Medical Defence: What Doctors Want, What Doctors Need, and What's Not Covered

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WHY EVERY DOCTOR NEEDS THE VERY BEST MEDICAL DEFENCE POSSIBLE

As doctors, we are reminded every day in our practice, in dozens of different ways, that we help patients with a mixture of art and science. We try to do our best in an environment of uncertainty that good education and up-to-date science can at best only partially reduce.

In reality, the consultation begins with the patient telling us his subjective experiences, and this history is prone to poor memory and sub-optimal communication. During physical examination, we elicit clinical signs that are partially dependent on the patient's mental state (e.g. the extent of his anxiety), that subconsciously limits the cooperation he can offer. We next order laboratory tests appropriate to the imprecise observations from history and physical examination, but sometimes even the interpretation of these test results is not definitive. We therefore reach a probable (but seldom definite) diagnosis based on the most likely interpretation of all these above uncertain inputs, the uncertainty of this process being reflected in our record of several "differential diagnoses". At the end of the process, we discuss the likely diagnosis and its treatment options with the patient, using our imperfect skills in lay language, with some of the patients having only a limited grasp of the significance of what is said.

Therefore, in this entire process, subjective reports, sub-optimal tools, imperfect skills, and limited knowledge are constant features. Inevitably, entering every doctor-patient encounter is always the risk of misunderstanding, miscommunication, misinterpretation or even misjudgement. These risks can be to an extent reduced, but never eliminated. Even practicing defensive medicine in the most conservative manner will not eliminate this risk entirely.

Some may argue that even though we try to do our very best for each patient, and though no patient begins the relationship with his doctor with legal challenges in mind, these above features of our profession make patient-doctor disputes almost inevitable. In every physician's professional life, therefore, it is only a matter of time before disputes arise, and therefore only a matter of time before medical defence becomes essential. Because imprecision and uncertainty are part of the art and science of medicine, the very best professional standards will not prevent this. It is absolutely naive to think that because we have helped thousands of patients in the past without complaint, the risk of legal challenge, and therefore the need for medical defence, does not apply to our specific case. This is so whether you are Professor of Medicine or a GP, and whether you practice in the UK, in New Zealand, or in Singapore.

That is why it is critical to have adequate medical protection. Adequacy, however, can only be properly assessed when you understand what you want and need, what your medical defence scheme offers, and, critically, what you are *not* covered for.

WHAT DOCTORS WISH FOR

On this topic, most doctors think only in general principles. We want a rewarding professional life, and a peaceful personal life. If pressed, we will specify that what we want is assurance of legal and professional advice when there is "an event", of competent and rigorous defence should there be legal challenge, of protection for our professional reputation and finally, payment of defence costs, fees and damages when judgement is awarded against us. In fact, we need to be much more specific about details than this wish list when we choose a medical defence scheme. Finally, even with medical defence, we also need to know what no scheme offers – what we can never be protected against – and consider how we must plan for this worst-case scenario.

WHAT DOCTORS NEED

In real life, you need to consider a few specific points when you select a medical defence scheme. This applies whether you want to join a specialist medical defence organization or purchase malpractice insurance from a general insurance firm:

1. Proactive education: Does the body you join provide you with continued training in "how to stay safe"? The form – seminars, a newsletter with case studies – matters much less than whether it does or not.
2. The nature of the body you are joining: Does it matter if this is a co-operative owned and run by doctors, or if it is a commercial insurance company?
3. Swift access to both professional and legal advice, once you suspect something might go wrong. Good advice leads to correct action, which when taken early in the course of events, can reduce the chance of a "case" emerging from an incident.
4. Once a complaint becomes a case: Is there a good panel of reputable and experienced lawyers that you can select from, should legal defence become necessary?
5. Respect for your personal point of view: Might you be forced to settle your case out of court ("cheaper to do so in your case"), when you might prefer to fight on for the sake of clearing your professional reputation?
6. Is there an upper limit ("cap") to the amount payable per settlement, and does this reflect the range of present awards *as well as the trend to the future?*

There are many important considerations beyond these. Doctors should therefore speak to their peers, or to members of their Medical Association who have studied this topic in the local context.

