


Medical Indemnity in Australia: How one birth changed maternity services.

 stine Caines reveals how one birth changed the medico-legal climate of birth care in Australia.

As a consumer advocate, I have long had an interest in medical indemnity. As I'm a homebirth mum who takes full responsibility for her body and that of her baby, some find this strange. In order to successfully engage with government, one needs to understand the current climate in order to achieve midwifery reform. I believe the view that professional indemnity insurance is not important is misconceived. Over many years I have seen it being the key to reform.

I was changing my second child's nappy in 2001 when my Midwife called to say she was to 'lose' her insurance. Clancy is now 71/2 years old. As you all know, despite hundreds of millions of dollars in rescue money to Australia's medical profession, not one cent has been afforded to midwives.

The Case of Calandre Simpson

Many know the collapse of medical and professional indemnity was largely a result of global factors, namely the demise of large re-insurers after September 11, 2001. Interestingly, the decision by Guild Insurance to no longer offer a policy to midwives happened before this. Their reasoning, that the midwifery pool was too small, was justifiable. The fear of a major payout for catastrophic birth injury proved correct. In November 2001, the NSW Supreme Court awarded Calandre Simpson \$14 million dollars (The award was reduced on appeal to \$11 Million). At that time, the \$11 M award was twice that of the next highest payout. This payout assisted in the collapse of Australia's largest medical indemnity organisation, United Medical Protection (UMP), and brought with it what we know as the 'medical indemnity crisis.'

Of particular importance is the 'care' received by Calandre's mother. It was proven that she was given an overdose of Syntocinon (a drug used for induction and augmentation of labour), as part of an induction. Five attempts at forceps were tried and finally the mother had a caesarean section before Calandre was born with severe Cerebral Palsy. It was concluded by the court that the Syntocinon overdose could have caused the Cerebral Palsy, before the attempted forceps delivery.

Before I look at what has unfolded, it is prudent to note that the Simpson family had considerable resources, far in excess of the majority of Australian families. This enabled them to fund a nine-year legal battle. It also contributed to the high cost of the claim as the family's lifestyle was

considerably more affluent than most.

The other interesting point is that, although this case essentially toppled the medical indemnity industry, little has been learned. The practice of performing a caesarean section rather than forceps is likely to have increased. The incidence of induction and augmentation of labour using the drug Syntocinon has not reduced. According to the Australia's Mother's and Babies 2005 report, 44 percent of women are having Syntocinon for induction (25 percent) or augmentation (19 percent) of labour.

The opportunity for error is therefore high. In essence, despite hundreds of millions of dollars in taxpayers money, obstetric practice has largely remained unchanged.

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meets 80% of the premium above the 7.5% threshold of an eligible doctor's gross private medical income." (Commonwealth Government of Australia, 2007a)

Rural Procedural GP's are eligible for PSS support regardless of their income.

Other policy protection measures include the High Cost of Claims Scheme. This scheme reimburses insurers for high claims costs. The Exceptional Claims scheme provides 100% assistance to claims resulting in awards greater than \$20 Million.


The Bolam Test

In addition, the Ipp Report (Ipp, 2002) made recommendations for considerable Tort Law Reform (the law governing personal injury negligence). Part of this reform was to, by statute, implement a modified version of the 'Bolam Test'. In at least NSW and QLD:

 "The standard of care will be that determined by the court with guidance from evidence of acceptable professional practice unless it is established (in practice, by the defendant) that the defendant acted according to professional practice widely accepted by (rational) peer professional opinion." (Dobler v Halverson, 2007)

Considering the majority of Obstetricians engage in practices that are not based on evidence this is deeply concerning. A relevant example could be anal/sphincter damage created from an extended episiotomy. The evidence regarding episiotomy effectiveness would assist a consumer in mounting a claim. Under the 'Modified Bolam Test,' however, if the subject practitioner gathered other specialists who agreed they would also perform an episiotomy, the injured woman could be unsuccessful.

The Australian Plaintiff Lawyers Association stated in a submission to government:

 "APLA is concerned that doctors already hold a privileged position in our society and are treated differently to other groups, including other professions. Patients' rights should not be compromised for the sake of doctors' hip pockets." (APLA, 2003)


The Indemnity Crisis Myth

Despite such comprehensive support and reforms throughout this time, the Australian public endured hundreds of media stories, transforming the spin of self-interest into an art form. Many in the community would still believe that the reduction of maternity services is as a result of sky-rocketing insurance premiums directly impacting practitioners;

The Truth About the Rescue Packages

In 2001 and 2002 the Howard Government sprang to action. Despite Midwives being precluded from the 'Indemnity Summit' and any indemnity protection, a raft of measures were introduced, at a cost of \$160-180 million per year. (Commonwealth Government of Australia, 2007a)

One of the key reforms was the introduction of the Policy Support Scheme (PSS), available to Obstetricians, Neurosurgeons and Rural Procedural GP's.

