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MEDICO-LEGAL SOCIETY OF NSW INC.

SCIENTIFIC MEETING

WEDNESDAY, 21 SEPTEMBER 2016 AT 6.15 P.M.

THE TOPIC:
THE CASE FOR SHAM SURGERY

SPEAKERS: PROF IAN HARRIS
MICHAEL FORDHAM SC

MR MICHAEL FORDHAM: I thought long and hard about a legal equivalent to the placebo effect. I was looking for something that was more expensive, supposedly more authoritative and seemed to get better results, although there was no real reason for it. I can tell you, I have really finally centred on it, and it is the silk process. That has been possibly the longest running sham of all time.

I am going to give some free legal advice. If we are going to promote this concept, we have to find another word for "sham". The reason is when lawyers and the public in general hear the word "sham" their hackles go up. However, when I read the Professor's book - and if you have not read it, you should – there is a line in it that resonated. That line is "Surgeons as faith healers".

In the legal process, we often concentrate on the act. Omissions tend not to get much of a run in law, although they do exist. Everyone always looks at the act. I want those of you who do medico-legal opinions and those of you who are lawyers, to think back over the last 20 years or so, and you will remember most of the surgical cases you were involved in were about how it was performed. The next and less common category of cases that you have been involved in is because somebody, as the Professor just said, did not operate. However the question that does not get asked in the legal process, which might be an answer to the last question, is what is the evidence for operating at all? The logical extrapolation of what we have just heard, which I think is correct, is that section 5O is the medical profession's last great laugh on the rest of society, and indeed, the legal profession. This is because what it says is that if everybody is doing it, even if it does not work, it is all okay, because peer acceptance is everything. We will come back to this irrationality a little later.

Two examples resonated with me from the book. When I was 16 years old I did some work in the wards at St John of God Hospital. One patient was a lovely old man who used to sit placidly in the corner and who could play the piano beautifully. He did not seem to have any other issues, other than he was extremely quiet and would occasionally play the piano. I said to the matron one day; "Why is this man here?" and she told me that he had had a lobotomy to cure his homosexuality. The other example is a bit more light-hearted. I have a permanently dislocated collarbone, courtesy of two large Tongan men and an inside ball playing rugby. This was years ago and my doctor, who was ahead of his time said to

me; “If you were an A grade footballer, you would be under the knife and back on the field within four weeks. I have seen you play and you have just retired.
He also said to me; “It will heal”. It did and it still works.

I want you to think about this. I did some research today, but not the kind that the Professor does. I went to the *Daily Mail.* In today’s paper there is an article, which you can look up when you get home, about an Italian neurosurgeon who plans next year to perform the first head transplant. His idea is to reanimate corpses. I have an inkling that proposal will not get past the ethics committee. However I do have a practical solution for the Professor’s problem about getting some of these things passed the ethics committee. You need lawyers as the human subjects. Then no one will be that concerned.

If you think about it, you can consent to anything. It is the quality of the consent that matters, and it is a question of degree. We consent to all sorts of things - being jabbed, being deprived of light, being given glasses that distort our view. There have been all sorts of things done, and provided the consent is full and appropriate, then they can be done. One practical issue is if you sat down any number of people and said to them; “we are going to cut into you and expose you to all the risks of surgery, but you may or may not get what it is you believe you need” then volunteers may be a little hard to come by. However we do get them for everything else and there is no reason we should not for this.

The legal process of consent will be the issue. It has to be done thoroughly and incredibly accurately, otherwise it will not hold. There some practical considerations that you would need to have in mind. Firstly, how do you underwrite this process? Is your professional indemnity going to respond? There is also the study itself. Drug trials, for example are sponsored by the drug companies who take on the risk of the liability. Who is going to take on that risk?

