intensive Care. Once again Dr Patel would not permit him to be moved to Brisbane for emergency treatment. This was later the subject of a criminal charge.

Mr Ian Vowles had a polyp in his bowel. Rather than snare it and test it, as doctors are expected to do, Patel took a biopsy which showed that it was non-malignant; but he then removed the whole of the man’s large bowel – completely unnecessarily. The pathology demonstrated that the bowel was entirely cancer-free. Mr Vowles remains alive without a large part of his insides, having never had cancer at all. A charge of maliciously inflicting grievous bodily harm was later preferred in respect of that operation. Patel took staples out of people’s obviously infected wounds and sent them home where they became very much sicker. Another man arrived, having suffered from a heart attack, and Dr Patel started to do a splenectomy. A junior doctor made a fuss and said, “He doesn’t need it and in any case he too weak for any surgery at all”. Patel screamed at him in front of the patient, the patient’s family, and all the staff,

“That’s the most stupid thing I have ever heard”. The doctor took off and made surreptitious arrangements for the man to be transferred to Brisbane. There it was found that he needed a stent in an artery near his heart but there was nothing wrong with his spleen; he was lucky.

The Renal Unit

Dr Patel started to come undone when he approached the renal unit. He didn’t seem to have anything else to do in his life and continued his habit of turning up on his days off to do operations on other people’s patients. He offered the renal unit his services in placing dialysis catheters. The staff were particularly germ phobic because their patients had lowered immune systems. They noticed that Dr Patel did not wash his hands before procedures and always ignored requests to do so. He would shout in nurses’ faces, “Doctors don’t have germs”.

So not only was he observed not to wash his hands between patients, even after handling dressings and wounds, but on one occasion he went to use a syringe he had just used on patient A on patient B. When one of the nurses physically stopped him, he responded in an aggressive way, saying, “I’m doing you a favour. I’m saving you money in this third world hospital”. Then a nurse in the renal unit realised that a complication had developed in every single patient for whom Patel had placed a catheter.

Another nurse noticed an unusually high level of wound dehiscence, caused by infection or by poor wound closure. There was also a massive spike in the number of anastomotic leaks, when segments of bowel are sewn together. Dr Patel was not much good at that type of surgery either. That nurse made a report to the Director of Medical Services, Dr Darren Keating. The response was that Patel came to her with the report that afternoon and roused on her. He told her that she shouldn’t be gainsaying anything that he did and, of course, he abused her. She didn’t complain again, although later she was to give evidence of her discomfiture. Of course, the difficulty for her and many other nurses in that hospital and in other regional hospitals is that it’s their livelihood – they can’t get offside and make life unpleasant. That type of industrial setting really helped Patel get away with all these dreadful breaches, incompetence, terrible hygiene and this mad, mad keenness on surgery for everything and for everyone – because the nurses were just very reluctant to make waves.

Dr Patel’s behaviour

Patel was abusive of anyone who questioned him. He was habitually rude to everyone, especially to nurses. He was particularly derogatory about nurses. He talked constantly and loudly about himself in grossly self-serving terms and he never sought other opinions. He was professionally isolated. He didn’t even mix socially with other doctors or nurses. He was always at work, but he didn’t have a social life. He used to leave the hospital, leave operations in his theatre gown, go and smoke in the car park, come back straight into the theatre. It was amazing.

He used to countermand the orders of anaesthetists. He was aggressive in his bid to control every patient and every procedure. He wrote false notes of procedures. He was not honest about any problems. All the notes made everyone look as healthy as could be, even though they were near death in so many cases, because he feared that trouble might follow if he wrote anything at all negative in the notes.

A nurse was later to say that they took to hiding patients from him and said to one another, “What on earth are we going to do to stop this man?” His choice of treatment and drugs was 20 years or more behind, all the time.

Of course, to shield himself from any scrutiny, all of the notes, surgical notes and ward notes, were inaccurate, making things look like everything was going well when it wasn’t.

