



A Nightmare on Doctor Street: Two

Just when you thought it was safe to go back into the clinic room...

BY PETER CACKETT

The quote below comes from Rudy Baylor, a graduate fresh out of law school and recruited by a ruthless ambulance chaser in the legal drama movie, *The Rainmaker* (1997). There are numerous jokes along these lines, negatively portraying lawyers, amongst other things, as greedy, amoral and dishonest. Upon viewing this movie at the cinema, having recently qualified in medicine, it first introduced me to the profession of 'ambulance chaser' (a lawyer specialising in personal injury and medical negligence claims). The knowledge that this branch of law exists can make one more sympathetic towards these jokes.

Until this time in my life, I hadn't really given much thought to potentially being sued as I was just trying to keep my head above water in the shallow end on the wards as a junior doctor [1]. However,

as I progressed over the years, I became increasingly aware of this threat. I have previously stated that the most important piece of advice to survive a career in medicine is not to be struck off by the General Medical Council (GMC). Well, the second rule for survival is: don't get sued for medical negligence!

As a junior doctor, although I was covered by 'Crown' indemnity, where the NHS Trust which I worked for would be liable for any claim made by a patient treated by me, I still took out professional medical indemnity as the fee at the time was nominal. Furthermore, as a colleague wise in the ways of being bulletproof advised me, this additional insurance would also cover me for any dreaded potential GMC or criminal investigation, whereas under these circumstances the NHS would just drop me faster than a Crystal Palace Football Club manager.

Along with this extra indemnity, bonus 'horror comic' magazines from the medical defence organisation would be delivered every quarter through the letter box and usually lie unopened in their cellophane wrappers gathering dust, together with the weekly *British Medical Journal* neatly piled by the front door [2]. The reason for the 'horror comic'

description became apparent on the odd occasion when I would actually open one of the magazines and read it. Inside each one there were usually a few terrifying and unsettling real-life tales of doctors being sued.

Working as a junior doctor on the medical and surgical wards, and especially in A&E, I felt particularly vulnerable to a medical malpractice claim for making a mistake. With an intense workload and covering every aspect of medicine, working long hours with limited clinical experience and often poor senior cover, the medicolegal bogeyman felt ever present. Most doctors working in that era, especially before the introduction of the European Working Time Directive, which has subsequently limited the number of hours worked to a more sensible quota, will remember how close to the wind we sailed then [3].

It was therefore with some relief that I started my Ophthalmology Senior House Officer rotation in Glasgow. In my first week I was afforded the brief luxury of observing in the eye casualty with the registrars. During one clinic, a particularly supportive doctor reassuringly told me that the potential for making a mistake in ophthalmology was fairly limited. "The only two things you must not miss diagnosing are an intraocular foreign body and temporal arteritis," he stated. "If you do that, you'll be fine."

'Well, that sounds pretty good to me,' I thought, and the image of a medicolegal spectre hovering with court proceedings

“How do you know when a lawyer is lying? His lips are moving”

in hand started to fade. This was short-lived, as a few months later one of the senior consultants gave a lecture to the department on medicolegal issues in ophthalmology, a topic on which he was well versed. There seemed to be no end to the potential pitfalls which I was unaware of, easily surpassing the number which Indiana Jones encounters in the opening, booby-trapped Peruvian temple scene in *Raiders of The Lost Ark* (1981). One in particular sticks in my memory.

During his talk, the consultant informed us that one had to be very careful when prescribing beta blocker glaucoma eye drops, and to check that the patient does not have any history of asthma or chronic obstructive pulmonary before doing so, and to record this in the notes. 'Duh!' I thought to myself confidently. 'I already do that, obviously.' He then went on to advise taking the patient's pulse to make sure that they are not bradycardic and to document this in the notes as well. 'Oh!' I realised. 'I hadn't thought of doing that.' He explained that this was because he had given advice in a case where a patient with bradycardia from an undiagnosed heart block had been prescribed a beta blocker eye drop which had sent their pulse even lower, and they had experienced an adverse event as a result. Whilst I was aware of the risk of bradycardia, I had not thought to check the pulse before treatment, documenting it in the notes, and resolved that I would do so from then on. However, the thought that there were potentially many more 'unknown-known' medicolegal pitfalls lying in wait made me more unsettled again [4]. The large boulder in the Peruvian temple was rolling down the tunnel towards me but unfortunately, working in the NHS, there was no waiting seaplane to whisk me to safety.

I have lived with this underlying fear of being sued for making a mistake in my work as a doctor for almost three decades. I also have the anxiety that someone will litigate against me when I haven't actually done anything wrong. Therefore, in a similar fashion to my previous discussion on the GMC, I wanted to explore how appropriate my fear is and what the current likelihood of having any medical negligence litigation against me is. In addition, I was curious as to what effect this legal threat is having on both doctors and the future provision of healthcare.