The good answer is; “what is the risk?” Your instant reaction as a lawyer is that this is outrageous. You are going to cut someone open and expose them to all the post-operative complications, without actually doing anything. I thought about this and decided you have the world’s best causation defence. This is because your risk is 100 per cent exactly the same, if not less, than if something is done to you. Even though there is an argument about whether it is a better outcome or not, the highest you could ever put it, is that

by not receiving what it was that you thought you were getting, you lost the chance of a better outcome. This of course is not compensable. The good news is, whilst you are at some real risk, my view is I can get you out of it on causation. Section 5O and peer acceptance is more of a problem. The general reaction of the peers, will be that it is not acceptable as no one else is doing it. That is the science v medicine debate.

I had a thought about another aspect of that defence. I think I can say this here reasonably safely because there is no Powerpoint and I do not want to be quoted. Years ago, as a very young barrister, being mentored by at least one of the people here, I came up with what I thought was the best defence ever. I was appearing for an allied health professional and I came up with a "genius plan" based on some expert evidence. The defence was that the treatment provided did not do anything good or bad; therefore there was no causation. However what are the ramifications of the status quo, which is the other side of what we are talking about. Let us think about this for a minute. It means, based on what we have been shown tonight, that every day around the world hundreds of thousands, if not millions of people, are undergoing invasive procedures that have not been effectively established to show benefit. We do not fly in aeroplanes until they are properly tested. We do not drive cars until they are properly tested. The argument here is do we do an operation on patients before it has been properly tested.

Think about this everybody on both sides of the room, whether you write or argue about the opinions. How many of you can recall all the procedures that we used to run cases about that are no longer performed? There are a large number of them. One of these mentioned by the previous speaker, the metal on metal hip, was the gift that just kept on giving, and for which the Fordham children are extremely grateful.

The problem with the current situation where large numbers of people are undergoing procedures that may not have any benefit what so ever, is that it goes back to the peer acceptance test. This is not advice or warning, this is should you be doing it at all. The peer position is you should be.

There has been only one case on irrationality under the Civil Liability Act of which I am aware. However let us put the irrationality test to what we are discussing tonight and the sorts of things that a judge might be willing to entertain. You are being exposed to invasive surgery. You are being

exposed to all the risks and complications that you have from being admitted a hospital in the first place for of surgical procedure that may or may not have a benefit. I would have thought that as we talk about recognised risks because they exist, it would not be difficult for a judge to find it irrational to have surgery with all those risks without a proven benefit.

The slippery slope works this way, because this is really all about consent. If it is that people are recommending and obtaining consent to procedures that they know or ought to know do not have a rational basis in science, what does that consent mean? Nothing. We talk about informed consent. At least the doctors do. Lawyers do not as it is either consent or it is not. I have seen a statement of claim where the argument was being put by the plaintiff that the consent process which did not disclose there was actually no proof this operation worked, was so flawed that it vitiated the consent and accordingly you were dealing with was an assault. The case was settled for other reasons. There are legal problems with that, but that is the natural end point for all of this, and it is being pleaded more and more. It does have problems because the laws around consent are that in general you are consenting to the idea of surgery. If you did not get quite what you expected it does not matter because you consented to it.

The point here is that where there is not the full and frank disclosure there is no consent. What is the full and frank disclosure of? It has to be whether or not this operation has actually been shown to work. I am not saying it is right but it is something that you need to think about.

I want to finish with a comparison of surgery and end of life care. When someone is in the end stages of life, and we have all been involved cases about this, the family wants treatment. They are desperate for anything that might make a difference. More often than not, responsible practitioners are saying we are not going to do that because it is not proven that what you are asking for is going to be of any benefit to your dying relative. They even go as far as briefing us to go to court to argue it. If that is logically and legally correct, which it must be, then why is not what Professor Harris says about surgery, also logically and legally correct. That is, leaving aside the practice of medicine for the moment, should we legally be offering and performing things when we do not know whether or not they work? As the studies have shown, often we later find out they do not work, which is why we do not run cases about metal on metal hip operations anymore.

I have given you my thoughts, but in reality I was here to support what was a fascinating presentation by Professor Harris. If you do not have his book, go out and buy it. It is a couple of hours of reading that will open your mind and make you think long and hard about what it is you do as either a doctor, or indeed a lawyer, looking at the potential rights and liabilities of both patients and medical practitioners. Thank you.