The whistleblower, nurse Toni Hoffman

Finally a brave nurse by the name of Toni Hoffman, the nursing unit manager of the Intensive Care Unit, blew the whistle, told a Queensland MP who tabled her complaint in Parliament in 2005. Already he had been told no more oesophagectomies. That was only in early 2005; and on 24 March 2005, when he realised the writing was on the wall, he resigned from the hospital.

On 13 April 2005, Hedley Thomas, a journalist with the Courier Mail in Queensland, published a lot of complaints and revealed the history in the United States of this doctor which no-one had, until that time, realised.

It was finally out that there was such a high infection and leak rate, there was poor wound closure techniques, injuries to contiguous anatomical structures, wrong organs removed, failing to remove cancers at times of operations, and all of these types of failures in almost everything that he had done. Finally he was linked to up to 87 deaths, but 13 deaths had resulted directly from an unacceptable level of care.

Three judicial inquiries

There were a few problems with judicial inquiries. One (the Inquiry by Anthony Morris *QC*) was shut down because of a perceived bias and then another, by Justice Geoffrey Davies *QC*, took its place. Dr Peter Woodruff *FRACS, FRCSEd, FACS*, a member of the Council of the Royal Australasian College of Surgeons, gave evidence. He said that Patel's performance was incompetent and far worse than what might be expected by chance. Of the 13 deaths clearly linked to Dr Patel, eight had related to procedures which he had been prohibited from doing in the United States. Dr Woodruff made a very interesting speculation, "I wonder whether this is not the missing piece of the mosaic. I wonder if his motivation for doing these quite outlandish operations is not to try to reassert in his own mind that what he has been precluded from in America he is in fact capable of doing and that he is in effect re-credentialing himself, if only in his own mind". That explained why he really wanted to do the operation he was particularly prohibited from doing in America. He wanted to show to himself at least, and perhaps to the world, that the restrictions placed upon him were unjust and that he really was a great expert at oesophagectomies.

Of course, there was a referral to the police. There were a number of effects from these reports, naturally recommendations that there be harsh penalties for falsifying applications, that there be much greater rigour in examining the applications of overseas-trained doctors.

The criminal prosecution

Then we come, of course, to the criminal prosecution. It wasn't straightforward and it is not over, but luckily, as I am not the prosecutor of Dr Patel, I can talk about it as freely as I like.

The Queensland prosecution was done by Ross Martin, a person I became friendly with when I prosecuted the Chief Magistrate, Di Fingleton. (That was a disaster too. Lawyers are another category of people you can't stick a prosecution on, but anyway we are here about Dr Patel.)

Ross Martin gave me some information about what went on during the prosecution of Dr Patel. Of course, Queensland has a completely different legal system from NSW. They have a code, a Criminal Code of Law, which is meant to be the whole codification, everything there is in the code under which criminal prosecutions take place and there is no Common Law behind it. It is meant to replace the Common Law. Originally, there were three matters: manslaughter, the cases that I have mentioned (Mr Morris, Mr Phillips and Mr Kemp), and Mr Vowles, who was was a grievous bodily harm case, but the prosecution really was centred on section 288 of the Queensland Criminal Code and it is at least about doctors. We don't really have that in NSW, which causes trouble in cases we hear about from time to time.

Section 288 of the Criminal Code in Queensland says it is the duty of every person who undertakes to administer surgical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.

Well, it looked as though, during the prosecution, there would be a problem if the presiding judge construed that to apply to what went on in the operating theatre only. Ultimately, the judge determined that it didn't so apply, that it also applied to choices made about the surgery to be performed before the

operation and, of course, like some cases that people are aware of, sometimes experts don't criticise the operation but the fact that surgery was performed at all. Sometimes the surgery was perfectly competent, not so much in Dr Patel's case, but the problem was that he often did the wrong operation or surgery that wasn't called for.

Criminality and consent

For a time the prosecution of Dr Patel had its focus switched to [section 282 of the Code](#) which deals with the reasonableness of performing the operation, something that section 288 of the Code doesn't touch, probably because it assumes consent. 288 assumes that the patient consents to an operation. Section 282 doesn't. It is more about cases where patients are incapable of consent. Section 282 says a person is not criminally responsible for performing with reasonable care and skill a surgical operation for the patient's benefit if performing the operation is reasonable, having regard to the patient's state at the time and to all of the circumstances of the case.

