

Only fools and doctors

BY PETER CACKETT

"Alright, this is where our future lies Rodney. Second hand motors. This time next year we'll be millionaires."

The above is the well-known quote by the happy-go-lucky Del Boy from the famous British sitcom, *Only Fools and Horses*, forever on a quest with his long-suffering younger brother Rodney for riches with his next money-making scheme [1]. As mentioned previously in the article 'Money Never Sleeps', in the world of private practice covering medical retina, I feel like a poor cousin to my colleagues in other fields. I am more like Del Boy, ducking and diving to earn some extra 'pie and mash' up the market, rather than Boycie, Del Boy's more successful and affluent nemesis, selling motors at his car dealership.

Another side gig to generate extra spondulix [2] as a doctor, and not through selling hooky videos, is by providing medico-legal reports. Shortly after becoming a consultant you will most likely start to receive email requests from solicitors requesting assistance to write these reports and provide an expert opinion on medical cases. These can be either for the pursuer (the person claiming negligence) or for the defender (the person being sued) [3].

The first thing to decide on after receiving an enquiry is whether or not the case is within your remit. When a solicitor is looking for an 'expert witness' it is important to bear in mind that the key word is 'expert'. Just being a doctor does not give you carte blanche to provide an opinion for every medical case put in front of you. Embarking on a case outside your area of expertise can be fraught with problems. As Inspector Harry Callahan states in the Dirty Harry movie, *The Dead Pool* (1988), "Well, opinions are like assholes. Everybody has one." You really don't want to look like an asshole in a legal case by providing an opinion that stinks.

Once you have determined that the case is one which you are able to give an expert opinion on, the next aspect to consider is the fee for generating the report. The main thing you should be considering is how much you value your time. These reports have to be written up in your spare moments which are usually already limited if you are working full-time and can be time



consuming. There are also plenty of other more important priorities outside work such as spending time with family and friends and recreational activities to enjoy instead. When pursuing extra money, it is useful to regularly ask yourself the same question Skyler asks her husband Walt in *Breaking Bad* when he is relentlessly driven to accumulate cash, which is "How much is enough?"

Having agreed to take on the case and an acceptable fee, the solicitor will then send out all the appropriate documents pertinent to the case, the most important of which are the patient's medical records. Many years ago, these documents were delivered by courier in the form of hard copies in several ring binder files. Nowadays they are sent by secure email. This may be a much greener and more efficient method for information transfer, however (there always seems to be a however when it comes to progress), without exception, you will find that the person who has scanned in the medical records has clearly gone to great lengths to make sure there is absolutely no chronology to them [4]. The written clinical notes, correspondence letters and investigation results are invariably all mixed together as well into one completely user-unfriendly, giant pdf. For me, the definition of soul-destroying is the sensation experienced on opening one of these pdf files relating to a diabetic patient, who usually has the most copious clinical notes of anyone.

Once you have extracted the relevant details of the patient's history and created an appropriate timeline, the next tasks are to decide on both negligence followed by causation. Medical negligence refers to the situation where a doctor or health professional (defendant) has breached their duty of care to the patient. Causation relates to whether or not the negligent actions by the defendant actually caused harm. Both of these are fairly straightforward to decide upon once all the facts in the case have been ascertained. This is the crucial point. Invariably there will be one key sentence in the entirety of the clinical records which the whole case seems to rest upon.

Later on in the case, your solicitor will usually provide you with the report from the expert witness working for the other side and ask you to comment on their opinion. Often it will be possible to see their point of view and you will also usually be able to find some common ground. However, there are occasions that after reading my counterpart expert's report, I have wanted to reply to my solicitor in a similar fashion to the lawyer Vinny Gambini in the legal comedy movie, *My Cousin Vinny* (1992). After hearing the opening statements in a court case, Vinny states: "Uh, everything that guy just said is bullshit. Thank you."

Throughout the case there will be opportunities for it to end prematurely. The pursuer's team may drop out if they feel that they do not have a strong enough

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case or the defendant's team may settle if they believe their client is at fault and pay a mutually agreed amount of damages to the pursuer. If neither of these two events happen and both sides are confident of their positions, then the case will progress to the end game which is a court case.

