The rising tide of litigation: a solicitor's view

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Any doctor can make a mistake: the important thing is to be honest with yourself and your patient, to take responsibility for the error, and to learn from it.

I was once asked by a group of doctors how to avoid being sued. My advice? Never make a mistake. Although it was meant as a humorous response, there was a serious point behind it: we will all, at some point in our careers, make mistakes and so are at risk of being sued.

So what should you do if you do make a mistake? The first thing to do is to admit it to yourself. Just as having an accident in your car does not necessarily mean that you are a bad driver, making a mistake in clinical practice does not mean that you are a bad doctor. Unless you can admit to yourself that you have made a mistake, you will never learn from it and will risk repeating it.

You should tell your patient and apologise. This allows you to focus on trying to make amends and tells the patient that you have their interests ahead of your own, which, at risk of doing myself out of business, can actually dissuade a patient from pursuing litigation. I have been told many times, I believe truthfully, 'if he'd just admitted he'd cocked it up, I wouldn't have come to see you, Mr Wicks'. Continuing to deny mistakes when they happen is actually more likely to anger patients and drive them to see a lawyer.

You should also have the confidence to talk to colleagues about the mistake. It can be helpful to share the burden, a relief even, and it can also stimulate discussion about how to avoid it happening again. In my legal practice our starting point is always that there is some justification for every complaint or expression of dissatisfaction that we receive because something has clearly gone wrong at some level, even if only because the client has had an unrealistic expectation of what we can achieve. While it is always good to receive compliments (and we do get some!), complaints are much more valuable because they enable us to learn where and why we have failed so that we can all learn from them.

CONDITIONAL FEE AGREEMENTS
The media are very keen to portray lawyers as chasing after the injured, begging them to bring claims. The reality for clinical negligence lawyers is very different. In my practice most of the work that we carry out is under conditional fee agreements, known as 'no win, no fee' because we get paid nothing if the claim fails. Therefore, despite what the press claims from time to time, it makes no sense for us to take on any case unless we think that it has at least a 50 per cent chance of success. It is for that reason that we turn down approximately 85 per cent of the enquiries that are made to us by people who think that they have suffered as a result of medical negligence.

FALSIFICATION OF RECORDS
Once we have decided to act for a client, we will obtain a complete set of the medical records. If you receive a request for a set of patient records, resist any temptation to alter them to hide or add something (Figure 1). With modern forensic technology there is little chance of getting away with it and the consequences of being found out can be catastrophic. As many politicians have discovered, it is the attempted cover-up that destroys careers because it escalates a case of straightforward human error into one of fraud and dishonesty.
MEDICO-LEGAL ISSUES

One of my partners acted in a claim against an eminent surgeon and, unusually, the case turned on the factual evidence of the claimant and the surgeon as to what had taken place in a consultation. Our client was certain that she had not been advised of a particular risk associated with the surgery, whereas the surgeon was adamant that he had told her all about the procedure and its risks. His notes of the consultation, when they arrived, appeared to have been altered to include the risk of which our client said she had not been warned. Our case had to be that the doctor was being dishonest. This is not a very attractive thing to have to argue, and (quite rightly) not something that a judge is keen to find without compelling evidence.

Although we had some forensic evidence that suggested the records had been altered, we also examined them carefully seeking anything else that might support a case that the surgeon was dishonest and therefore somebody whom the judge could not take at his word. When doing so, we discovered that the surgeon had submitted a claim to, and been paid by, our client’s medical insurer for the cost of a procedure that he had not carried out – it had in fact been carried by another surgeon under the NHS. At trial he was cross-examined on this and the colour drained from his face (and those of his lawyers). Not surprisingly, his credibility was ruined and the case settled. It did not end there for him, as the General Medical Council began an investigation into his practice. So do not ever be tempted to amend the notes, because it can bring consequences well beyond any litigation.

PEER REVIEW OF TREATMENT

Once we have obtained a complete set of the patient’s notes, we will instruct a consultant in the relevant field to comment on the standard of care received and to advise whether any injury has resulted. It is important to remember that no clinical negligence claim will be pursued unless a consultant in the same discipline has prepared a report stating that the Claimant’s injury could and should have been avoided. It is a very high hurdle for Claimants to clear and many claims, approximately half of those that we investigate, will fall away at this stage. So if you are sued, remember that the Claimant and his or her lawyers are only doing so because they have been advised by a consultant that the treatment that you provided was substandard. Thus, far from being driven by lawyers, the process is, in effect, a peer review of the treatment that you have given.

It is at this stage that we will send a Letter of Claim to the Trust in an NHS claim or to the individual doctor in a private healthcare claim. If you receive a Letter of Claim, forward it to your defence organisation immediately so that they can begin their investigation without delay. The defence organisation or NHS Litigation Authority will wish to speak to you and instruct their own medical experts to investigate the allegations of negligence before serving a Letter of Response that either admits or denies liability.

HONESTY AND INTEGRITY

When you meet with your lawyers and the medical experts instructed by them, be honest and open. Tell them precisely what happened. Do not try to construct a self-serving explanation.

In a claim in which my firm was involved, our case was that the Defendant surgeon had negligently placed a stitch around our client’s ilioinguinal nerve. The court heard that, after his complaints of pain were dismissed by the Defendant, our client had sought an opinion from a second surgeon. The second surgeon gave evidence at the trial that he had explored the Claimant’s groin and had found a stitch around the ilioinguinal nerve, which he had removed, following which the pain largely resolved. The court also heard evidence from neurologists that the pain was consistent with a stitch being placed around the ilioinguinal nerve.

However, when he gave evidence, the Defendant persisted in an attempt to argue that either the stitch was not around the nerve, or if it was, that he had not put it there – despite no other surgery having taken place in the area and the evidence of the surgeon who had found the stitch. He must have found his cross-examination in the witness box humiliating, following which the judge, unsurprisingly, rejected his evidence and the Claimant succeeded. So the end result for that doctor was that a judge had not simply found that (like us all) he was somebody who was capable of making the occasional mistake, but far more seriously for his professional reputation, was also somebody who was lacking sufficient integrity to take responsibility for and face up to the consequences of his own shortcomings.

CONCLUSION

The litigation process is stressful for both Claimants and Defendants. Any doctor who gets through a career without making at least one mistake that injures a patient achieves that distinction by luck, not skill. If you do make a mistake, it does not necessarily mean that you are a bad doctor; it just means that you had a bad day. The important thing is to be honest with yourself and your patient, to share the burden with your colleagues when it does happen and to learn from it. If you are sued, accept it as part of modern professional life, and put it in the hands of your defence organisation so that they can provide redress to your patient. Then get on with your career in the knowledge that the experience (unpleasant as it may have been for both you and your patient) will have made you a better doctor.