Record payout to patient for failure of GP's duty of care to refer to a specialist - What this means for the dental community

By Dr Kia Pajouhesh

I have described as "super generalist" the growing proliferation of clinicians or practices:

- referring fewer and fewer patients for specialist care as a consequence of economic pressures through greater competition and technological advances in dentistry, rendering certain traditionally specialist-performed procedures as more achievable;
- offering "one stop shop" dental care, assisted by the advent of the Internet as the primary source of patient referrals to their clinics;
- being pushed, in ever-increasing numbers within corporate structures, by demanding business KPIs, powerful corporate marketing and preferred provider schemes, in turn servicing more complex case loads and often over-stretching the boundaries of their skills and training; or
- most commonly referring some treatment modalities internally within their clinics to other super-generalist dentists with a "special interest" or some additional experience in the allocated field.

A recent record payout in the Queensland Court of Appeal puts all Australian clinicians on notice that:

- failure to refer a patient who is in need of complex management to a board-registered specialist in a timely and constructive manner may prove costly for both the patient and the treating general dentist; and
- referring a patient to another general dentist within the clinic in a commercially symbiotic relationship may be scrutinised heavily when it can be shown that a registered specialist referral would have been a better choice for the patient, based on formal specialist training and troubleshooting experience levels.

In the Smile Solutions specialist practice, we are seeing a higher incidence of such issues each year. This February, for example, a teenage patient sought a second opinion and report from one of our orthodontists because her general dentist had failed to diagnose the complexity of her occlusion and initiated extraction orthodontic treatment to the substantial detriment of the young patient's dental and overall wellbeing.

In another instance, one of our oral and maxillofacial surgeons provided a second opinion for a patient with a numb lip, cheek and tongue who had been referred by one general dentist to another general dentist within the same high-profile Melbourne clinic for the extraction of her wisdom teeth under sedation over three months ago. When questioned, the patient was adamant that she had been referred to a specialist surgeon for her wisdom teeth management, highlighting the most common misconception of virtually every patient in this predicament.

Why is this?

- Super-generalist practice websites and related marketing information spruik their "team" of general dental practitioners as specialists in some fields in the most blatant of the misdemeanours, or have special interests or talents within the faculties of dentistry as the common denominator;
- Referring dentists and ancillary staff within super-generalist clinics talk up the clinician with the "special interest" by using terminology such as "experts", "the doctor that does all the difficult cases", and even "specialised"; and
- A culture of branding is evolving among super-generalist practices where terminology and references are made that fall within the strict letter of current legislation but are specifically intended to induce a patient into acknowledging the expertise of the super-generalist dentist as the highest in the land.

Examples currently marketed on Australian dental practice websites include: "Dr [Super] has vast training and experience in orthodontics"... "Dr [Super] is one of the most trusted and peer acclaimed clinicians in surgical implantology"... "Dr [Super], a dental surgeon with extensive experience in the field of oral surgery, is a natural choice for your wisdom teeth management"... and "Dr [Super] is a caring children's dentist and a preferred provider for children's dentistry by many of the major health funds".

The problem lies in the fact that all of the above initiatives result in virtually all consumers believing that the clinicians in question are specialists.

The second instance described above (the post-operative numbness) raises some serious challenges for the defence of each general dentist's actions within the referral chain, namely:

- The treating general dentist will have to defend the position of why he/she chose not to refer the patient to a specialist oral and maxillofacial surgeon when the case was deemed to be potentially complex; and
- The referring general dentist should have to respond to the following potentially confronting question: If you felt that the wisdom teeth extractions were too complex for you to treat yourself and you therefore felt the need to refer the patient, why did you choose another general dentist with the same recognised qualifications as yourself over that of an oral and maxillofacial surgeon?

Record payout of $6.7 million: Mules v Ferguson case

In September 2008, Ms Nancy Mules consulted her GP, Dr Kaylene Ferguson, on four separate occasions "regarding neck pain".[1] Initially, it appears that Dr Ferguson believed Ms Mules's complaint was "a probable musculo-skeletal insult to her neck", specifically, she thought it "could be cervical spondylosis".[2] Ms Mules also had a "history of headaches and facial flushing".[3] During these consultations, Dr Ferguson did not physically examine Ms Mules' neck or enquire "about the progress of her headaches or facial flushing".[4]

After the fourth consultation, Dr Ferguson referred Ms Mules to Cairns Private Hospital and the following day "she was diagnosed with cryptococcal meningitis".[5] Cryptococcal meningitis is a potentially fatal condition that attacks the central nervous system. It is an extremely rare disease[6] but is less so in tropical Queensland, where Ms Mules lived and Dr Ferguson practised. It is frequently not diagnosed early because it manifests as a low-grade inflammation in its early stages.[7] However, because of the seriousness of the disease, the condition is emphasised in undergraduate and postgraduate clinical teaching.[8]

