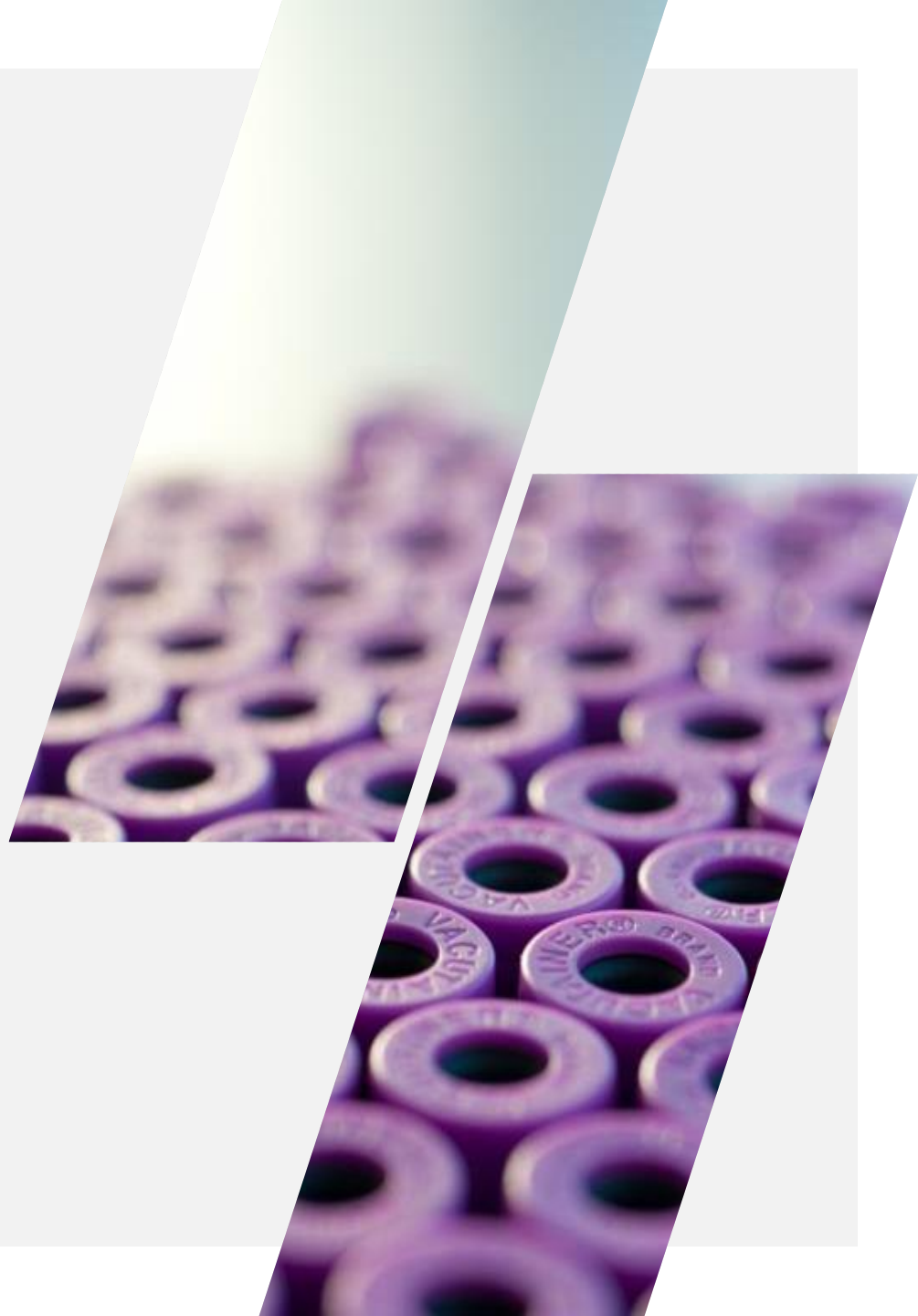


What is negligence and why do people sue?