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WHAT MAY NOT BE COVERED IN YOUR SCHEME

Different medical protection schemes have very different features. It is up to the doctor to understand these differences, including what his scheme does, and does not, cover. Here are some examples of points that may be important to doctors practicing in Singapore.

How sure are you that:

a. *Your medical defence body is strong, will remain healthy, and will still be in business when the time comes?* For example, one body has "over 180,000 members worldwide, nearly 4,000 members in Singapore, and assets in excess of S$800 million". It has been protecting doctors in Singapore for more than 20-30 years. A newer scheme is run by a very large and reputable insurance concern, and some doctors like the fact that it is entirely Singapore-based. Different strengths matter more than others to different doctors. What is important is that you assess your defence body's strength by asking searching and explicit questions.
b. *The terms of your defence scheme or insurance policy cover an adequate time interval between incident and claim?* One body offers "occurrence based" cover, meaning that cover will be extended regardless of when the claim arises, so long as the member had paid his premium at the time of the incident. Other bodies offer "claims made" cover with different terms in this regard. You need to know the difference, and decide which one is a better fit for your needs.
c. *The terms of your defence scheme or insurance policy cover changes of your status?* For example, you may retire (and thus no longer pay premiums) or leave that medical protection body to join another. Cover continues unchanged through retirement and change to another medical defence body, in an "occurrence based" scheme. You need to know the precise terms (and assess if the difference matters in real life in your practice) if you are joining a "claims made" scheme.
d. *Will <u>all matters</u> arising from your professional practice be covered?* You may be challenged in more ways than by the patient. Have you considered, for example, criminal allegations, defamation charges, enquiries from the Medical Council, Coroners' enquiries, etc? (See real examples in box on page 6.) Do you know if your defence scheme covers these matters? For your own guidance, ask current schemes for their past history, and ask new / young schemes for their arrangements and provisions.

Some doctors only require it to be a large defence body with a long and stable history. Apart from size, though, you should ask other doctors about their personal experiences with the different bodies, to get from real-life reports an indication of how much support you may expect when you need this. When selecting a scheme to join, you should first define which defence bodies you feel you can rely on, then choose from these a defence scheme that meets your needs. If you are unsure of the technical differences about what may or may not be covered (e.g. those in points (a) to (d) above), you must seek clarification directly from them, or advice from your Medical Association.

WHAT'S NOT COVERED BY ANY DEFENCE SCHEME, BUT IS CERTAINLY NEEDED BY BOTH DOCTOR AND PATIENT

Although the doctor can join the best medical protection currently available, he cannot predict the future health of that scheme. No scheme, however good, can guarantee him and his patients that it will be still "in business" when he is legally challenged in the future. This is important because unlike car accidents, the interval between the medical events and the resultant case may be many years. Conceivably, it may be even more than a decade after the incident when you realise you need access to medical protection.

Defence bodies or insurance companies, however healthy at the present, can become non-viable because of unforeseen, catastrophic business events in the future, or perhaps simply withdraw from doing business in a specific region.

For example, nobody could have foreseen that in 1999, MDU would greatly reduce its area of operations and pull out of Singapore, or that UMP would be forced to consider provisional liquidation in 2002. In the first instance, MDU and MPS reached an agreement whereby MPS assumed MDU's obligations. In the second instance, the SMA was able to negotiate with MPS and NTUC Income to offer "nose cover" to UMP members, covering future challenges from events that occurred during their former UMP membership. These are exceptional outcomes. *In reality, there is no iron-clad guarantee that the doctor can buy nose cover, the next time a defence body declines, or is unable, to continue its work in Singapore.* While the risk of being caught without cover in such circumstances is probably small, the consequences both to the affected doctor and his patient are potentially enormous.