Could a surgeon be held criminally responsible for wrongly deciding to operate on a patient who consented to the operation, but later died because it shouldn't have been done? The problem was that it could be seen that some of these operations, the ones in relation to which he had been charged, except for one of them, might have been performed competently, but Patel misdiagnosed them and then operated when he shouldn't have, but with consent. The prosecutor, Ross Martin, argued that, if the Criminal Code didn't recognise misdiagnoses and wrongful decisions as potential criminal acts, then the consequences for society were disastrous. If the Criminal Code were interpreted narrowly, section 288, doctors could diagnose a cough as cancer and remove a healthy lung without any criminal charges – that type of thing.

The judge did rule in the prosecution's favour and ruled that section 288 applied, not only to the act of surgery but to the administration of any surgical treatment generally, including advice before surgery and diagnosis before surgery.

[Justice Byrne ruled](#) that Dr Patel was not absolved from criminal responsibility for the adverse outcomes to his patients merely because he had their consent to the procedures and performed them with reasonable skill and care.

That section was broadened. Of course there might be appeals about this, but Dr Patel, as you are probably aware, was ultimately convicted and sentenced to seven years' jail in relation to the three manslaughters and the charge of maliciously inflicting grievous bodily harm. It is not without its difficulty and, in NSW, were there a similar case, it would very difficult under the Crimes Act, which doesn't really envisage the prosecution of doctors, whom it expects not to be malicious. It expects that doctors might make mistakes, but doesn't expect malice on the part of doctors; so it is very difficult to mount a successful prosecution.

New South Wales law

Even if, for argument's sake, a New South Wales doctor were to be charged with maliciously inflicting grievous bodily harm, there would be the inevitable legal argument about such things as an honest and reasonable mistake. Did the doctor simply make a mistake? Even 'honest and reasonable' has its problems from the development of the law. Firstly, on the basis of, "Was the operation a mistake and secondly, was the consent which was forthcoming, an informed consent or did the doctor make an honest and reasonable mistake about it?" In fact, if it is a matter of consent, because of an English case [DPP v Morgan \[1976\]](#) about sexual intercourse, is consent an issue even if it is a consent to an operation, something about which one can just make an honest mistake, without being reasonable?

Really, the criminal law is not equipped with very much power to prosecute doctors very effectively because of this expectation that doctors will not do something maliciously against a patient, that they will only make a mistake which may or may not be civil negligence.

In that way nothing much has changed. Today I had occasion to have a look at a case from the *Weekly Notes* of 1893, a case of *R v Lubienski*, which dealt with the delivery of a baby in Dubbo and a man

prosecuted at the Dubbo Quarter Sessions in 1893 or before. He was practising as a doctor, but he was not a legally qualified medical man. He was called to attend a lady during her confinement and it was a disaster. In fact a real doctor, a Dr Fitzpatrick, arrived at this unfortunate lady's home to find her in a state of extreme exhaustion and found two limbs protruding, the foot and part of the right leg, the hand and part of the left arm. They were very discoloured and swollen.

"I succeeded in doing with my fingers in five or six minutes the birth. The child was then in a position to be expelled head first. Owing to the condition of the mother I had to use forceps and the birth took place immediately. I made an examination of the body of the child. I should say it had been dead for two or three hours. It was well nourished, full grown and well formed. The right leg was swollen and black. It was dislocated at the hip joint, hanging loosely from the body and seemed to have been twisted".

And so on. Naturally the baby, of course, had died and I don't think its mother lived very much longer, but this medical man, not a legally qualified man, Lubienski, was charged with maliciously inflicting grievous bodily harm on the child during delivery. The Crown argued that the man was utterly ignorant and incompetent to perform the procedure, but Justice Windeyer was of the opinion that there was no case to go to the jury. "Although the prisoner may have displayed ignorance he could not be said to have acted maliciously within the meaning of section 58. He did not act recklessly or with indifference to human life."

Justices Stephen and Foster concurred. I can only say that I fear that the law has not moved on very much in NSW when it comes to the criminal prosecution of doctors.