SUPREME COURT
OF QUEENSLAND

Official Conference Opening
East Coast Medico-Legal Conference
Saturday, 1 September 2012
Hyatt Regency Sanctuary Cove

The Hon Paul de Jersey AC
Chief Justice

Mr President, doctors and lawyers, distinguished guests …

I begin on a congratulatory note, as the Society celebrates its diamond anniversary: for 60 years now, the Society has been providing an excellent platform for the sharing of knowledge and views on medico-legal issues and drawing together interested members of two significant professions; professions which, while obviously different, share a host of important values – especially a commitment to public service.

It is a particular pleasure to welcome our colleagues from interstate – visiting South East Queensland at a particularly seductive time of year.

As to the Society's 60th anniversary, I look forward to the cocktail event proposed for 22 November in the Gallery of the Banco Court at our new Queen Elizabeth II Courts of Law in Brisbane. I confidently predict you will be greatly impressed by the new courthouse.

Despite the passing of time, the value of these colloquiums has only increased. It is abundantly clear that there are at least as many complex issues on the medico-legal divide today as there were 60 years ago, when one of my predecessors, Chief Justice Neal Macrossan, gave what was, I am sure, an enlightening and engaging presentation on the *Medical and legal aspects of drunkenness in relation to drivers of motor vehicles*. Neal Macrossan was the 9th Chief Justice of Queensland. He held that office for 9 years from 1946 to 1955. You will see his portrait, refurbished, hanging in the Gallery if you attend the cocktail function.

An enduring issue for the medical profession, and for those lawyers who interact in their professional capacity with their sibling profession, is professional negligence. One need only refer to the recent report of the recently-retired Justice Chesterman – who, I might say, seems to be struggling with the definition of retirement! – to be reminded that allegations of medical malpractice, and the process for the reporting of such conduct, are constant issues, not to ignore the investigation of what has been done or not, and issues of rehabilitation and the like. That constancy is not a reflection of inadequate standards. It is in fact more a reflection of enduring concern within our professions that we reach appropriately high standards.

The most high profile instance of alleged medical malpractice in Queensland, certainly in recent times, concerns Dr Jayant Patel. From the way the allegations were revealed by a ‘whistleblower’, to the allegations themselves, the extradition, the Court of Appeal hearing, and now the High Court’s

decision, everything about Dr Patel's matter has been the subject of extensive public interest.

As one would expect in a criminal matter where special leave to appeal was granted, the matter raised interesting challenges to the decision of the Court of Appeal to uphold the convictions. As we now know, Dr Patel was successful in his appeal on one of those grounds, but not the other. In light of the potential for the matter to return to the Supreme Court, I will limit my comments to the High Court appeal against the Court of Appeal's decision.

The Court of Appeal had rejected the appellant's arguments against conviction. They were first, that the section of the Criminal Code under which Dr Patel was charged was not apt to attach criminal liability to the matters established against him, and second, that a miscarriage of justice resulted from the presentation of new particulars by the prosecution approximately two thirds of the way through the trial.

What I have referred to as the second argument was a series of interlinked points culminating in the contention that evidence admitted under particulars existing early in the trial became irrelevant to the final particulars presented two thirds of the way through the trial. In short, the earlier particulars alleged that Dr Patel had failed to exercise reasonable skill and care in deciding to operate, but also, in the actual act of operating. The final particulars eschewed allegations of the operations themselves being 'botched', but maintained the allegation that the operations should not have been

undertaken in the first place. Dr Patel contended that evidence of his conduct in the operating theatre then became irrelevant to the final particulars, and that its admission prejudiced his right to a fair trial. It is in respect of this ground that Dr Patel's appeal was allowed and a retrial ordered, notwithstanding what Justice Heydon termed the trial judge's "earnest, energetic, even heroic" endeavours to address the difficulties caused by the change of particulars. That discussion, however, is largely specific to the circumstances of Dr Patel's case.

The question of broader enduring relevance is that raised by the first argument put by the appellant at his Court of Appeal hearing: whether the section of the Code under which Dr Patel was charged captured liability for negligence in deciding to operate, even if the surgery itself was performed competently.

Counsel for Dr Patel contended that section 288 only captures surgery negligently performed but not a negligent decision to operate. The case against Dr Patel was ultimately left with the jury in the latter basis: a negligent decision to operate.

Section 288 relevantly provides:

> It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person … 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 … by reason of any omission to observe or perform that duty

The Court of Appeal rejected that contention and the High Court agreed. The ‘act’ in doing which the person must exercise reasonable care and skill is the ‘surgical or medical treatment’ – a term the majority held to ‘encompass all that is provided in the course of such treatment, from the giving of an opinion relating to surgery to the aftermath of surgery’ [paragraph 24]. Justice Heydon agreed with this assessment, but went one step further than the majority. In his Honour’s view, the ‘act’ may also include ‘advice not to undergo particular forms of surgery or to receive particular forms of post-operative care’. By contrast, the majority were of the view that there can be no criminal liability where there is no physical act of surgery. “There can be no criminal responsibility for manslaughter or grievous bodily harm merely by the formation of an opinion or the giving of a recommendation” [paragraph 27].

Notwithstanding even that level of disagreement in our nation’s highest court, this remains certain. The scope of the medical practitioner’s duty of care should be clear to a point which obviates any need for litigation. As we know, however, courts have never been prepared, or sufficiently informed, to be prescriptive about that. It is an unachievable ideal.

Potential negligence is one thing: criminal liability quite another. The matter of abortion was for a long time a grey area. The Patel case has resolved another arguably grey area.

The High Court endeavours to remove these uncertainties: one can only hope it does so in a sufficiently certain way, and in saying that I recall the anxieties generated by decisions like *Chappel v Hart* in 1998 and *Rodgers v Whitaker* in 1992. The problem is that while principles may be formulated with apparent precision, uncertainty very often attends their application to the infinitely various factual circumstances which inevitably confront practitioners in both our professions.

Our professions maintain demanding ethical codes, and regrettably sanctions, including striking off, must sometimes be imposed. And although insurance protects against professional negligence, an adverse judgment carries a stigma, not to overlook the level of premiums. But the prospect of a practitioner's incurring criminal responsibility is of quite drastically different order. I suppose lawyers have been imprisoned for fraud committed in their professional offices. But it is obviously a doctor's contribution to the maintenance of human life which raises this serious prospect for the medical profession. The High Court decision again exposes the necessarily close relationship between our professions.

Today, I must acknowledge an undoubtedly pleasant other aspect of that relationship – its cordiality.

I wish you an interesting weekend as we reflect upon these and other critical issues. Those who have and do now comprise the Society should truly be

proud of its contribution to enhanced mutual understanding between these two noble professions which nevertheless have, from time to time, to deal with some surprising vulnerabilities.

I am very pleased, now, formally to open the “East Coast Medico-legal Conference”, 2012.