

The Scope of Duty of Care

Reading time:

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Doctors are legally obliged to provide a reasonable standard of care to their patients. This is uncontroversial. However, determining what is reasonable is more challenging. In other words, how many times must a practitioner follow up with a non-compliant patient and how many tests are required to adequately investigate a particular set of presenting symptoms? This concept is fraught with difficulties for practitioners as no two patients are the same and they can range in the degree to which they follow their doctor's recommendations and advice. Furthermore, reasonable practice is never measured in real time, but by courts in hindsight. It is therefore difficult for a practitioner to know how much to investigate or follow up symptoms tests, results, referrals, or failures to attend.

Common Law Interpretation of the Duty

In 2023, Australian Courts provided some clarity on what is considered 'reasonable'. The ACT Court of Appeal found in favour of a GP who had been accused of failing to follow up on a surgical referral for a corn on the sole of the plaintiff's foot. The GP referred the plaintiff in March 2014 and followed up on the referral in May 2014. Two years later, the plaintiff developed a foot infection requiring hospitalisation. The referral had still not been actioned.

The Court found that, at the time the referral was made, the waiting time in the ACT was excessive and that, even if the GP had followed up, it would not have resulted in the patient being seen sooner. The Court made it clear that when the task required by the GP is 'onerous', it is considered beyond what is part of the doctor's reasonable duty of care. This demonstrates that there is a limit to a GP's scope of duty, especially in exceptional circumstances that are outside of a GP's control.

In 2023, MIPS had a matter go to trial in the District Court of NSW that also helped to demonstrate the limits of the scope of duty of care. In this matter, the plaintiff alleged that a GP failed to investigate symptoms that caused a delay in the diagnosis of coeliac disease. The consultations under review spanned from January 2015 to October 2020. In this case, the Court found the plaintiff to be an unreliable witness and accepted the GP's recollection.

In finding that there was no breach of duty, the Court considered the seriousness of the potential diagnosis and that it would have been unreasonably burdensome for the GP to have undertaken further tests or referrals. Essentially, the Court was not persuaded that reasonable care required the GP to refer the plaintiff to a gastroenterologist for the purposes of investigating coeliac disease. The interpretation is that this referral was beyond what reasonable tests were given the presenting symptoms.

Takeaways

Record keeping is paramount: Generally, when a practitioner cannot recall a patient, the Court will prefer the patient's recollection. Practitioners are not expected to remember individual patients, particularly given it may have been years since a single consultation. As such, clear and comprehensive records are invaluable. For example, if the record states that the patient was given specific advice and the patient later says they were not advised, it is more likely that the Court will accept the record as an accurate representation of what advice was given.

We recommend making a record of:

- All attempts to follow up with patients.
- Any conversations had with patients about the importance of getting a test done and the possible repercussions of not undertaking the test – as well as any response provided by the patient that indicates their awareness, understanding and/or acceptance of the advice.
- Refusal by patients to undergo your recommended test(s).
- Safety-netting advice.

Taking responsibility for referrals: Should a matter become disputed, the efforts made to follow up need to be recorded. It is also important to note that if a practitioner has made a referral for test of a potentially significant diagnosis, this test needs to be treated with more urgency than a referral for non-urgent treatment. This means the practitioner will be expected to make more effort with regard to following up on a potentially significant diagnosis.

Summary:

- Documentation – if you didn't write it didn't happen; we don't expect you to remember.
- Taking responsibility for referrals – the records need to demonstrate a reasonable effort to follow up.
- Practice context – if the follow up is less onerous and/or the diagnosis is significant, more is expected.

Only exceptional circumstances will excuse a doctor from the duty to follow up.

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