In the absence of such iron-clad guarantee, and because of the very serious potential consequences, the doctor must consider three things:

a. Carefully evaluate the need to take on a second, independent, cover. Perhaps the second defence scheme will still be functioning, and thus still can offer the doctor cover, when the first has stopped.
b. Charge fees that reflect this risk of "uncovered exposure", and save the difference against a rainy day, every time he sees a patient. This is fair compensation for the risk he is assuming on behalf of his patients, day after day.
c. Seek professional financial and legal advice, about ways and means to insulate personal and family assets from consequences of legal challenge. This has always been a priority among entrepreneurs; and sadly, doctors need to consider this as well.

ACTIVE STEPS IN PRESERVING PERSONAL ASSETS

Tragically, the average doctor knows far less about this important topic than the average renovation contractor. In catastrophic situations (e.g. being sued for a large sum when your defence scheme has quit the business, or when it is unable to help) the doctor may even be made a bankrupt by the action. This is not the end of the world – he may be discharged as a bankrupt within three to five years. The real tragedy is if his family suffers unnecessarily from this bankruptcy, especially if this suffering could have been reduced by prophylactic action.

Active planning to preserve personal assets is not a sleazy or morbid thing, and should be considered by all of us. There are several very acceptable ways to shield some of our previous earnings from creditors in the event of personal bankruptcy – most of these are perfectly legal. We can consider irrevocable trusts

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set up to cater for our children's education and other future needs, and similar arrangements to shield the family home. We can structure the medical practice as a limited liability company (Pte Ltd), which will permit paying part of the practice income to our spouse, by making him/her a Director of the company – and thus preserving this portion should we become bankrupt. There are other fairly easy, relatively fuss-free, options – one does not have to think in terms of offshore bank accounts and "BVI companies". But we need first to acknowledge that we are babes in the woods in this sub-specialty, and then actively seek professional advice on such matters.

SUMMARY

Imagining that we will be immune to legal challenge, so long as we always do our best for our patients, is self-inflicted hyper-myopia. All of us have made professional mistakes in the past, and will continue to do so in the future, till the end of our medical careers. Many of us, sooner or later, will need assistance in medical defence matters – and sometimes, not even because of our professional mistakes. It is for this reason that we need to carefully study and select the medical defence scheme that best applies to our needs, from the (often very good) choices available today.

Understanding the features and limitations of the defence scheme we choose is critical. In addition, we need to admit to ourselves that belonging to a medical defence scheme, however good and strong it is at the present, is no iron-clad guarantee of help when we need it most, as only a State-sponsored scheme will have anything close to an assured life. Doctors should therefore consider this unavoidable risk, and take steps accordingly. Some may feel the need to subscribe to two independent covers, because any one, however healthy at the present, may fail in the future. At a minimum, all doctors should charge fees that reflect the risks they have to assume on behalf of their patients. In addition, we must take steps to preserve our family and personal assets, in case current medical defence is not present, or not adequate, to prevent personal financial disaster. With greater confidence of safety, we will be in a better position to meet our patients' needs more objectively, and thus to serve them better as doctors. Being forced to retreat into defensive medicine because of fear of future medico-legal challenge, is bad for both doctor and patient. Careful planning to meet the defence needs of normal practice, and making additional provisions for unimagined needs that might deteriorate to worst-case scenarios, will help reduce that fear significantly. This will be of significant benefit to everybody. ■

PERSONAL EXAMPLES OF TIMES WHEN DEFENCE WAS NEEDED

Many years ago when I was a Consultant Physician in Oxford, there was a suggestion of negligence on the grounds that we had missed the diagnosis of carcinoma of prostate (the subsequent cause of death) when a patient was in hospital for another medical condition. In fact, a tentative diagnosis had been made and an appointment for urological assessment arranged prior to discharge. The patient failed to keep the appointment and was lost to follow-up. Although no one was guilty, the entire team was made to feel negligent – but the matter was efficiently resolved through the good offices of the MPS.

On another occasion, my professional integrity was questioned when I criticised what I believed to be an irresponsible action on the part of the Marketing Division of a food industry. MPS arranged for a leading barrister to pursue the matter. An apology was received and all costs were covered.

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