

ETHICS MAN **Daniel K Sokol**

# “How can I avoid being sued?”

Common sense is the key

“Doctors don’t care much about ethics,” an unusually frank junior doctor told me one day. “What they care about is law: they don’t want to get sued.” As an ethicist and, like all healthy people, a patient in waiting, I believe strongly that doctors should provide medical care to a high ethical standard.

Yet, as a lawyer, I am aware that many ethical violations have no consequence in law. A healthcare professional may wander through the hospital, exuding rudeness and disdain from every pore, leaving a trail of anxious patients and relatives in his wake, without any legal repercussions. A breach of the duty of care is, in itself, not enough. There must be an injury resulting from that breach; and, in the eyes of the law, grief, anger, and upset are not injuries.

The law, however, does try to keep up with ethics. In *Chester v Afshar*,<sup>1</sup> a neurosurgeon failed to inform the patient of a 1-2% chance of developing cauda equina syndrome from spinal surgery. Sadly, despite being operated on competently, she developed the condition and sued the surgeon for not telling her about the risk. The patient could not deny that she would have had the operation even if informed of the 1-2% risk. She would, however, have sought further advice.

If the patient had told the court, “I would not have had the operation if warned of the risk,” then causation would be clear. No operation, no cauda equina syndrome. But here the patient could not say that she would have refused the operation. Would her injury have occurred in any event? Was the syndrome caused by the surgeon’s failure to mention the risk? In his judgment Lord Hope answered in the affirmative on policy grounds. He wrote, “The function of the law is to enable rights to be vindicated and to provide remedies when duties have

been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence.” *Chester v Afshar* is a wonderful example of the law adapting to current ethical norms.

In my first few months as a barrister the allegations of clinical negligence have been varied: a patient dies after a radiologist fails to spot the tell tale signs of a lung problem on a scan; a baby is born with severe disabilities after midwives wait too long to call a doctor; a depressed woman commits suicide soon after discharge from hospital; a surgeon performs a major procedure without an anaesthetist in someone’s basement flat. In some cases, it is unclear whether the clinician has acted unethically. At other times the conduct is so obviously unethical that a saying comes to mind: “You don’t have to be an ichthyologist to know when a fish stinks.”

Cameron and Gumbel, in *Clinical Negligence*,<sup>2</sup> provide a useful list of common breaches of duty in medicine. These include failing to properly examine the patient, failing to diagnose the patient’s condition, failing to refer to an appropriate specialist, failing to give competent advice, failing to prescribe the right treatment, failing to treat or operate competently, failing to interpret tests correctly, failing to monitor a patient, and failing to follow up the patient when necessary.

What happens, then, when the case papers arrive in chambers, packed in boxes of lever arch files of documents and medical records? The barrister examines the documents with a fine tooth comb, deciphers the hieroglyphics of the medical notes, and writes a detailed chronology of events. This was my first lesson in chambers: get on



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top of the case right from the start. No detail is superfluous, even the names of the client’s young children. If the subject emerges during a meeting with the client, it will reveal your meticulous preparation and inspire the client’s confidence. As in medicine, trust is essential. In a recent lecture on legal ethics, the master of the rolls repeated the words of the late Lord Bingham, who said that a barrister must be someone who could be “trusted to the ends of the earth.” This vertiginous standard also applies to doctors and nurses.

With the facts firmly at the finger tips, the barrister can dissect the case, identify its strengths and weaknesses, and proffer advice. Often he or she will give a prognosis on the chances of success if the case goes to trial.

My wife is a neurosurgical registrar. Her days are so filled with brain tumours and bleeds that all headaches appear sinister. Similarly my days are so replete with clinicians of dubious skill and knowledge that healthcare institutions seem like festering reservoirs of clinical incompetence to me. Concentrating the mind on one issue tends to distort reality. Risks and dangers loom disproportionately large. With this caveat in mind, here is my short answer to the oft posed question, “How can I avoid being sued?”: know your medicine; be alert to early signs of deterioration; act promptly if a problem arises; warn patients of risks; write thorough, legible medical notes; and, perhaps most importantly, be aware of your limits and seek help if unsure.

And if you think this is plain common sense, let me tell you about a case . . .

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References are on [bmj.com](http://bmj.com).

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