

Commentary

Registered paramedics, insurance and first aid – looking for coherence in law

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Abstract

This article challenges the view that professional indemnity insurance is required when paramedics provide first aid at an unexpected accident or medical emergency while not at work. It is argued that an interpretation of 'practice' that includes emergency first aid would be inconsistent with the policy of the law reflected in 'Good Samaritan' legislation and would be contrary to the public interest. The provisions of the Registration Standard 'Professional Indemnity Insurance' are linked to judicial decisions on what it means to practise a profession to demonstrate that an interpretation of 'practise' that excludes first aid is consistent with the law. The Paramedicine Board of Australia and the Australian Health Practitioner Regulation Agency should give a clear statement that providing first aid at an unexpected health emergency is not and will not be considered professional practice by an off-duty registered health professional who is at the scene of the emergency, simply by coincidence.

Keywords:

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Introduction

In a forum to discuss requirements for paramedic registration, a representative of the Paramedicine Board of Australia (the PBA) discussed the need for professional indemnity insurance (PII) for registered paramedics. In the course of the forum it was said (1, at 55' 20"):

... the insurance coverage that's applicable to jurisdictional services varies greatly ... some jurisdictional services will cover their employees if they're attending the scene of an accident on the weekend and they're not working or where they're doing volunteer sports trainer work with the local soccer club, other jurisdictional services won't. What practitioners need to know is any time they're using their skills and knowledge and experience as a paramedic ... they have to be covered by PII...

When reporting on the forum, Paramedics Australasia (2) wrote:

At last week's Paramedicine Board of Australia forum, we once again received the advice that:

- Each individual practitioner needs to decide what level of insurance they require
- Employees may have vicarious liability cover through their employer or a third party, however there may still be unique circumstances which arise whereby an individual paramedic is required to represent themselves before a tribunal
- Two other examples where it may be practical to have additional PII ... were: attending a scene of a road traffic accident whilst not on duty, or providing first aid as a spectator at a soccer match ... any time where you are using your skills or knowledge as a paramedic, you must be covered by PII.

This article challenges the view that PII is required when 'attending a scene of a road traffic accident while not on duty, or providing first aid as a spectator at a soccer match'. It is argued that the PBA and the Australian Health Practitioner Regulation Agency (AHPRA) should give a clear statement that providing first aid at an unexpected health emergency is not, and will not be, considered professional practice by an off duty registered health professional who is at the scene of the emergency simply by coincidence. On the other hand, a paramedic or any registered health professional who is 'doing volunteer sports trainer work with the local soccer club' will require PII.

This article will discuss paramedics (as that is the context in which the statements, above, were made) and because this issue will be of particular importance to paramedics. For paramedics providing assistance at a road accident or to a

person who is suddenly ill or injured at a soccer match is an essential part of what it is to be a paramedic. Paramedics are best qualified to provide assistance in these circumstances and should not be discouraged from doing so. Arguing that paramedics need PII before 'attending a scene of a road traffic accident whilst not on duty, or providing first aid as a spectator at a soccer match' will expose the sick and injured to harm and expose paramedics to dilemma. It would also reveal an internal incoherence within the law. It is argued that the law neither imposes that dilemma nor requires the PBA to do so.

The need for professional indemnity insurance

Paramedicine is (since 1 December 2018) the 15th registered health profession. As members of a registered health profession, paramedics are regulated under the Health Practitioner Regulation National Law. It is a requirement of that law that registered health professionals (other than a person who holds non-practising registration) must maintain appropriate PII (3, cl 129).

Professional registration boards are required to develop a 'registration standard' dealing with PII arrangements (3, cl 38). The PBA Registration Standard - professional indemnity insurance ('the Registration Standard') (4) was approved by the Ministerial Board on 15 May 2018. The Registration Standard sets out broad principles rather than prescriptive requirements. The Standard does say that insurance is required 'When you practise as a paramedic...' Practice is defined as '... any role, whether remunerated or not, in which an individual uses their skills and knowledge as a health practitioner in their profession...' (4, p. 4).

When practising their profession, paramedics are required to be covered by PII but that does not mean that they have to enter a personal insurance contract. Where a paramedic (or any other health professional) is practising only as an employee, their employer's insurance may be sufficient. Employers are vicariously liable for the negligence of their employees (5,6). Vicarious liability extends to liability for independently registered health professionals (7,8). Where a paramedic intends to practise only as an employee then, subject to any insurance or indemnity arrangements meeting the Registration Standard, the paramedic is not required to obtain their own PII.

