



J.P. Jackson (Ed.)

A PRACTICAL GUIDE TO MEDICINE AND THE LAW

With a Foreword by The Right Honourable
Kenneth Clarke, QC, MP

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Foreword

From: The Rt. Hon. Kenneth Clarke, QC, MP



HOUSE OF COMMONS
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When I practised at the Bar in the Midlands some years ago, I had quite a large industrial injury and negligence practice. I therefore must have read thousands of medical reports prepared for litigation. I also encountered medical issues in cases quite frequently, and found myself involved in the presentation of the evidence by non-medically qualified advocates to non-medically qualified Judges who had to determine differences of professional opinion between the expert witnesses on each side. When I turned to politics and became a Minister at the Department of Health, I of course experienced, from a different perspective, problems for everyone in the Health Service that arise from the rapid growth of litigation involving medical issues that is now taking place. I am convinced that we are going to see a continuing expansion of these medico-legal problems. There is therefore a growing need for good practical guidance to all who might find themselves involved.

Peter Jackson is a good friend and also a very distinguished orthopaedic surgeon. He has gathered an extremely impressive list of colleagues to produce this new Guide. It is written by consultants and lawyers in a way designed to be of great assistance to those practising Consultants and lawyers who wish to have a useful reference guide. I am also sure that students preparing for both professions will find this an invaluable introduction to the issues that they are bound to encounter in the course of their professional lives when they are advising upon or engaged in potential litigation.

London
January 1991

A handwritten signature in black ink, appearing to read 'K. Clarke'.

Preface

Litigation involving doctors has greatly increased during the past decade. This is of two types, the first and perhaps of more immediate interest to doctors arises from negligence claims against them for errors of diagnosis or treatment. The second involves the suing of an employer as the result of alleged negligence involving the health of his employees. Despite the fact that nowadays few doctors can remain aloof from litigation, no appropriate formal teaching is given to most medical students or doctors. Furthermore there is only a limited amount of literature available to which reference may be made. The purpose of this book is to give practical guidance to all who may be involved.

The book is presented in three parts. The first part relates to those problems which may affect the doctor in the examination of patients and the preparation of medical reports. In order not to infringe the rights of the plaintiff, when arranging an appointment or obtaining information from hospital or practitioner's notes, or indeed any other source, knowledge of the problems of confidentiality and consent is required. These aspects do not normally arise in clinical practice and accordingly a chapter has been included on this subject. In addition, the writing of reports is discussed so that the results may give most help to solicitors and the courts.

The second part is devoted to clinical problems. The specialties chosen are those carrying the highest risk of leading to litigation. The authors all have experience in the various medico-legal problems in their subjects, mostly being members of council of the two defence societies. They have been asked to cover the contentious issues that arise most frequently in their specialties. Some of these complaints such as perinatal damage and the viability of the unconscious patient may be primarily related to the negligence of doctors. Other problems such as backache or deafness caused by accidental or industrial negligence are more concerned with damage assessment.

Finally a third part, written by those with legal expertise sets out advice to the doctor on the law, both on the writing of reports, Court attendance and includes a discussion of medical negligence. This will perhaps give some instruction to doctors on the problems that may arise, and occasionally allow them to avoid the dangers of

litigation. As a result, earlier and appropriate contact with the medical protection societies may be made.

The hope is that the book will prove useful not only to all students and younger doctors but in addition to some of their older colleagues for reference. The second and largest part should also be of interest to many of the legal profession who, often with limited medical knowledge, have to deal with the conditions discussed. General Practitioners also should find much helpful information in this section. Many of them may well be approached by their patients for advice on whether or not there has been negligence in the handling of their case at the hospital. The advice given, may well determine whether or not there are reasonable grounds for litigation.

Finally, following the reorganisation of the National Health Service, Practitioners may well wish to undertake a number of minor procedures of a surgical nature, which would previously have been referred to hospital. The clinical part gives some guidance in the snags which may be encountered and how to avoid them. There may as a result be an increase in negligence claims. Hopefully much of this will be avoided.

March 1991

J.P. Jackson

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PART 1:

**The Writing of Reports and
Related Problems**

The Medico-legal Consultation

J.P. Jackson

Although examination of patients is essentially the same whether they are seen for medico-legal purposes, or have simply come for advice in a normal consultation, there are certain differences in the way that they are referred and seen. This chapter is therefore concerned with the differences between the two so that problems can be avoided.

Arranging to See Patients

Initiation of the process for seeing patients for the purposes of assessment of medico-legal disability should start with a letter asking for an examination and report. This request usually comes from either a solicitor or an insurance company. Most will be from private firms of solicitors but large organisations such as British Telecom or British Coal utilise their own legal departments. Trade unions may also approach the doctor directly and on occasions smaller firms may need a report which they ask for without employing a solicitor. If the doctor is in doubt as to the standing of the organisation or person making the request, it is as well to make further enquiries, if necessary from their Medical Defence Organisation. There are "insurance assessors" of doubtful integrity. At this stage there is no necessity for the general practitioner to be involved as would be the case if it were a normal clinical consultation.

