ACECC
Anaesthesia Continuing Education Coordinating Committee

Review RD 14 (2011)

WELFARE OF ANAESTHETISTS SPECIAL INTEREST GROUP

MEDICO-LEGAL ISSUES

INTRODUCTION

Anaesthetists are subject to a range of medico-legal risks. Apart from a high standard of professional practice, there are other ways in which anaesthetists can minimise medico-legal risks and the potential for legal claims.

The **maintenance of good records –** timely, accurate and detailed record keeping - will greatly enhance your defence to any legal claim. The lack of medical records will inevitably weaken a defence.

The manner in which you handle those around you can also minimise legal risk Do **not publicly criticise colleagues**. There are better methods for dealing with relevant issues of performance or management.

Be careful when delegating responsibility to junior staff and locums, as you can still be responsible, despite delegation.

Your method of **communication with patients and relatives** can also affect the possibility of them seeking to make a legal claim. Continued contact, a good bedside manner and an empathetic response to an adverse event can lessen the risks of legal action against you.

Maintain your **medical defence insurance**. This is a requirement for employment and practice in the great majority of healthcare facilities. Advice from your medical defence organisation (MDO) is essential in the event of any legal claim.

MINIMISING LEGAL RISK

(see Resource Documents (RDs) : RD 10 Breaking Bad News, RD 05 Critical Incident Support, RD Communication and Consent).

Obtaining **informed consent** from patients is not just complying with a legal obligation. It also helps to inform patients of what they may experience, and can identify what the patient considers a "material risk". It provides you with the opportunity to give patients a "reality check" about potential outcomes, and potential and material risks. A patient who has been warned of a risk will be more likely to accept that risk if it eventuates.

Good record keeping is an essential part of providing a defence to any legal claim. The absence of records or notes of what was done, and what was said, leaves you having to rely on your own memory. Detailed record keeping is essential. *("Good records = good defence, mediocre records = mediocre defence, poor records = poor defence")*

An **empathetic approach** to patients who complain can also assist in avoiding future medico-legal entanglement. A doctor with a "good bedside manner" is less likely to be sued by patients. Good communication with patients, particularly after adverse events, shows that you care about them, and want to ensure that they get better outcomes.

Australian and New Zealand legislation allows doctors to **apologise** when a patient has had an adverse outcome, whether or not the doctor has been negligent. There can be an open acknowledgment of an adverse outcome, and an apology to express regret for the fact that the patient has not had an optimal outcome. It is appropriate to **express sympathy without accepting blame.**

Such an apology will not, at law, constitute an admission of guilt.

Many hospitals have implemented an "**Open Disclosure**" policy, with strict guidelines regarding apologies and truthful disclosure of events. The patient or family can receive appropriate information about what has occurred, and an expression of regret, if appropriate. Guidelines may differ in each hospital or region. Check your facility policy before engaging in an open disclosure meeting or interview.

Inter-relationships in the workplace are also areas where the minimisation of risk can occur. **Good professional relationships** and communication with peers, colleagues and others can provide support and provide a supportive work environment in the event that any claim arises.

All health professionals are required to make mandatory reports in relation to the conduct of other health professionals who may have engaged in "notifiable conduct"

This includes occasions when a health practitioner

- practices while intoxicated by alcohol or drugs;
- engages in sexual misconduct in practice;
- places the public at risk of substantial harm because of impairment;
- places the public at risk of significant harm in a way that constitutes a significant departure from accepted professional standards.

(see RD 07 Sexual Misconduct, RD 13 The Impaired Colleague, RD 24 Mandatory Reporting)

IN THE EVENT OF A CLAIM ARISING:

(See RD 05 Critical Incident Support)

Consult your medical defence organisation immediately before you make any response. Any initial response should deal only **with the facts of the case.**

Compose a document (with help from your mentors and colleagues if necessary) with the details of these **facts;** keep a copy for yourself, a copy for your MDO, and place a copy in the patient's record. Do not alter other notes made in the patient's records.

A prompt empathetic response in breaking the bad news (RD 10) to the patient or relative, with truthful information, can sometimes assist to deter a claim developing into legal proceedings. Your employer/hospital and medical defence organisation can assist in an **"open disclosure"** frank discussion with the patient about the adverse event or claim.

Your employer/hospital should have processes to deal with any medico-legal claims. You should discuss the claim with your director of medical services or equivalent.

It is important to explore **your feelings about the case**. Discuss the issues and your feelings with a trusted colleague, who may be your mentor (or could act as a mentor), as well as with family and close friends (in talking to you family and friends, remember that confidentiality is paramount).

Recognise the **significant personal stress** associated with claims. Good communication with your family and friends will assist you in this process. Developing a trusting relationship with your legal advisers will also provide you with support.

Recognise that stress can contribute to depressive and anxiety symptoms. This is not uncommon. Recognise the possibility and seek professional help if appropriate.

Your physical health may also suffer. Consult your general practitioner and take his/her advice.

An **active intellectual interest in your case** can give you some feeling of control over its progress. Be aware. Ask questions. Build confidence.

Ongoing stress management is essential. Resolution of medico-legal matters may take some considerable period of time, up to several years. Ensure on-going contact with your mentors. Leisure and professional activities have a major role in stress reduction, and should be continued.

Further reading

The Health Practitioners Competence Assurance Act 2003 in New Zealand provides registration authorities with functions and powers to ensure that the registered health care workers are competent and fit to practise.

Australian Council for Safety and Quality in Health Care.
July 2003. Open Disclosure Standard: A National Standard for Open Communication in Public and Private Hospitals, , www.safetyandquality.org/articles/Action/opendisclfact.pdf)

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2010. Handbook of Communication in Anaesthesia and Critical Care. A Practical Guide to Exploring the Art ISBN 978-0-19-957728-6

Merry A, McCall Smith A.
2001. Errors, Medicine and the Law. Cambridge University Press

Nash L, Daly M, Johnson M et al.
2007. Psychology morbidity in Australian doctors who have and have not experienced a medico-legal matter: a cross section survey. Australian and New Zealand Journal of Psychiatry,; 41:917-925

Welfare of Anaesthetists' Special Interest Group Resource Documents (RDs)

RD 05 Critical Incident Support
RD 08 Mentoring and Peer Support Programs
RD 10 Breaking Bad News
RD 13 The Impaired Colleague
RD 24 Mandatory Reporting

Older references which may be useful

Birmingham & Ward.
1985. A high-risk suicide group: The anesthesiologist involved in litigation. Am J Psychiatry, 142(10): 1225-6

Charles S
Stress associated with medical malpractice litigation. Review of Psychiatry; vol 8, Difficult situations in clinical practice, ch 26 pp 531-548

Gorton M 1997. Medical Records - Revisited. ANZCA Bulletin 16:1 17-20

Martin et al 1991. Physicians' psychologic reactions to malpractice litigation. Southern Med J, 84 (11): 1300-4

Wilbert et al 1987. Coping with the stress of malpractice litigation. Illinois Med J 171 (1): 23-27

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ACECC is a joint initiative of the Australian and New Zealand College of Anaesthetists, the Australian Society of Anaesthetists and the New Zealand Society of Anaesthetists.

ANZCA HOUSE 630 ST KILDA ROAD MELBOURNE VIC 3004
Telephone: (03) 9510 6299 Facsimile: (03) 9510 6786