What paramedics do

The Health Practitioner Regulation National Law works to protect the titles used by registered health professionals. Only a registered professional can use the title 'medical practitioner', 'nurse' or 'paramedic'. The legislation does not define the scope of practice for registered health professionals. The scope of practice for paramedics will vary and will continue to vary as paramedics find new ways to contribute to health services. It is, however, probably uncontroversial to say that paramedics are experts in out-of-hospital medical care and in particular out-of-hospital emergency care.

The conflict

Assume a registered paramedic is an experienced and capable paramedic who works only for her state ambulance service. She does not have private PII as she is not required to do so as her employer provides adequate insurance that applies whenever she is at work. As a paramedic she is an expert in providing out-of-hospital emergency care. While off duty she comes across a car accident where people have been injured, or she is attending a soccer match and a spectator near her collapses with a sudden cardiac arrest.

Although she is not under a legal duty to stop and assist (9) the community might expect that a trained paramedic, who is 'by virtue of his [or her] training, qualifications and registration, permitted by the community to become and be a member of a relatively small group of persons in the community who alone are recognised as having the capacity and are accorded the privilege of affording [para]medical treatment to those who require it' would assist if there is no practical impediment to stop her (10).

Further, as a registered paramedic she may be guilty of 'unsatisfactory professional conduct' (3, cl 139B) if she is found to have engaged in:

'Conduct that demonstrates the knowledge, skill or judgement possessed, or care exercised, by the practitioner in the practice of the practitioner's profession is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience'.

The Code of Conduct: Interim issued by the PBA (11, at [2.5]) says:

'Good practice involves offering assistance in an emergency that takes account of the practitioner's own safety, skills, the availability of other options and the impact on any other patients or clients under the practitioner's care, and continuing to provide that assistance until services are no longer required'.

In that case failing to come forward where there is no significant barrier could be considered a failure to provide 'good practice' and therefore conduct 'significantly below the standard reasonably expected of a [paramedic] practitioner' (3, cl 139B).

Good Samaritan legislation

Every Australian state and territory has introduced legislation to provide legal protection for people who step forward at an unexpected accident or medical emergency in order to assist those who are injured or ill (12-19). This legislation was passed after a review of the law of negligence commissioned by the Australian Treasury. The Ipp Report (20 p. 108) says:

'The Panel understands that healthcare professionals have long expressed a sense of anxiety about the

possibility of legal liability for negligence arising from the giving of assistance in emergency situations.'

Although the Ipp Review recommended against 'Good Samaritan' legislation it has been enacted Australia-wide. To give an example s57 of the Civil Liability Act 2002 (NSW) (13) says:

'A Good Samaritan does not incur any personal civil liability in respect of any act or omission done or made by the Good Samaritan in an emergency when assisting a person who is apparently injured or at risk of being injured'.

A Good Samaritan is defined (13, s56) as 'a person who, in good faith and without expectation of payment or other reward, comes to the assistance of a person who is apparently injured or at risk of being injured'.

The relevance of the reference to the Ipp Review (20) is that even though in every jurisdiction (other than Queensland) the legislation is generic and applies to all persons it was passed, at least in part, to address reported concerns of health practitioners. The legislation was intended to ensure that registered health practitioners are not reluctant to assist in an emergency for fear of legal liability. A registered paramedic who is 'attending a scene of a road traffic accident whilst not on duty, or providing first aid as a spectator at a soccer match' (1) would meet the definition of a Good Samaritan.

On the other hand, the PBA has indicated that 'attending the scene of an accident on the weekend [whilst] not working', without PII would be a breach of the Health Practitioner Regulation National Law (3), the Registration Standard: Professional Indemnity Insurance (4) and the Code of Conduct: Interim (11, at [8.5]). Although that breach is not an offence, it 'may constitute behaviour for which health, conduct or performance action may be taken' (3, cl 129).

What follows is that on the one hand the 'Good Samaritan' legislation and the Code of Conduct: Interim [2.5] encourages registered health professionals to act in the circumstances described by the PBA above (1). On the other hand, the Board's interpretation of the Health Practitioner Regulation National Law, the Registration Standard: Professional Indemnity Insurance and the Code of Conduct: Interim [8.5] would actively discourage action to assist in an unexpected emergency. This conflict suggests an incoherence in the law. Further, to tell a health practitioner, and in particular a paramedic that he or she should not assist at an emergency is to defeat the primary purpose of registration – to protect the health and safety of the community (3, cl 3A; 19). Discouraging paramedics from helping when their specialist skills are most needed is not putting the protection and safety of the public first.

