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Duty of care or a matter of conduct

Can a doctor refuse a person in need of urgent medical attention?

Background
Medical practitioners may have their particular skills called upon outside a direct professional context. The responsibilities of medical practitioners outside their defined scope of clinical practice may not be clear to all clinicians.

Objective
To consider the possible legal consequences of a doctor refusing to assist a person in need of urgent medical attention both in terms of medical negligence and professional misconduct.

Discussion
Where an established clinical relationship does not exist, and a doctor does not wish to render aid, three particular scenarios may arise. A doctor may actively deny being a doctor, passively avoid identifying themselves as a doctor or acknowledge being a doctor, but refuse to render assistance. Aside from any ethical issues, how a doctor chooses to act and represent themselves may lead to different legal ramifications. There exists significant variation in state provisions relating to legal obligations to render aid, which may benefit from review and revision at a national level.

Keywords
jurisprudence; malpractice; professional misconduct; professional practice

The roles and responsibilities of medical practitioners in Australia when faced with a situation where their particular skills are called upon outside a standard clinical context, and specifically the medico-legal issues that may arise, are not always well understood by practitioners. Where an established clinical relationship does not exist, and a doctor does not wish to render aid, three particular scenarios may arise: a doctor may actively deny being a doctor, passively avoid identifying themselves as a doctor, or acknowledge being a doctor, but refuse to render assistance. Notwithstanding the inherent ethical issues surrounding these scenarios, each situation raises legal questions worth considering, namely the potential for a finding of negligence and/or unprofessional conduct.

Duty of care in established clinical relationships

The common law (case-based law) surrounding a doctor's interaction with a patient within the confines of a standard doctor–patient relationship is relatively settled; doctors have a legal obligation to patients to adhere to a standard of reasonable care.[1] The duty of care exists between doctors and patients both ethically and with respect to common law and legislation. The definition of a 'patient' is interpreted broadly; a duty of care may exist between doctors and future patients,[2] and even between medical administrators and hospital patients.[3]

The Good Samaritan defence

The Good Samaritan defence is a well-established concept in Australian law. Although state rescue/Good Samaritan provisions vary, the underlying purpose of the provisions is consistent. If an action in negligence is brought against an individual in this context, these provisions provide an after-the-fact defence if the individual was acting 'in good faith', 'without recklessness', 'without anticipation of a reward or compensation' and exercising 'reasonable care and skill'. The provisions therefore have no effect on whether an initial duty to assist exists.

The Good Samaritan provisions apply in emergency situations involving individuals that have no pre-existing relationship. In these circumstances, many doctors may be willing to render aid, particularly if an individual is at risk of imminent harm. Where the doctor does render aid, the doctor may be eligible for Good Samaritan protection against civil litigation.[4]

The doctor does not wish to render aid

Circumstances may however arise whereby a pre-existing clinical relationship does not exist between a doctor and an individual in need of medical assistance, and a doctor chooses not to assist despite the

existence of Good Samaritan provisions. In these circumstances, a number of ethical issues arise. Despite these issues, how a doctor chooses to act and represent themselves may lead to different legal ramifications.

The medical practitioner actively denies being a doctor

In the context of a medical practitioner actively denying being a doctor, a recent disciplinary tribunal case suggests that such denial could amount to an act of professional misconduct.[5] The focus of this case was not on whether the medical practitioner refused to render emergency assistance, but whether he or she was obliged, when asked, to confirm being a doctor.

The relevant case arose in Western Australia in 2012. A woman was standing outside a clinic with a sick infant. She asked a medical practitioner outside the clinic if he was a doctor. Neither the woman nor the infant were patients of the doctor and the clinic was yet to open. The medical practitioner denied being a doctor. The Professional Standards Committee recommended to the Medical Board of Australia that the medical practitioner be cautioned for his behaviour. The Medical Board of Australia felt that this decision was inadequate and made the decision that he be reprimanded and fined the sum of $1000 for this misrepresentation. This decision was set aside by the Western Australian State Administrative Tribunal (WASAT) on appeal and substituted for a decision cautioning the practitioner.

