

# Post-webinar activity: Reflecting on your duty of care and the underpinning, legal, ethical and regulatory principles



Reading time:

Last Modified on 21/05/2024

## 1-hour Reviewing Performance Activity

### Part A - Reading Section

Doctors are legally obliged to provide their patients with care and treatment that reaches a reasonable standard of care and one which would be seen to be competent and professional by their peers. This is uncontroversial.

However, determining what is reasonable can be more challenging. For example, how many times must a practitioner follow up with a patient on whether they have undertaken recommended tests, investigations or referrals? Does it depend on how serious the patient's illness or condition is? If a referral is, for example, made by a GP for their patient to be seen by a specialist at a particular hospital, does the GP have a positive obligation to satisfy himself or herself that the patient has attended the consultation? These questions are difficult to precisely answer, as no two patients are the same and the degree to which patients follow their doctor's recommendations and advice can vary. It is therefore difficult for a practitioner to know whether they are under an obligation to investigate or follow up symptoms, tests, results, referrals, or failures to attend.

#### Continuity of care

Continuity of care is one of the cornerstones of primary care and the breakdown of continuity can be a major factor in the occurrence of adverse incidents involving patients that can sometimes lead to litigation.

Continuity of care is when a patient experiences a series of discrete healthcare events in a coherent, connected, and consistent manner in accordance with their medical needs and personal circumstances.

Medical defence lawyers sometimes see clinicians being sued by patients in circumstances where a failure to ensure consistent and connected healthcare has resulted in a missed or delayed diagnosis of a preventable, and sometimes terminal, medical condition. Healthcare practitioners have a duty of care to their patients and have a legal obligation to adhere to a standard of reasonable care. Encapsulated within this obligation are the principles of continuity of care.

Continuity of care will largely be the responsibility of the GP. The GP is the central hub where communications from specialists and hospitals are directed. The GP who has the ongoing care of a patient is best placed to recognise patterns in the patient's presentation, and their role includes proactively communicating with secondary care specialists.

However continuity of care does not always rest exclusively with a patient's GP. If a secondary care provider sees the patient on multiple occasions, then they too will owe the higher standard of care that attaches when there is an ongoing relationship with a patient.

#### Common Law Interpretation of the Duty

In 2023, Australian Courts provided some welcome clarity on what is considered 'reasonable' when it comes to a doctor following up a patient. 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 to a specialist 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 which the doctor is accused of not doing is seen to be 'onerous', the Court may hold it to be beyond what is part of the doctor's reasonable duty of care. This decision 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 defended a matter to trial in the District Court of NSW that also expounded the limits of the scope of a doctor's duty of care. In that 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 January 2015 to October 2020. The Court found the plaintiff to be an unreliable witness and accepted the GP's evidence.

In finding that there was no breach of duty of care, the Court decided 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 Court didn't approach the matter with hindsight or outcome bias. It looked at what the doctor was dealing with at the time and whether the diagnosis and treatment was reasonable given the patients presenting symptoms and disclosed history.

#### What is the duty to follow up?

The duty to follow up is part of a practitioner's general duty of care to exercise reasonable skill and care in the provision of advice and treatment to patients. This includes follow up of test results, referrals, treatments, and appointments, including hospital admissions, especially where abnormal results are anticipated or found.

A reasonable balance is needed to ensure your duty to the patient is met "in the circumstances" of a particular clinical encounter. You cannot renege on this duty and expect your patients to follow up, arrange or interpret test results especially where they are or are likely to be abnormal. As such, in the case of litigation or regulatory action, the courts are likely to accept the patient's presumption that "no news from a doctor is good news".

Consider the case of *Tai v Hatzistavrou* (1999) where the patient consulted a gynaecologist with post-menopausal bleeding. The physical exam showed no abnormality, but a procedure was recommended to exclude cancer.

The gynaecologist completed the admission form and gave it to the patient to arrange. The patient submitted the form to the hospital the same day and waited for the hospital to contact both herself and the gynaecologist to arrange admission.

The hospital lost the form and admitted that the procedure date was never set. The doctor did not follow up but thought that the 10-month delay was abnormal. 10 months later, the patient returned to the doctor as she was still bleeding. The gynaecologist arranged an urgent procedure. Unfortunately, ovarian cancer was diagnosed that had already spread to the uterus.

The gynaecologist was found negligent in not monitoring the patient's progress, and ensuring the procedure was carried out in a timely manner, the results obtained and acted upon earlier.

**Key take away:** The gynaecologist did not have any follow up systems in place and relied on others, including the patient, to follow up their care. The delay changed the patient's situation dramatically. The gynaecologist had a continuing duty to advise the patient to submit to the procedure.

#### Follow up issues – areas of risk

- No follow up diary system / reliance on patient
- If the patient does not re-attend
- If the patient does not understand
- If the patient cannot be contacted
- If you get results but do not review them

Other issues to consider:

- Is the lengthy test/procedure wait appropriate or avoidable?
- Is there an alternative – should you follow that up?
- If access to best investigation is delayed, ensure follow up to minimize risk to the patient.
- Monitor progress: follow up those with life threatening conditions on hospital waiting lists.

#### Takeaways

Record keeping is paramount: Generally, when a practitioner has no memory of 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, the creation of clear, comprehensive and contemporaneous health records is 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 – such as advice to return if symptoms persist despite treatment, to attend an emergency department if certain red flag symptoms arise, or to contact the referrer if they are unable to obtain an appointment or do not receive a response from a specialist or hospital.

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 referred a patient for a test or specialist appointment in relation to a potentially significant diagnosis, the referral needs to be treated with more urgency than a referral for non-urgent treatment or investigation. This means the practitioner will be expected to make more effort regarding following up on a potentially significant diagnosis.

It is also important to action results when received: The Courts have often assigned blame to both a specialist who ordered a test and a GP who also received the results of the test ordered by the specialist, when neither practitioner advised the patient of the results. Therefore, if a practitioner receives results of an investigation, even if not ordered by them, that practitioner may still be responsible for communicating the results to the patient. Often this will involve confirming the patient has already received the results. It is important to document this confirmation.

#### Have a robust follow up routine

- Record all tests ordered and patient no-shows
- Use a follow-up diary for ongoing management
- Have a standard patient recall letter
- Where a result is abnormal, use and document reasonable attempts to notify for follow up e.g. telephone, letter, registered letter
- Ensure proper management of test results
- Aim for consistency of follow up routines throughout your practice.

#### Summary

- Documentation – a Court will often take the view that if something doesn't appear in the medical record then it may not have been done. Good record keeping is critical to good medical practice. Taking responsibility for referrals – the records need to demonstrate a reasonable effort to follow up. This includes ensuring that results are communicated to the patient.

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- Practice context – if the follow up is less onerous and/or the diagnosis is significant, greater effort is expected.
- Following up is not a state of perfection – the law requires reasonable care and skill in continuity of care.
- In relation to follow up, the courts can extend your duty to ensure it occurs. Be responsible for patients who fail to attend tests or return for results or treatments.
- Following up tests, results or referrals is not only good clinical practice, but also a legal obligation.
- Implement robust follow up systems – to do so will assist you reach the standard expected of you at law, and reliance on reliable follow up systems is a step that your peers would expect you to take.

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