Resolving the conflict

There are ways to resolve the conflict. In the discussion that follows, I identify three; two could be described as a 'work around', the third is more soundly based on law. The three possible resolutions are:

1. Employer recognition that actions in the circumstances are part of the paramedic's employment;
2. Recognition by the PBA that in circumstances where the Good Samaritan legislation applies there is no risk of liability so 'appropriate cover' can mean 'no cover'; and
3. Recognition that a paramedic who stops to assist at an unexpected accident or emergency is not engaged in the practice of the profession of paramedicine.

Each is considered below.

Employer recognition that actions in the circumstances are part of the paramedic's employment

An employer of paramedics could provide that it is part of their duty or employment to assist at unexpected emergencies.

As noted at the PBA forum (1), it is understood that some state-based ambulance services do agree to extend PII to paramedics in these circumstances. The author understands that some services have formal procedures to allow paramedics to recall themselves to duty when attending accidents. If an employer has provision in their workplace agreements or contracts of employment to the effect that the employer will extend PII arrangements to their employees in the circumstances described, that would meet the PII standard. It is not unreasonable to think that a paramedic employer would want their staff to assist at an emergency. An agency such as jurisdictional ambulance service is funded by the government to provide a public service. Apart from any moral considerations, the damage that it would do to the government's and the ambulance service's reputation if it was known that qualified paramedics were not supported to assist at an emergency could be sufficient motivation to ensure that paramedics are reassured that they are covered if they step forward. Whether private employers would take the same view is beside the point.

The point is that this solution would depend on every paramedic employer to decide their position. While we may hope that anyone who employs a paramedic would want them to step forward and help, that cannot be guaranteed. This solution would depend on the good will of each employer and it depends on the paramedics being confident that they understand the circumstances when the employer will consider that they are 'at work'. As a solution it would not be equally applicable to all paramedics regardless of where in Australia they practise.

Recognition by the PBA that in circumstances where the Good Samaritan legislation applies there is no risk of liability so 'appropriate cover' can mean 'no cover'

Under the Health Practitioner Regulation National Law (3) a registered paramedic must have 'appropriate' PII cover. With respect to the value of that cover, the Registration Standard (4, p 2) says:

'If you are arranging your own professional indemnity insurance, you should ensure that you take out adequate and appropriate insurance or professional indemnity cover. Professional indemnity insurers provide these policies. Insurance brokers or providers are best placed to advise you on what level of cover is adequate and appropriate for your practice'.

A paramedic whose practice is restricted to working only for a single employer may conclude that the only possible part of their practice that is outside their 'stated employment' would be providing assistance at sudden and unexpected emergencies and, given the Good Samaritan protections (discussed above), the appropriate level of cover is nil.

The problem with this approach is that the PBA can require evidence of 'appropriate PII arrangements'. The intention of the Act and the Registration Standard is that there will be a policy of insurance issued by a licensed insurer (4, p. 4). While arguing that no insurance is the 'appropriate' level of insurance is intellectually appealing, it is not likely to be accepted as consistent with the National Law (3) or the Registration Standard (4) should the PBA require evidence of 'adequate insurance'.

If the PBA does not require evidence then the issue will only arise if someone makes a complaint that a paramedic who renders first aid was practising without adequate PII. As noted above, practising without insurance is not an offence 'but may constitute behaviour for which health, conduct or performance action may be taken' (3, cl 129). A disciplinary panel may well conclude that any practitioner would provide assistance even if they do not have relevant insurance and so the choice to do so does not require disciplinary or corrective action. As with many legal issues, the matter cannot be resolved in the abstract. It would require a complaint to be made and the facts to be determined but it is certainly arguable that such conduct should not be considered as evidence of unsatisfactory professional conduct. That provides little guidance for paramedics faced with an unexpected emergency and would require them to 'throw themselves upon the mercy' of the panel or tribunal.

Recognition that a paramedic who stops to assist at an unexpected accident or emergency is not engaged in the practice of the profession of paramedicine

The best solution, both because it is, as I will argue, consistent with the law and would be nationally applicable, is to recognise that a paramedic who stops to assist at an unexpected accident or emergency is not engaged in the practice of the profession of paramedicine.

The question of what it means to practise a profession has been discussed in case law. In *Attia v Health Care Complaints Commission*, Walton J said (21, para [149]):

'The word 'practice' ... is not defined in the National Law. Nor is the phrase ['the practice of the practitioner's profession'] itself. There appeared to be common ground that the word and the phrase were attended by some ambiguity'.