WASAT considered that a caution would be adequate for the protection of the public and maintenance of the high standards and the good reputation of the medical profession and that further reprimand or financial penalty would be excessive and unwarranted. It did, however, state in its decision, 'The publication of the finding, the caution, the complaint and disciplinary process to which (the doctor) has been subjected is adequate to deter him and other medical practitioners from denying being a doctor if asked that question by a member of the public who appears to be in the need of medical assistance.[6]

As a disciplinary tribunal decision, the determination of WASAT should not be considered binding on other regulatory bodies or courts. However, the case provides an example whereby both the Medical Board and WASAT determined that a doctor's misrepresentation in these circumstances may be considered improper conduct, and potentially subject to disciplinary action.

The medical practitioner doesn't volunteer themselves as a doctor

The legal questions may well be different should the clinician find himself or herself in a circumstance where medical aid is clearly required, but instead of an active denial of being a doctor, the practitioner chooses not to volunteer this information. Although very difficult to quantify, this set of circumstances may occur much more commonly. No cases within Australia have yet addressed the issue, particularly in the context of medical negligence.

The difference between active denial and failure to volunteer raises significant questions in both cases with respect to when precisely a duty of care is established, if at all, and what standard of care is expected. A potential argument could be made that if a patient is unaware that a bystander is a registered medical practitioner, then the patient has no expectation of assistance, and a duty of care may not necessarily be established.

However, consideration needs to be given to the Code of Conduct for Doctors in Australia, which is published by the Medical Board of Australia.[7] This Code is designed to be considered by courts, boards, councils and tribunals to assess professional standards by which medical practitioners will be judged. The Code indicates that good medical practice involves offering assistance in an emergency that takes account of the clinician's safety, skills and availability of other options. If a duty of care can be established, this will, as in the case of a therapeutic relationship, be a positive duty. Further, it is quite possible that in either situation, be it an active denial or a failure to volunteer, this duty will be breached by a clinician's decision not to act.

The medical practitioner identifies themselves, but refuses to assist

The main legal issues in a situation where a medical practitioner is identified as such, but refuses to render aid to persons in need are related both to negligence and issues of professional conduct.

In the context of negligence, traditionally, the common law has been particularly reluctant to impose any positive duty to act to assist others in need.[8] Before the landmark case of *Lowns v. Woods*,[9] there was no positive duty for doctors to render aid to an individual who was not their patient outside of a clinical setting.

In this case, a boy was experiencing an epileptic fit. His sister ran to a nearby doctor's clinic for help. Dr Lowns was asked to come to the aid of the boy. He refused. The court found that the doctor did have a duty of care to help the plaintiff. This decision was affirmed on appeal by a majority judgment in the Court of Appeal.

This case created the first example of a 'duty to assist'. This expansion of the duty of care owed by medical practitioners was particularly unique and has been heavily criticised. As was stated in the judgment in *Lowns v Woods*: 'This is a high standard. It goes beyond what is expected, and imposed by the law, in the case of other professions.'[10]

A primary consideration discussed in the judgment was the statutory obligation (an obligation imposed by legislation) to render aid, arising from the Medical Practice Act 1992 (NSW), which has since been repealed and replaced by the National Law. This complicates the applicability of the findings of this case to the present day and other jurisdictions. Whether a duty would be found in the absence of the statutory obligation is unclear, and this has not been well explored in common law. As with the previous scenario, this will likely come down to the existence of a duty of care, and whether, by act or omission, that duty of care was breached.

From the perspective of professional conduct, relevant to the case, section 36(1)(l) of the Medical Practice Act 1992 (NSW) stated that unsatisfactory professional conduct for a medical practitioner includes the failure to attend and render aid in an emergency situation. This Act has since been repealed in an attempt to reconcile national health practitioner regulation. The remaining regulatory Act does not explicitly affirm or deny the existence of a duty to assist.[11] The New South Wales application of the National Law includes a list referencing conduct that may constitute unsatisfactory professional conduct, including failure to render assistance.[12]

Conclusion

Where doctors choose not to assist, whether a successful action in negligence can be brought against them depends largely on whether a duty of care can be established. If it can, refusal to render assistance may constitute a breach of that duty. It is not possible to know with certainty how the courts will approach this situation in the future, however, Lowns v Woods has been heavily criticised and is arguably limited in its application to a present day context.

Even following the enactment of national regulatory legislation, there is still inconsistency between jurisdictions with respect to what amounts to unprofessional conduct in this context. The potential for a finding of unprofessional conduct with respect to refusal to render aid is probably more likely than a finding of negligence and thus the more relevant practical consideration from a medical practitioner's perspective.

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Competing interests: None.

Provenance and peer review: Not commissioned; externally peer reviewed.

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