

# Legal Challenges in Medicine



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I recently attended my forty-year post-graduation reunion - I graduated from Sydney University in September 1978. It was a cheerful night and great to see old friends. I am still recovering from the humiliating ritual of dancing to the Village People's, YMCA. (I was the cowboy).

There has been a lot of awareness about clinico-legal matters among junior healthcare practitioners since the Bawa-Garba case. I thought I would share a retrospective view on some aspects of my personal experience interacting with the legal profession over a long career without attempting to author a comprehensive document. The clinico-legal area is so complicated that I will not comment upon specifics other than saying that joining a Medical Defence Organisation (MDO) is essential for any practicing healthcare practitioner. MDOs know stuff that you will never know.

## Choosing a MDO

Choosing an MDO that suits your needs is one of the most important decisions you will make during your career. The decision should be considered carefully as not all insurance companies are the same. I recommend an MDO that is not necessarily a part of a large commercial insurance company. I have remained with the same company very successfully with all the ups and downs for over forty years. A good MDO has the commitment to care about a healthcare professional's personal welfare as well as the other legal matters. The good ones have experienced and sympathetic clinico-legal advisers and you will need their emotional support as well as expertise if things get sticky.

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# How do you manage if you hear that you are being involved in a legal matter?

This is one of the most stressful things that can occur for a healthcare practitioner so be prepared in advance.

Firstly, find a good experienced mentor that suits your personal style as early as possible in your career and before bad stuff has happened. There are differences between a supervisor and a mentor. A supervisor is appointed by the hospital administration, whereas you can choose your own mentor. Accordingly, a mentor is a better fit for your personality and aspirations. Sensible mentors recognise that being asked to mentor a junior colleague is a compliment in the Hippocratic tradition, and don't mind helping when approached. You don't have to propose formally.

If you do hear that you are being investigated or sued, contact your MDO immediately. You will need emotional support from understanding contacts like your mentor or peer colleagues. This support may come from your partner, however non-medical partners may not understand the paradigm completely. It is difficult when you 'put yourself out there' doing what you hope is the very best for your patients, usually because you have a great deal of internal self-drive, and then have the whole thing turn into a mess. Also, you may reasonably wish to quarantine work stuff and home stuff, especially if you have a young family.

Friends and colleagues that have been sued often say it is the reassurance and support of their colleagues who remind them that "you really are a good doctor" that is most helpful. In addition to your mentor and colleagues, consider professional support from your organisation's Employee Assistance Program. Most of all, do not personalise it excessively nor let it affect your sense of self or enjoyment of your profession. Many people that have been through the difficult journey find that they emerge with a greater sense of destiny and fulfilment and greater skill and knowledge. It takes some effort and luck to get to that point.

If you do have to attend court get specific orientation and support from your MDO. Be prepared-you may be permitted to carry your notes into the witness stand and read from them, for example. Know what type of proceedings that you are giving evidence- is it Criminal or civil? At all times, with or without a lawyer's help, you must tell the truth about the facts and not be evasive (eg if you did tell a superior about something), even if the truth may not help others.

## How is Medical conduct adjudicated?

The Bawa-Garba case showed that doctor's performance is judged 'on the facts' of that specific case. That principle was a factor in why the Bawa-Garba case judgement appeared so unreasonably harsh. Despite the sadness of the whole affair the court took the view based on the bare facts of the case that the management of the patient was well below reasonable professional standards. Mitigation for prolonged shift length/personal situation was not a consideration.

It means that if you are in a situation where you believe that workplace practices impair your ability to practice safely, consider raising a paper trail or at least initiate a discussion that objectively states your concerns with your supervisor. Situations could include excessive clinical workload or roster lengths, systematically poor communication, unavailable supervision, or being directed to provide care or undertake a procedure that is outside your level of expertise.

## Workplace Matters

Workplace matters are another area that MDO's can be worthwhile. There is the potential for an enormous range of conflicts or difficulties. I was once threatened with substantial legal action for defamation by another clinician following a complaint I made to a teaching hospital about the medical care that was provided to one of my patients. It was a difficult time. Because confidential complaints about clinical care directly to a Medical Superintendent have 'legal privilege' I was just able to deter the threatened defamation action with the assistance of my MDO. My painful teaching lesson was that "You can express an opinion and relate facts about what happened but don't be malicious, and tell the truth". Your MDO can assist with Workplace disputes such as bullying and harassment from staff or patients, or if you are accused of that. There are processes in place for this and many other workplace scenarios of which you may not be aware. An example could be if you feel the need to withdraw from providing your own personal care to a patient if they are harassing you. That needs a number of carefully calibrated steps including making satisfactory to the patient alternative arrangements for care.

Medical insurance does not substitute for a professional organisation such as ASMOF or the AMA and all doctors should belong to one of these.

## Root Cause Analyses

NSW Health does have a process for misadventure called Root Cause Analysis (RCA), and most Public Health Organisations have similar processes. They are supposed to look at systems rather than individuals. They have legal privilege and confidential recommendations, although the information can leak out. RCA's can be a useful means of improving patient care. Even if it is difficult I advise honest engagement with this process. RCA's are humbling and stressful. If there is senior medical staff engagement and diligent exploration of the facts, clinically useful outcomes are possible.

## Expert Certificates and Reports

There are some differences between an "Expert Certificate" and an "Expert Report". An Expert Certificate is prepared for the court by doctors involved in a case, such as for the Coroner. Any grade of doctor can be approached. Senior doctors are much more likely to be approached Expert Reports, which may seek review of a case that they did not personally manage. In both areas,

sticking exclusively to the facts of the case is crucial, and not being tempted to step outside your area of expertise or to conjecture. A skilful barrister can make even the most caring doctor look pretty stupid in the witness stand. In both circumstances look at them as an objective means of assisting the court, and not representing or supporting any individual. Don't run the risk of appearing biased (or excessively sympathetic to a colleague).

If you are asked to provide a mandated Expert Certificate I would advise that is done with the assistance of your MDO. Expert reports are generally a request rather than a directive. Although agreeing to write an Expert report is 'doing the right thing', it exposes the doctor to what may not be a nice experience. You need to ask what it will involve for you e.g. being subpoenaed to Court, maybe having to attend joint conferences with other experts. Enquire about fees and a timeline for when you will be paid. I personally accept those Expert Report requests with my eyes wide open, and agree to cooperate if the matter is of sufficient merit ,the request is put reasonably and originates from a reputable source (such as a MDO). In summary, dealing with legal profession is stressful but it is also a crucial part of our professional responsibility. An important lesson from the Bawa-Garba case is that it is essential for any doctor of any grade to be a member of a good Medical Defence Organisation. Ask your senior colleagues about their experience. Choose your MDO carefully, you could be married to them for life.

Should members have any queries related to these issues they are advised to contact MIPS for advice on 1800 061 113.

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