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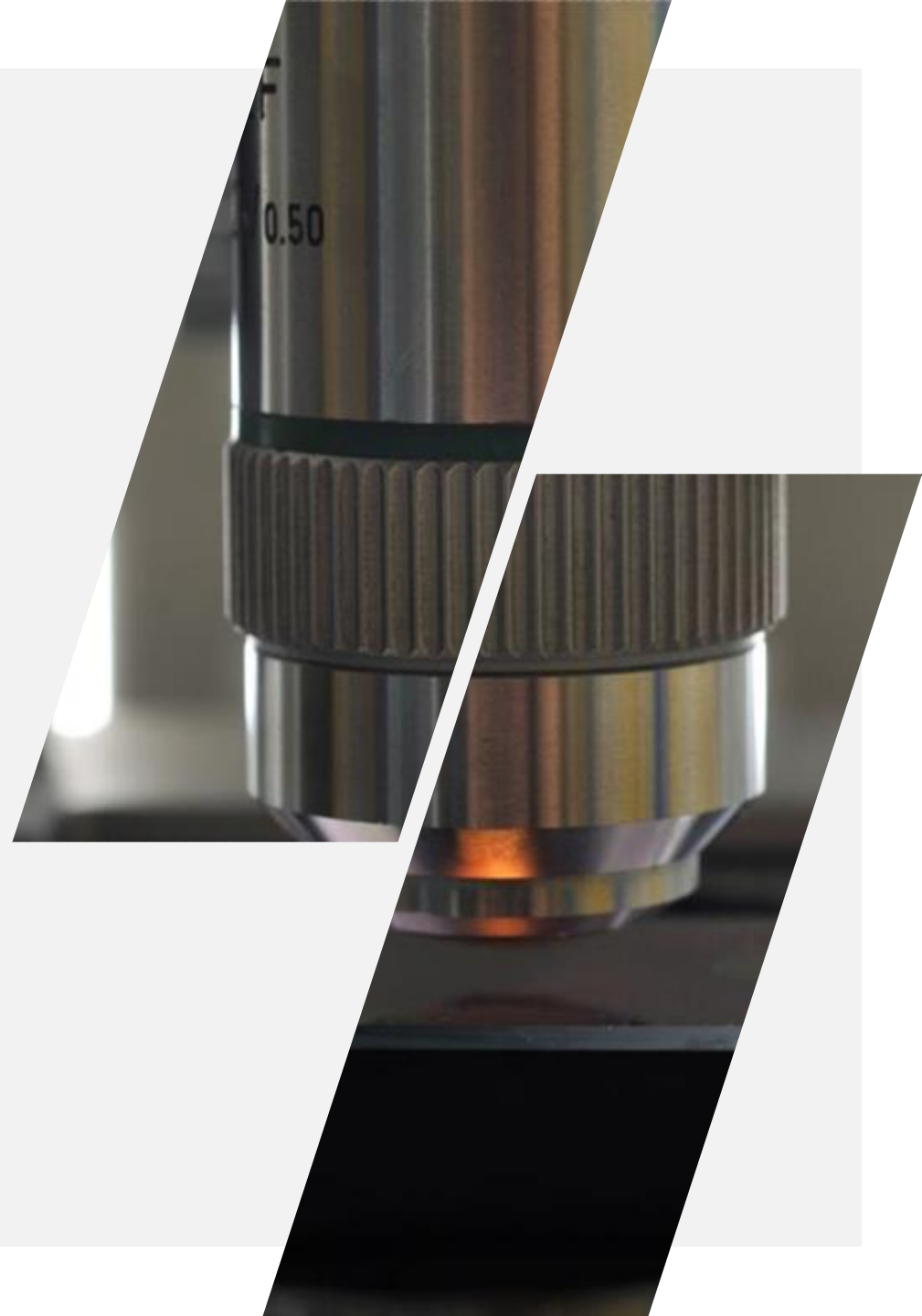


What will we cover ?

- Legal aspects of medical negligence
- Drivers for medical negligence claims
- Strategies to reduce the risk of litigation

What is Medical Negligence from a legal point of view?

Jessica Lewis, Claims Technical Specialist and Solicitor, International Healthcare



Bolam – the test of Reasonableness

The Court will look at what is **reasonable** when determining whether or not a doctor has breached their duty of care to a patient. The test was laid down in Bolam v Friern Hospital Management Committee [1957]:

“...that he [doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.”

A “body” has been accepted as a number as small as 7.

Informed Consent – Hii Chii Kok

- Supreme Court decision in the UK: *Montgomery v Lanarkshire Health Board [2015] UKSC 11*
 - Patient autonomy is key
 - To obtain informed consent, one must provide the patient with any information which would be relevant to the patient in order to make a decision
- Singapore Court of Appeal decision modified Montgomery in the case of *Hii Chii Kok v Ooi Peng Lin London Lucien and another [2017] SGCA 38*

Informed Consent – Hii Chii Kok

3 stage test:

1. Patient must identify the exact nature of the information that they allege was not provided to them
 - Information which is relevant and material to a reasonable patient in patient's position
 - Information which the doctor knows is important to the patient
2. Was the doctor in possession of that information?
3. Why did the doctor withhold the information?
 - To be judged in light of Bolam, i.e. was the decision to withhold the information reasonable

Informed Consent – Documentation

How do you document the fact you have obtained Informed Consent?

- You need to show that you have asked questions to ascertain what is significant to the patient e.g. work; cannot be drowsy; has 4 children who have to be able to care of, etc.
- You need then need to document options for treatment discussed e.g. pain relief; physiotherapy; surgery?
- Then set out what the patient chose and why e.g. went for physio in the first instance understanding may not be as effective, but cannot afford to be drowsy at work due to handling machinery, surgery may be considered if physio not useful.
- All of the above could be documented as follows:
 - Pain in neck
 - Work ✓ Drowsy x
 - Physio ✓ drugs cause drowsiness so no. Will consider surgery if physio not a success

Informed Consent – Documentation

- The Singapore Court has yet to be asked to determine what documents reflect that informed consent has been obtained.
- In the case of ***A v East Kent Hospitals University NHS Trust 2015*** the Court set out a number of factors they would consider when determining if a patient has been given sufficient information to assist them to make an informed decision re treatment.
- It is important to note that it is not just documentation and the patient's word, the court will look at how the patient conducted themselves and responded to information they were provided.