Your solicitor will then contact you with the dates of the impending court case and ask you to keep them "relatively free" so that you can attend to give evidence as an expert witness. The main problem with this is that it is impossible to keep your diary "relatively free" if you are a doctor working full-time. You just have to hope that this act of brinkmanship between the two sides ultimately results in an agreed settlement before the case starts, which from personal experience, it pretty much always does. You can breathe a sigh of relief at not having to go through the torture of dropping everything to attend at a moment's notice to give evidence and simultaneously juggling your clinical responsibilities for the day.

Although it makes life a lot easier not having to attend court to give evidence, there can often be a degree of despondency that the case has settled, especially if you believe that the side you are working for is in a reasonably good position [5]. It is understandable though as not only are the costs of a trial high, but also the outcomes of medical negligence cases are decided by a single judge. Both sides will be worried about losing, even if they believe that they are in a stronger position, because sometimes judges have been known to make unpredictable decisions (allegedly, Your Honour!). Furthermore, from the pursuer's position in no win no fee cases, no one from the legal team receives any payment at all if the case is lost at court. A settlement fee acceptable to both pursuer and defender is therefore often considered to be the best outcome. In a nutshell, there is frequently too much at stake for either side to risk a trial and statistics from NHS

Resolution show that only 2% of medical negligence cases ever make it to court.

After any work performed you can submit the fee previously agreed upon with the solicitor. And therein can lie problems. Solicitors can be extremely quick and relentless in pursuing you for any payment for work performed such as conveyancing or preparing wills but when it comes to making payments themselves, they can sometimes behave like the most tight-fisted Scrooge. Extracting any fee can be problematic with multiple emails and letters going unanswered. Shouting, "Show me the money!" invariably falls on deaf ears. For this reason, I now tend to provide reports for solicitors who have a good track record of paying promptly because life is too short to spend time chasing legal firms for money. As the comedian Alan Davies said in the Abbey National advert from the 90s, "Because life's complicated enough!"

In the majority of cases, you never get to find out the outcome of the case or what influence your report has had on the legal proceedings. It's a bit like watching an episode of *Kavanagh QC* and not getting to see the last 10 minutes. In general, the only feedback that you receive to let you know if your report was of sufficient quality is if the same solicitor approaches you for another report in the future. The preparation of a report is all very transactional which can leave you somewhat deflated if you have invested any emotional energy into the case.

In summary, the medico-legal arena can be interesting and financially rewarding but beware of the pitfalls I have described. Give yourself the least amount of hassle as possible when deciding whether to give up your evenings and weekends. It may well be a 'lovely jubbly' moment when you finally receive the cushty fee, but always remember that Her Majesty's Revenue and Customs will be hovering in the background awaiting his share, and a couple of Alka-

Seltzer may not be enough to deal with the headache from trawling through the lengthy pdf documents, and you may find yourself lamenting, "That's another Sunday I'll not be getting back again."

References

1. John Sullivan, the scriptwriter for *Only Fools and Horses*, had originally intended to call the show *Readies*. However, despite initial opposition, he changed the name based on a proverb originating from 19th century American vaudeville which says, "Only fools and horses work for a living."
2. Spondulix is a 19th century slang word for money. The most likely origin for the word is believed to be from the Greek word 'spondulox' which refers to a type of seashell from bivalve molluscs of the genus *Spondylus*. These *Spondylus* shells were used as jewellery in the Neolithic Age and also traded as an early form of currency. In light of this I will suggest to my wife that I pay her with shells instead for her medico-legal proofreading tasks.
3. Given the continued exponential rise in medical negligence claims, as soon as you start accepting medico-legal cases to work on, word will likely spread throughout the legal community. You will start to become inundated with requests.
4. The person helpfully scanning the clinical notes so that there is absolutely no chronology could also be usefully employed by the budget airline Ryanair to enhance their 'random seat allocation' software which already ensures that passengers from the same booking are placed at opposite ends of the plane if not paying for their seats.
5. I am always slightly upset when a case settles without going to court as one of my bucket list ambitions is to get onto the witness stand and say the famous line uttered by Colonel Nathan R Jessep (Jack Nicholson) in the military legal drama *A Few Good Men* (1992): "You can't handle the truth!" Hopefully one day I'll get the chance.

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