"Under the PSS, if a doctor's gross  medical indemnity costs exceed 7.5% of his or her gross private medical income, he or she will only pay 20c in the dollar for the cost of the premium beyond that threshold limit. In other words, the PSS



The numbers of private midwives have been greatly reduced, with no Government action to resolve the situation.

fundamentally these programs are flawed. They all exist with rigid guidelines and on the back of the benevolence and goodwill of Obstetricians. Some of these individuals are truly wonderful and their practice most progressive. The premise, however, that midwifery practice can only exist on the say so of the medical establishment is dangerous.

Surely the central tenant of midwifery reform is to establish a midwifery scope of practice that enshrines the appropriateness of midwifery care based on education and registration. It must also enforce the very heart of midwifery, 'being with woman' and as such the relationship between a woman and Midwife. This, in turn, would help establish the rights of women to make choices around how, where and by who their bodies are or are not handled.

a direct result of an over-litigious society. This could not be further from the truth. Medical practitioners have been very well protected, whilst consumer rights have shrunk and the continuation of a totally anti-competitive maternity health system has resulted in a reduction of services and arguably quality and safety for women and babies in rural and metropolitan Australia.

During this time I canvassed these views with several journalists. I even raised evidence of 'double-dipping'. Whilst private Obstetricians were receiving the benefits of the PSS scheme some were also charging women an insurance fee of up to \$1500. Sadly there was little interest in covering this story. I believe that lazy journalism continued to perpetuate the myth of an 'indemnity crisis' for several years.

Outcomes for the Midwifery Profession

The most obvious outcome of the refusal by the Federal and State Governments to assist with Midwives indemnity insurance has been a great reduction in the numbers of privately practicing Midwives. Alongside this, very few private health funds provide a midwifery/homebirth benefit. Of those who do, most do not provide a benefit on par with obstetric pay-outs.

The advent of the Bachelor of Midwifery was very positive. Practical experience, however, has been severely restricted. Students are unable to gain experience with homebirth midwives; rather, they experience the highly interventionist 'system'. It would seem the theory of

educating a midwife to work in continuity and community models is of little use when the majority of students are unable to complement this learning in practice.

Access to Medicare provider numbers (or a national funding arrangement) is impossible without indemnity. There is, however, no impediment for the Rudd Government to include Midwives in the PSS. Some positive comments have been heard from Health Minister, Nicola Roxon. However, providing indemnity cover would demonstrate a fundamental commitment to maternity reform. It would also enable midwives to take their rightful place as the experts in normal birth.

Consumers Silenced

Consumers have again been silenced in this debate. Most states and territories have legislation that makes professional indemnity either compulsory or a central component of registration. In NSW, The Health Care Liability Act was instituted in 2001. The explanatory memorandum stressed the importance of consumer protection. Interestingly, the rights of Australian women choosing private midwifery care don't have the same value as those women choosing the services of a Specialist Obstetrician or a Procedural GP. When I challenged the legal branch of NSW Health with this comment I was greeted with silence.

Another contentious issue that has surfaced since the loss of indemnity insurance is the establishment of publicly-funded homebirth services. Whilst my socialist heart leaps for joy that women can access the care of a known midwife and the option of homebirth without cost,

Whilst the catastrophic birth injury of Calandre Simpson is tragic, the impact of her court outcome has not been critically analysed. The whirlwind of risk management and defensive practice that has followed was not justified. Calandre Simpson was a 'veritable needle in a haystack'. A terribly injured person as a result of negligence from a family of considerable means able to fund expensive litigation. Instead of looking at what constitutes negligent practice and rewarding its reduction, the Federal Government chose to remove the rights of consumers, protect the pay packets of medical practitioners and deny Midwives their rightful practice.

Pull quote suggestions:

*All current assistance from the Federal Government has been in the form of Medical indemnity. Midwives have sought professional indemnity and with their inclusion in any government scheme, such a term would be more appropriate

References: ☰

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- APLA (2003) Submission to Medical Indemnity Policy Review Panel