In *Legal Services Commissioner v Walter* (21) the Queensland Supreme Court had to determine whether the respondent had engaged in legal practise while not a registered Australian lawyer. Daubney J said (22, para [15]):

'More recently, in *Cornall v Nagle* [1995] 2 VR 188, J D Phillips J, in construing the Legal Profession Practice Act 1958 (Vic), identified that a person who was neither admitted to practise law nor enrolled as a barrister and solicitor may be regarded as acting or practising as a solicitor in one of three ways:

1. By doing something which, though not required to be done exclusively by a solicitor, is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor;
2. By doing something that is positively proscribed by legislation or rules of court unless done by a duly qualified legal practitioner;
3. By doing something that, in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law.

Further (22, para [17]):

In *Legal Services Commissioner v Bradshaw* [2009] LPT 21, Fryberg J... explained:

'One would look for evidence of continuity, of repeated acts; one would look for evidence of payment for those acts; one would look for evidence of seeking business from members of the public, or at least from other lawyers; one would look for evidence of a business system; one would look for evidence of maintaining books and records consistent with the existence of a practice; one would look for evidence of a multiplicity of clients. None of those things is in evidence before me'.

Daubney J objected to the reference to 'carrying on the business of being a lawyer' preferring instead 'the notion of carrying on or exercising the profession of law, not the 'business' of law' (22, para [18]) but he did not disagree with the indicia proposed by Fryberg J. He did say that the requirement of fee or reward was not essential. At (22, para [20]) he said 'an Australian legal practitioner who habitually acts pro bono for needy clients can hardly be said to be not engaged in legal practise because he or she provides professional legal services without reward from those clients'.

Applying Daubney J's approach to paramedics one could conclude that a person is practising as a paramedic if he or she:

Is doing something which, though not required to be done exclusively by a paramedic, is usually done by a paramedic and by doing it in such a way as to justify the reasonable inference that the person doing it is a paramedic.

Providing first aid at an accident or to a fellow spectator is not done exclusively by paramedics. The first to respond to a sudden accident or illness is always someone who, by coincidence, is at the scene. The fact that a person is assisting at a sudden emergency would not be sufficient to draw the inference that the person is practising as a paramedic. That inference might reasonably be drawn if the person has and is using equipment normally associated with a paramedic, such as an emergency drug kit or an intubation kit.

Criterion 2 is not applicable. As noted the Health Practitioner Regulation National Law (3), unlike legal professional regulation, does not proscribe actions or treatments that can only be administered by registered health practitioners generally or paramedics specifically.

The use of scheduled drugs 'is required to be done only by those who have the necessary training and expertise' (criterion 3, above). The use of restricted drugs would suggest that the person is practising as a paramedic or other registered health professional so to use a drug kit would be evidence that the person is practising as a paramedic. That conclusion is also consistent with the argument addressing criterion 1, above.

As further argument that voluntary unpaid attendance at a motor vehicle accident or assisting a fellow spectator is not practising one's profession, such action does not have the '... evidence of continuity, of repeated acts' nor is there '... payment ... [or] evidence of seeking business [or] ... of a business system'.

Payment is not a necessary indicia of practising a profession. A paramedic who agrees to do 'volunteer sports trainer work with the local soccer club' with an understanding that he or she will assist players and/or spectators as required should be considered to be practising their profession, regardless of whether they get paid or not. But a person who is attending the game as a spectator and who assists their neighbour spectator simply because they are there, is not.

Section 3A of the Health Practitioner Regulation National Law (3) says: 'The main principle for administering this Act is that the health and safety of the public are paramount'. New South Wales has its own wording of s3A. In that state the law says: 'In the exercise of functions under a NSW provision, the protection of the health and safety of the public must be the paramount consideration' (22).

In each case an interpretation of the phrase 'in relation to the practitioner's practice of the profession' that includes the sort of first aid described in this article would not advance the health and safety of the public. Restricting the ability of paramedics who, for whatever reason, are not at that moment covered by relevant PII is to deny the community the value of the skills when they are needed most, at the immediate time of the accident or illness and before the 'on duty' paramedics have arrived.