The disease left Ms Mules "blind, deaf and with other grievous disabilities",[9] and as a result, Ms Mules brought an action against her doctor in the Queensland Supreme Court.[10]

After an 11-day trial, the judge (Henry J) found that "Dr Ferguson failed to act with reasonable care and skill in not physically examining Ms Mules's neck and enquiring about the progress of her previously recorded symptoms of headache and facial flushing".[11] Henry J also found that, had Dr Ferguson referred Ms Mules to a specialist earlier, "she would have been diagnosed and treated and her grievous injuries would have been prevented"[12] and he assessed Ms Mules's damages at around $6.7 million.[13]

However, the trial judge dismissed Ms Mules' claim, stating that a physical examination and enquiries about the progress of previously recorded symptoms "would not have detected anything to prompt Dr Ferguson exercising reasonable care to respond differently".[14] Also, the judge found that section 22 of Civil Liability Act (Qld), "provided a defence" as Dr Ferguson "had acted in a way which was widely accepted by peer professional opinion as competent professional practice".[15]

Ms Mules appealed the case to the Queensland Court of Appeal, which (by majority) reversed the trial judge's decision. The court found that Henry J erred in his assessment of the evidence and that Dr Ferguson was liable, in particular for failing to refer Ms Mules to a specialist, when she should have known that Ms Mules's condition was not cervical spondylosis and that she was deteriorating.[16] As Boddice J states: "Had the respondent acted in accordance with her duty of care, she ought to have referred the appellant for specialist assessment or to her local hospital for further specialist assessment."[17]

The resultant delay in referring Ms Mules to a specialist caused "the catastrophic loss of" Ms Mules's sight and hearing.[18] In addition, the court held that there was "no evidence sufficient to satisfy the respondent's onus in respect of s 22 of the Act".[19] As a result, Ms Mules was awarded $6.7 million.

At this stage, it is unclear whether Dr Ferguson will be appealing the decision to the High Court and, while Queensland case law does not bind the courts in other states, arguably it will carry significant persuasive weight, particularly as the laws in many Australian states are similar to those on which the Queensland judgment was based.[20]

Implications

This case raises significant issues for health services professionals throughout Australia. It stresses the importance of undertaking physical examinations where appropriate and making comprehensive enquiries about patients' symptoms.

More significantly, it confirms that the duty to exercise reasonable care and skill extends "to the determination of whether a patient ought to be referred for specialist assessment".[21] This is particularly relevant in today's dental industry where "referrals from general dentists to specialists are undoubtedly shrinking",[22] whereas referrals from general dentists to general dentists within the same business are increasing.

Inevitably, this trend will result in a drop in dental care standards and when patients do not receive the care they need or are not referred appropriately, resulting in case failure, pain and suffering, they may seek legal recourse.

With payouts like those in Mules v Ferguson,[23] it is inevitable that professional indemnity insurance premiums will skyrocket to the detriment of all practitioners.

What is to be done?

So how do we reverse this trend? The obvious answer is to educate general dentists so that they understand that the reasonable care they are required to provide extends to referring patients to a specialist in appropriate circumstances, as well as the potentially catastrophic results (for patient and practitioner alike) of not referring patients.

In addition, a public education plan would help in ensuring patients understand choices presented to them. This would also assist them in researching specialists for themselves, via the Internet or otherwise.

Further, I would propose an overhaul of professional indemnity insurance - to ensure that rogue super-generalist providers are heavily financially penalised for recurrent misdemeanours and, in turn, to encourage referrals to specialists.

On the other hand, I do not believe that further legislative or regulatory controls would assist in this area. This is because many highly skilled general dentists with vast experience in specific fields would be adversely affected by such measures.

About the author

Dr Kia Pajouhesh graduated dentistry at The University of Melbourne in 1992 and established Smile Solutions in 1995 with just 8 patients. Situated in the heart of Melbourne's CBD, it is now the largest singly located dental practice in Australia engaging over 50 clinicians including 20 board registered specialists, servicing over 75,000 patients. Together with his expanding branch practice chain, trading as the Core Dental Group, he controls 60 chairs across Melbourne with an annual turnover revenue of over $45 million. Dr Pajouhesh has lectured internationally and mentors other practitioners on operating cohesive large private practices. In 2014, Smile Solutions was awarded Telstra Victorian Business of the Year.

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