Medical negligence claims in the UK are clearly on the rise [5]. This is not because doctors are making significantly more mistakes but unfortunately because the ambulance chasing attitude prevalent in the USA has now reached our shores. Patients who had previously been reticent about medical negligence litigation, especially

against the beloved NHS, now perceive it to be acceptable and as a consequence, doctors are being sued with increasing frequency. Between 2006 and 2007, the number of clinical claims made against the NHS was 5426, and this increased by 133% to 12,629 in 2020/21. The figures also now show that a general practitioner in the UK can alarmingly expect to be sued once every 10 years, and therefore four times over a 40-year career.

For doctors, along with the many other contributing factors, both being sued and also the threat of a criminal prosecution can potentially lead to the four horsemen of the medical career apocalypse: stress, burnout, anxiety and depression. Doctors are also expected to cover the rising costs of professional medical indemnity in the event of being sued. As a result, doctors are increasingly likely to stop performing high-risk procedures which carry higher premiums and cherry pick the easier cases. Furthermore, defensive medicine is becoming more commonplace, where patients undergo additional tests and treatments which aren't always necessary in order to provide healthcare professionals further protection against litigation.

Not only that but doctors are also at a steeply increasing risk of facing criminal proceedings for gross negligence manslaughter. Most would probably agree that doctors should not be exempt from the criminal justice process, but there are concerns that criminal law is a blunt tool when applied to the intricate arena of healthcare. The main anxiety doctors have about the law of gross negligence manslaughter is that it is arbitrary and not properly delineated. The law currently does not define the standard of culpability deserving of a criminal sanction and does not distinguish between 'bad' doctors and those professionals acting in good faith who simply make a bad choice. There is also the risk that an individual doctor is made a scapegoat for wider systemic failures within the NHS.

As Ken Woodburn, a Consultant Vascular Surgeon, observed when he was accused and then subsequently acquitted of the manslaughter of a patient: "we are all only one error away from potential criminal prosecution." One only has to look at the relatively recent criminal convictions of Dr David Sellu and Dr Bawa-Garba to get a sense of the injustice that exists. Returning to the career in medicine monopoly board, unfortunately for doctors there are now more 'Go to Jail' cards in the community chest and chance decks.

This may all seem like a pretty bad state of affairs for doctors, but the potential cost to society appears to be even greater. Medical negligence pay-outs in the NHS rose from £583m in 2008/09 to £2.4b in 2018/19, which equates to 2% of the entire budget for the NHS in England, which was roughly £115b in that financial year. This fourfold increase in medical negligence expenditure over a decade is putting extreme financial pressure on an already overstretched NHS, with a corresponding loss in financial resources available for patient care.

This rise in costs is now believed to become unsustainable since the spending on clinical negligence claims is rising faster than funding for the NHS, with resources being diverted to pay for litigation rather than actually providing care for patients. The problem is now so great that NHS medical negligence claims is the UK government's second largest public sector financial liability (£83.4b) after nuclear decommissioning (£131b). Medical negligence litigation now actually threatens the future viability of the NHS.

To cope with medical negligence in the future, doctors and society as a whole are going to need a much bigger bank balance, and even then that might not be enough to stop this monster.

Finally, to round things off and cheer everyone up, I will close with another lawyer bashing joke, this time told by the lawyer Jimmy McGill in the TV drama, *Better Call Saul*.

“What’s the difference between a tick and a lawyer? The tick falls off when you’re dead [6]”

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PETE'S BOGUS JOURNEY

References

1. The hospital ward swimming pool analogy is burned into the memory of most doctors of a certain age. It comes from Dr Claire Maitland's comment to a new start house officer in Jed Mercurio's realistic medical TV drama series, *Cardiac Arrest* (1994-1996): "Phil, you work in a pool of excrement. Your job is to swim for the shallow end."
2. Occasionally, seeing the pile of BMJs grow to an unacceptable height, with a mild sense of guilt, I would open a few and read the Minerva pictures and obituaries before depositing the whole lot unceremoniously in the recycling bin. Latterly, with the onset of austerity brought on by children, the tortuous sight of unopened BMJs fortunately ended with the cancellation of my BMA subscription.
3. This realisation of the potential for mistakes at that time is summed up well in the novel *A Paper Mask* by Dr John Collee (1987). Adam, a junior doctor, is consoling a colleague, Simon, who has recently attended an inquest into the death of a patient under his care for which he feels responsible. "We've all had narrow scrapes," he says. "I bet there's not a doctor in this hospital who doesn't feel responsible for someone's death. You just drew the short straw. It's an occupational hazard, the public should realise that."
4. This is an extrapolation of Donald Rumsfeld's famous interview in 2002, where he explained, "There are unknown unknowns", in reference to the lack of evidence linking the Iraqi government's supply of weapons of mass destruction to terrorist groups. For me the feared 'unknown known' medicolegal pitfalls are those that are already known about, but which I personally am unaware of.
5. If it is any consolation, despite this rise in medical negligence claims, doctor remains the most trusted profession in the UK. I can happily take that thought with me to my early grave.
6. Disclaimer: the lawyer jokes in this article do not reflect the views of the author, just in case he is in need of legal services in the future!