Other health professions

There are 14 other registered health professions and each registered health professional is required to maintain PII when practising their profession. No doubt many health professionals, including medical and nursing practitioners, have stepped forward to help in the circumstances described by the PBA (1). The author is unable to identify any cases where a health practitioner has been disciplined for providing first aid care without PII. That may suggest the issue is unlikely to arise. It may also be that other health professionals are able to say that providing the type of care described is so different from their normal practice that they are not then practising their profession.

What is unique for paramedics is that emergency out-of-hospital care is the essential or defining aspect of paramedic practice (23). A doctor or nurse may feel they need to assist at an emergency but may not see that they are 'practising' their profession where their practice may have little or nothing to do with emergency care in an out-of-hospital environment. Paramedics, on the other hand, are experts in out-of-hospital emergency care. A paramedic whether on or off duty is still a paramedic and still has the knowledge and skills of their profession. When providing first aid they may not have the drugs and technology that would normally come with paramedic practice, but they have the skills to communicate with their patient and bystanders, to identify and respond to hazards, to manage what may be multiple patients with varying degrees of injury or illness and to make sense of the complex scene before them. They have the knowledge to allow them to diagnose the patients' conditions (within the limits imposed by not having all of their equipment) and to prioritise treatment. They may not be operating as a paramedic with an intensive care ambulance, but they still have and will be using the knowledge and skills of their profession.

It follows that a paramedic must, in the circumstances described by the PBA (1) be using his or her 'skills and knowledge as a health practitioner' but that does not necessarily mean that they are engaged in the practice of their profession for the reasons given above and based on the decision in *Legal Services Commissioner v Walter* (22). It does mean that the ambiguities inherent in the word 'practice' and the phrase 'the practice of the practitioner's profession'

identified in *Attia v Health Care Complaints Commission* (21) will arise more directly when considering whether a paramedic providing first aid is practising his or her profession when compared with other registered health professionals.

Conclusion

This article started with quotes from a representative of the PBA given at a forum on paramedic registration and reported by Paramedics Australasia. The gist of the advice is that a paramedic needs to ensure that he or she is covered by adequate PII even if he or she is providing first aid at an accident or other health emergency that they witness simply by coincidence, that is, they are not at work for their employer or otherwise at the scene of the potential accident for the purposes of providing emergency healthcare.

The article has argued that such a view creates an incoherence in law. Each Australian state and territory has passed Good Samaritan legislation to reassure everyone, including health practitioners, that they are not at legal risk if they step forward to assist at a sudden emergency. To suggest to paramedics, or any registered health practitioner, that they should not provide that assistance if they are not at that moment covered by PII is inconsistent with the policy of Good Samaritan legislation and with the stated aim of the Health Practitioner Regulation National Law (3): that is to advance, not hinder, community health and safety.

It was argued that there are at least two work around solutions for registered paramedics who, for whatever reason, do not have privately funded PII. One is for employers to extend PII to cover employed paramedics when providing emergency first aid. The second is for the PBA to accept that in the circumstances, 'adequate cover' can mean 'no cover'. Problems with both solutions were identified and discussed.

The author's view is that providing emergency first aid where the paramedic is not doing so in an ongoing capacity and is not using equipment and technology (such as scheduled drugs) that are usually used by paramedics then they are not practising their profession. If that is correct, the requirement for PII in those circumstances does not apply. That determination does not depend on the relevant Board as it is a question of law. What the phrase 'practise the health profession' as used in cl 129 means would, in the right circumstances, be a matter for judicial determination. Further, if this argument is accepted it would apply to all health professionals in all states and territories. It would further reassure registered health professionals that if they witness or come across an accident or sudden health emergency they should be prepared to come forward and do their best for the sick and injured without fear of personal legal consequences.

While the interpretation of cl 129 is ultimately a matter of law and therefore a matter for the courts, health practice and community safety would be enhanced if Boards, and ideally AHPRA, gave a public statement to the effect that a health professional who, for whatever reason, is not at that moment covered by PII should be prepared to provide emergency first aid without fear of either civil liability (as they are protected by the Good Samaritan legislation) or professional disciplinary proceedings. To do otherwise is to fail to administer the National Law in a way that is intended to ensure that 'the health and safety of the public [is] paramount'.

Of course the easiest solution, and one not discussed here, is for paramedics to obtain appropriate 'top up' insurance to cover them whenever they are not covered by an employer's or other third party PII arrangements. Such insurance is available (24).

Conflict of interest

The author is a member of the Board of Paramedics Australasia. Paramedics Australasia is the publisher of this journal. Paramedics Australasia has negotiated with Guild Insurance to offer professional indemnity insurance to paramedics, but this article does not promote that insurance offer.

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