

## Patel Conviction requires broad interpretation of Criminal Code provision

**The conviction of Dr Patel has broadened the scope for the potential criminal liability of doctors. Whilst this does not immediately appear to impact their exposure to civil liability, it may impact the cost and cover of medical indemnity insurance.**

### Introduction

Dr Jayant Patel was recently convicted and sentenced by the Supreme Court of Queensland on three counts of manslaughter arising out of criminal negligence.

The conduct in respect of which the convictions were sought was the performance of surgical procedures on three patients between 2003 and 2005, all of whom died as a result of post-operative complications. All three victims had consented to the procedures which had been recommended by Patel.

The court accepted evidence that the surgical procedures themselves had been performed skilfully and competently. However the prosecution argued that Dr Patel's criminal negligence arose from the anterior decision to embark on the procedures. Specifically, the performance of the surgeries was either unnecessary in the circumstances or dangerous having regard to the patient's precarious state of health at the time of the operation.

### Background

The issue for consideration by the court was whether s 288 of the *Criminal Code* applied to such a case, where it was not the actual performance of the surgery but the decision to perform certain surgery which should not have been undertaken in the circumstances.

Section 288 relevantly provides,

*"It is the duty of every person who ...undertakes to administer*

*surgical...treatment...or to do any other lawful act which is or may be dangerous to human life or health, 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 to the life or health of any person by reason of any omission to observe or perform that duty."*

The defence argued that s 288 applied to cases where the surgery itself was negligently performed and the section could not be construed to extend to pre-surgery incompetence involving diagnosis or recommendation to a patient of a specific treatment.

However, the prosecution submitted that the consequences of such an interpretation would lead to an absurd result, because s 288 would then extend to a surgeon's performance of a surgical operation but not to circumstances where a surgeon might procure a patient's consent to undergo a dangerous or inappropriate procedure.



### Findings

The court found that on its face, s 288 indicated that the duty did not extend to a decision to perform surgery. However, it agreed if such a construction was adopted, the consequences would be peculiar. If a surgeon failed to exercise skill during performance of surgery, s 288 would impose criminal sanctions, however if a surgeon made a negligent decision to embark on a dangerous procedure this would only attract civil

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liability and expose the surgeon to disciplinary proceedings. The court considered such an outcome could not have reflected the intention of the legislature.

It was therefore concluded that the words "surgical treatment" in s 288 were sufficiently wide to contemplate a decision to embark on a dangerous operation or treatment notwithstanding the skill and competence with which that operation may have been performed.

The court found that Dr Patel had not exercised reasonable skill and care in embarking on the surgical procedures performed on three parties, which ultimately led to their deaths and he was therefore convicted accordingly.

### Consequences

This decision has effectively extended the duty owed by surgeons under s 288, the breach of which results in criminal liability. Academic commentators have suggested that the broader construction will increase the potential criminal liability of doctors, which may have an impact on the cost and cover afforded by medical indemnity insurance. However the decision does not currently seem to impact the liability exposure faced by the surgeons or the damages to which their medical indemnity insurance responds for civil claims.

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