Whatever the initiating body, reports can only be given with the consent of the person to be examined. This may seem self-evident when the patient is specifically sent an appointment for an examination. On most occasions the appointment is sent direct to the patient and the instructing solicitor will usually make clear whether this is to be done, or request an appointment and take the responsibility of informing the plaintiff. If the report is on behalf of the defendant then permission must be sought through the plaintiff's legal representative. When a report is compiled from previous notes, the same necessity for consent applies.

In those cases in which medical negligence is involved, a briefing letter will also be required from a solicitor. In no case is the doctor under any obligation to see and report on any patient. In a negligence case it may be wiser to refuse if the doctor concerned is a colleague or acquaintance.

The details of the case, so far as they are known to the instructing solicitor, should be stated in the initial briefing letter. On occasion, the process will be initiated by a phone call asking whether the doctor is prepared to carry out the examination and, if so, requesting an appointment. Should the initial approach be by phone, the doctor or secretary should ask that a briefing letter, setting out the details as far as possible, should be forwarded. Until an appropriate letter is received, it is unwise to proceed.

There may well be some difference in the amount of information which is given in the briefing letter, depending on whether the doctor is being employed by the plaintiff or the defendant. Solicitors, representing the latter, may be ignorant of a number of the facts. Indeed there may well be a reluctance on behalf of a plaintiff's solicitors to disclose at this stage some of the details of how the actual accident occurred. If the request is on behalf of the plaintiff no further action need be taken. On rare occasions there may be an objection to the defendant's choice of doctor by either the plaintiff or his solicitor. In this event, no further action need be taken. Most defending solicitors are well aware of the necessity for permission for examination and have already obtained this prior to contacting the doctor.

On occasions the plaintiff may not keep the appointment. If the doctor is satisfied that reasonable time has elapsed after the request has been delivered and there is no good cause for non-attendance, the instructing solicitor should be informed. Further instructions may then be given to the doctor, either immediately or at a later date when enquiries have been made, as to whether a second appointment should be given. In the event that there is no good reason for non-attendance, a modified charge should be made for waste of the doctor's time.

Accompanying Persons

Relatives

In most cases the relationship is close, being either husband or wife. There should be no objection to their presence during either the interview or the clinical examination, provided that the plaintiff requests it. Not all patients may wish to have their spouse present, and in consequence it is wise to obtain permission before admitting them. There should be no difficulty in doing this without causing offence.

If the plaintiff is under age (less than sixteen) a parent or authorised guardian must be present, otherwise the appointment should be cancelled. The reason for cancellation should be explained and the plaintiff told that in all probability a further attendance will be necessary. The patient is told to return at a later date, accompanied by a suitable person. Problems in connection with this are most usual in those who are nearly sixteen, and they often feel rather irritated by this request. Nonetheless there is unlikely to be any difficulty, once it is explained that the examination is purely for legal purposes.

Interpreters

Prior to the appointment the doctor may have been warned that an interpreter will be accompanying the plaintiff. On many occasions the plaintiff appears

with a friend or relation who has come for this purpose without prior notice. Unfortunately not all interpreters are of a quality that can be considered reliable. Indeed on occasions the plaintiff may appear to speak and understand English better than the interpreter. The doctor may then have to decide whether or not the facilities are adequate, since it is vital that the plaintiff understands the questions that are put. Furthermore the clinician must comprehend the replies. If not, there should be no hesitation in cancelling the visit and arranging a further attendance with a more suitable person. If during the taking of the history it is apparent that there is a language difficulty, the plaintiff should be asked to return at a later date when arrangements have been made for an interpreter. In a mixed society this is not at all uncommon.

It is essential of course that satisfactory screening facilities for disrobing are available if the interpreter is of the opposite sex. Problems may arise, if the patient has difficulty in co-operating with the physical examination due to lack of understanding. With a little care and patience this can usually be overcome.

Friends

The accompanying person may be simply a friend. Provided the plaintiff wishes them to be present, there would appear to be no reason against it. Where the friend is of the opposite sex, and unrelated in any way, their presence is largely dependent on the views of the examining doctor. If in doubt, it is probably wiser to request that they remain in the waiting room.

Solicitors

Rarely, there is a request for the patient's solicitor to be present. Once more, there seems no reason to refuse admission though it might be wise to inform the briefing solicitor if the examination is being carried out for the opposite side.

It should be made clear from the outset to all accompanying persons that no interruptions should be allowed, unless asked for by the examining doctor. In the case of a minor, help from the parent or guardian may be very necessary should the plaintiff be too young to give an adequate history. If, in the opinion of the doctor the plaintiff is of an age to speak for him or herself, then they should be encouraged to do so, as far as possible, even if further help is subsequently required. In any event, at the end of the history taking, it is wise to ask the relative or friend (if an interested party) whether they wish to add anything. Whatever they do say, should be noted, but it is not necessary to include it in the subsequent report unless it is informative.

Most doctors will be well aware of the necessity for chaperones when seeing patients of the opposite sex. They will, however, have managed perfectly well without them in most cases in their normal clinical practice, since it is not always convenient or possible to have one present. Medico-legal work does however produce rather more patients with a functional or hysterical component and it is wise to have someone at hand who can act in this capacity if necessary. During the taking of the history, the attitude of the plaintiff, which can at times be very aggressive, may suggest that it would be sensible to have the support of a chaperone during the clinical examination. Unfortunately it is often only with hindsight that the doctor may feel that it would have been wiser to have had a third person present, if only as a witness.