# The personal cost of medical litigation

I AM ON LEAVE AT PRESENT. The leave was planned but not voluntary.

In May 2000 I received a writ concerning a woman with cerebral palsy, who was born 20 years ago. I had been the general practitioner obstetrician who attended her mother until I handed over to a specialist obstetrician for a caesarean section. At first I felt confident that my management was proper and there could be no case. Two years ago, however, a court settlement of $14 million changed everything. Since then I have been through intensive examination of everything I did during the 4½ hours she was under my care. The notes and written answers to highly detailed questions now fill a 12 cm deep file box and I have become totally disillusioned with medicine and the law. The only records that exist from that time were the notes I wrote during her labour. Instead of providing a solid basis for my defence, as I thought, my notes have been dissected, with every nuance of each word explored and even the punctuation and layout questioned. The lawyers even questioned the fact that notes at different times during the labour were written in different pen. This threw me until I realised the event took place late at night into the early hours and I had probably attended in a tracksuit without a pen, and had used whatever I could borrow at the time I wrote each note.

As the case approached I was forced to question and requestion everything. The stress began to take its toll on me, but I believed it would not affect my family and practice partner. How conceited! In retrospect my relationship with my wife, my children, my colleagues and staff all suffered as they each tried to support me.

My practice has changed. I am constantly asking myself: "Did I miss anything? Have I performed all the tests?" — beyond any sensible practice of good medicine. Of course, I quit delivering babies two years ago. GP obstetrics was never a well paid practice, but I loved it. I had undertaken extensive training overseas as well as in Australia so that I could fulfil my role as a rural GP, caring for women in labour. When I found myself doubting everything I could no longer continue. From time to time, the lawyers would iterate that I would be judged by the standards of my peers. However, the repeated examinations made it plain that only a specialist obstetrician could be considered competent. The plaintiff's lawyers couldn't find an obstetrician in Australia to criticise my care, so imported one from overseas.

The case was scheduled to start on a Monday (nearly 4 years after the initial writ had been served) and run for 4 to 6 weeks. I am a country GP and have only once had 6 weeks' leave. On that occasion I had major surgery. At least I was given 3 months' notice of the court schedule, so had time to find a locum and to refinance against our home to cover the loss. Most readers will be aware how difficult and expensive this is.

Then at 12:30 on the Monday, my former partner and long-time friend telephoned to congratulate me that the case had been settled. He had been subpoenaed by the plaintiff's lawyers to give evidence as to her disabilities and they had telephoned him to tell him he would no longer be required. I immediately called my solicitor and he confirmed the news. My wife and I cried. When I investigate a patient with a breast lump, I telephone her as soon as I have the result. As a caring doctor I never allow a third party to give sensitive results to my patients. Part of our contract with our patients is to be sensitive to their feelings and the effect our diagnoses can have. So I am disillusioned with the law.

We are now having a few days to recoup. My sense of humour is returning and my practice partner and I shared a bottle of red wine last night and debriefed each other. I am not ready to return to work, but hope that catching up on correspondence, as well as the many odd-jobs I never had time to do, will give me a chance to regain my desire to be a good doctor.

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## Comment

**KERR'S STORY HIGHLIGHTS** all that is wrong with the adversarial civil litigation process. The plaintiff can choose whether or not to bring a claim. However, once the writ is served, the defendant has only two options — settle or defend. In a cerebral palsy case, the potential multimillion-dollar cost of the claim means it is not an option to settle "for convenience", or on commercial grounds, or to spare the defendant doctors and their families the psychological, professional and financial trauma of a protracted defence. If the best advice obtained for the defendant is that the plaintiff's claim is weak, then the claim must be defended. The defendant doctor is locked into a "Clockwork Orange" scenario — nothing he or she can do can end the nightmare.

The problem of course is that it is only "grey" claims that become protracted. If the expert evidence obtained by the defendant's lawyers is that the plaintiff's case is sound, an early settlement will be attempted. If the claimant has an inflated estimate of what their claim is worth, there may be a protracted argument about "quantum", but otherwise the claim will be settled and everyone can get on with their lives. If the plaintiff receives advice that there was no departure from acceptable care and skill, or an important fact not known to the claimant's lawyers and the experts commissioned by them emerges which makes that clear, the claim will be abandoned. Neither side will pursue a lost cause.

The most painful part of this story is reading of the settlement "at the door of the court". It is customary tactics, if the parties can't agree, to bluff their way right to the door of the court. The barristers are there, fully kitted up in gowns and wigs. The clients hear the opposing barrister say, "Look over there — I've got my experts lined up ready to go. This is your last chance to talk sensibly." That tactic of brinksmanship is what caused this country doctor the most distress. Three months beforehand, he was told that the case was unlikely to settle and that he should prepare for a 4- to 6-week hearing. Hence, the expense of a locum, and the need to refinance his home. Would even his own lawyer understand that a locum never pays his or her way; that even with a locum in the practice, the doctor would suffer a substantial loss of income? How

can the courts be managed efficiently when court time is set aside on the parties' estimate that a case will run for a number of weeks, but it collapses either just before starting, or on the first day? What an appalling waste of resources!!

But this *cri de cœur* is closer to the bone. All parties to litigation suffer severe distress during the process. The medical indemnity insurers offer collegiate support to defendant members during the process. One (the Medical Defence Association of Victoria) offers access to confidential counselling services by an external psychologist at the fund's cost. Litigation has the same emotional impact as a major illness, loss of a loved one, or a severe career setback. The stages of grief (as described by Elisabeth Kubler-Ross[1]) were transparently apparent in the members whose claims I managed. Some were clinically depressed, but were reluctant to admit it and seek help. None committed suicide, but I have heard of that happening overseas.

Further, the protracted course of the litigation, and the accompanying incessant questioning about minutiae, has caused this doctor to second-guess his own competence. All I can offer is the platitude that an accusation of "negligence" is not an accusation of "incompetence". Being sued, even successfully, does not mean that you are a "bad" doctor. The vast majority of claims I settled for doctors represented the one-off lapse or slip or error of a perfectly competent doctor. Most medical indemnity funds offer collegiate support. A senior clinician associated with the fund is assigned to the claim, not to manage it legally, but to be kept up to date on its management and, more importantly, to be available to discuss the medical aspects, at length and repeatedly, with the doctor. Even when a member is told that the case must be settled because the circumstances meet the legal test of negligence, mentoring can help the doctor learn from the case, put it in perspective, and then move on.

Perhaps writing up his experience will have a psychologically cathartic effect on the author. It is no consolation to him that very few doctors go through his experience. At least 90% of claims brought against doctors are either settled or abandoned by the plaintiff. Very few get to the final stages of preparation for trial, even fewer actually go to trial, and even fewer go to verdict. Litigation leaves deep scars on defendant and plaintiff alike. Rumpole and his supporters might think the gladiatorial adversarial model of litigated compensation for personal injury represents the highest form of justice, but it has been abandoned for injuries arising from workplace and road accidents. Why has it not been abandoned for medical accidents?

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1 Kubler-Ross E. On death and dying. New York: Scribner, 1997. ❑