

Confidential



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Dear Dr Woollard

AREA HEALTH SERVICE'S LIABILITY TO VMO INJURED WHEN ATTENDING PATIENT IN EMERGENCY DEPARTMENT

Thank you for your email enclosing Dr Ken Mackey's letter of 10 August 2006 seeking my advice on the status of a rural VMO contracted to provide services to an Area Health Service under a RDASP VMO FFS contract and the liability of an Area Health Service if a VMO is injured while providing services under that contract.

As you are aware, the VMO FFS contract states that the VMO is providing their services as an independent contractor. While the wording of a contract is not determinative of this issue at common law, the tests used by a court to determine if a person is an employee or an independent contractor support the wording in the VMO FFS contract.

The VMO is paid a fee for each service. The VMO is not paid for leave taken. No tax is deducted at source (except a withholding payment if an ABN is not supplied). The VMO renders an invoice that is a taxable supply subject to GST. The VMO retains considerable control over how they treat the patient. While the Area Health Service supplies much of the infrastructure, equipment and staff, the VMO is supplying their independent skill and knowledge. The VMO conducts their own separate private practice in their rooms and supplies their services to other entities. The VMO is conducting a business.

As an independent contractor, the VMO will not be a "deemed worker" for the purposes of workers compensation legislation in NSW. This legislation deems certain categories of non salaried persons as workers (eg persons supplied under labour hire contracts, jockeys, salespersons, timbergetters and certain contractors). The details are set out in Schedule 1 of the Workplace Injury Management and Workers Compensation Act 1998.

Liability of Area at common law

The Area Health Service will have a duty of care owed to the VMO under both common law and the Occupational Health and Safety Act 2000. At common law there will a duty of care due

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to two liabilities of the Area. Due to the nature of the VMO contract and the relationship created, the Area will have a common law duty to provide a "safe system of work". This arises from the general legal principles of the law of negligence. The High Court case commonly quoted is *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16. Recent NSW Court of Appeal cases considering the duty of care owed to a contractor include *Rockdale Beef Pty Ltd v Carey* [2003] NSWCA 132 and *Maricic v Dalma* NSWCA [2006] NSWCA 174.

These cases have confirmed that the duty to provide a safe system of work is not confined to the employer-employee relationship. The duty may be owed to a contractor. I have no doubt that a court would find that a VMO who regularly attends a public hospital under a VMO FFS contract is owed a duty by the Area Health Service to be provided with a safe system of work. The Area Health Service needs to take reasonable care to avoid a foreseeable risk of injury to the VMO while the VMO is performing the services under the contract. The Area Health Service provides the premises, nursing and other staff and undertakes the initial triaging of the patient on presentation to the Emergency Department. Accordingly, the Area needs to take reasonable care to avoid exposing the VMO to unnecessary risk of injury.

The Area is not required to guarantee a risk free system of work for the VMO. There can be situations where a patient becomes violent and this could not have been reasonably suspected by the nursing staff or others caring for the patient or calling in the VMO. A VMO is expected to take reasonable steps to assess a clinical situation and the patient. Whether the Area breaches its duty of care will depend very much on the particular facts of each situation.

The second liability of the Area under common law of negligence is the Area's duty to take reasonable steps to provide safe premises for persons it invites on to its premises. The VMO is clearly attending the Emergency Department with the consent of the Area. The Area will also have as part of this duty of care a duty to take reasonable steps to prevent the person being exposed to a risk of injury,

While both duties of care could be pleaded in a civil action for damages, the standard required under the duty to provide a safe system of work is somewhat higher than the general duty owed to contractors on site. This means that it will be a little easier to prove a breach of the first duty than to prove a breach of the second. However, to prove a breach of this duty the VMO will need to be able to show that the Area Health Service failed to take reasonable steps to reduce, eliminate or manage the risk.

As you know, patients can be violent unexpectedly due to their clinical condition, effect of alcohol and other drugs, personality disorders and the actions of other patients or staff. What the Area is required to do is to take reasonable steps to either prevent such patients from harming others and/or to have in place procedures to minimise the harm occurring if the unexpected occurs. What this means in practice will of course vary from site to site and at different times of the day. Triage and assessment of patients presenting, staffing levels, provision of duress alarms and ease of access by patients to implements that could cause injury are examples of factors that may be relevant.

Should a VMO successfully establish a breach of this duty of care, the impact of the Civil Liability Act 2002 on the availability of damages needs to be taken into account. While a VMO would be able to recover loss of income and medical expenses, access to general damages is very much restricted due to the "tort reform" laws. Basically, a VMO would have to suffer an injury assessed as being at least 15% of the most severe injury before being eligible for any

general damages and these general damages are reduced on a sliding scale for injuries assessed as being in the 15%-30% range. There is an indexed overall cap on general damages.

Liability of Area under Occupational Health and Safety Act 2000

The Area Health Service will also have a statutory obligation to provide safe premises for contractors. This duty again requires the Area to undertake a regular risk assessment and to take reasonable steps to reduce or eliminate risks to contractors.

A VMO cannot obtain compensation under the OH&S Act. However, the factors proving a breach of the Act will also be factors that can establish a breach of the duty of care at common law. Breaches of the OH&S legislation may lead to very significant fines on an Area Health Service (up to \$825,000).

Impact of Workchoices

The new Workchoices legislation does not have a role to play in the above issues for two reasons. The first is that a rural FFS VMO is not an employee. The second is that Workchoices does not extend to occupational health and safety as this is still a function of State and Territory legislation. I would also note that since the commencement of the Public Sector Employment Legislation Amendment Act 2006, Areas no longer employ staff and Workchoices does not apply to those staff. The staff of Areas are now employed by the Director-General of the NSW Department of Health.

Should the RDASP VMO FFS contract be revised?

As there is a potential to "muddy" the waters on the tax, superannuation and workers compensation status of VMOs in a revision of the current contract in relation to the status of the VMO, some caution should be exercised in doing so.

However, if there have been concerns of members of the RDA on this issue, while the common law is fairly clear, there may be no harm in having the common law position referred to in a future revision of the standard contract.

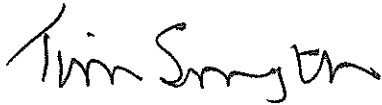
Conclusion

- 1 There is no doubt that an Area Health Service owes a common law duty of care to provide a safe system of work for VMOs working in rural hospitals.
- 2 I do not feel that a RDASP FFS VMO is a deemed worker for the purposes of workers compensation law.
- 3 The duty of the Area is to take reasonable steps to reduce or avoid foreseeable risks of injury to a VMO.
- 4 If the common law duty is breached, a VMO could recover lost earnings and medical expenses. Recovery of general damages in addition would depend on the severity of the injury suffered due to the operation of the Civil Liability Act 2002.

- 5 Area Health Services also have a duty to provide safe premises for contractors under the Occupational Health and Safety Act 2000.
- 6 All VMOs should have income protection insurance personally or through their practice company.

Please let me know if you require any further advice on this issue.

Yours sincerely



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