A v East Kent University Hospitals - The Facts

Mum had been trying for a baby for over 10 years. She had suffered a number of miscarriages and they eventually proceed to IVF. Two rounds were unsuccessful and the family had no further money. Happily, she became naturally pregnant a short time after the second cycle of IVF. She underwent amniocentesis in the first trimester. These showed she had a 1 in 150 risk of having a child with Downs Syndrome. She accepted this risk and continued with the pregnancy. At 23 weeks, the scan showed the baby was constitutionally small. Parents advised that likely caused by natural factors, i.e. parents were small, or there could be a problem with one of the cords feeding the child. Mum was monitored weekly and the baby remained below the 5th centile. At 27 weeks, parents advised that baby may be born early. This could lead to death or significant injury due to lack of development. Mum advised to take steroids to assist with the development of the lungs. Baby born at 36 weeks and was significantly impaired. Chromosomal tests confirmed she was the only child in the world with this specific disability.

Parents sued on the basis that they were not advised of the risk of chromosomal injury. If they had been, they say they would have undergone further amniocentesis in the second stage of labour and following karyotyping would have ended the pregnancy at 34 weeks gestation.

Decision by Court in A v East Kent

- Medical notes included an entry as follows:
 - Chromosomal? Inter-uterine growth restriction ✓
- It was reasonable for the doctor to convey the most likely cause of restricted growth and pass this information to the parents. The rule is not to pass all information, only that which is significant to the patient to allow them to make a decision
- Based on the facts, the Court did not believe that a 0.05% chance of chromosomal abnormality would have been deemed significant by the parents even if they had been informed of it. The parents accepted a risk of the child having Downs Syndrome as the first amniocentesis tests did not rule this out; they also accepted the possibility of significant injury when they chose not to end the pregnancy at 27 weeks.
- Amniocentesis in the second stage of labour held a 1% chance of death for the unborn child. On balance the court found the parents would not have opted for this procedure.

Informed Consent - documentation

There is limited case law as to what would constitute valid documents in respect of Informed Consent, but a few points to note below:

- Something to indicate a discussion took place to illicit the factors the patient would deem significant to them
- Treatment options discussed
- Reason why treatment chosen was deemed most suitable
- Safety net

Remember, a patient is entitled to refuse treatment as much as they are entitled to accept treatment. If a patient declines life saving surgery, document and send to a colleague for a second opinion and/or consider counselling. Do what you can to identify all **reasonable** steps have been taken to provide the patient with sufficient information to make an informed choice.

Medical Negligence Key Points

Tests



- Is the treatment being provided in accordance with a reasonable body of like minded medical opinion?
- Have you provided the patient with relevant information to make an informed decision?

Why do patients sue?



Reasons Patients Sue

Answers

- Feel complaint has not been handled properly
- Do not accept the investigation conclusion – feel there is a cover up
- Feel that lessons have not been learned
- They want to hear that you are sorry

Autonomy

- Do not believe they provided informed consent
- Family considerations
- Do not feel as if their complaint is being taken seriously

Personality

- Believe that they have not been spoken to with respect
- Feel violated – assault
- Grief/lack of empathy

Examples of escalating complaints

Complaint

- Patient complained that there was a failure to diagnose fracture of the left wrist in good time. As a consequence she felt she required surgery as a result of the delay. The response to the complaint was simply that the patient would have needed surgery in any event and the doctor was not negligent in his treatment. The matter escalated to litigation.
- Child born with significant brain injury. Parents advised that it was “just one of those things” and when they challenged the mechanism of injury they felt that the answers provided were not full, nor did they make any sense. Matter escalated to GMC complaint as parents felt doctors were seeking to cover up poor medical practice.

What would have avoided escalation?

- The patient wanted reassurance as to procedures. If the response had advised the reasons why x-rays had not been undertaken; apologised for any inconvenience and set out that surgery was always necessary due to the nature of the fracture, then the patient would not have pursued litigation.
- It transpired that the cause of the brain injury was due to chromosomal abnormality. The doctors involved felt that the medicine was too complex to explain to the parents and therefore decided against this. GMC penalised the doctors with further training and supervision on the basis that they should have made more effort to involve the parents in understanding the reasons for injury.

Reducing the risk of litigation

Caroline White, International Healthcare
Risk Director



Patient drivers

- To find out what happened and why
- Empathic validation of their perception of events
- To receive an acknowledgement, acceptance of responsibility and an apology
- To enforce accountability
- To correct deficient standards of care
- Financial compensation

Source: Stephen F et al, *A Study of Medical Negligence Claiming in Scotland*, Scottish Government (2012); Vincent C et al, Why do people sue doctors? A study of patients and relatives taking legal action, *The Lancet* 343(8913):1609–1613 (1994)

Reducing risk of litigation

- High quality and safe care, professionally delivered
- High quality interactional skills with every patient every time
- Patient-centred consultations involving active listening and empathy, establishing patient views and concerns
- Building trust. Every time you interact with a patient you have the opportunity to build rapport, show compassion and develop trust
- Establishing and managing patient expectations
- Checking patient understanding
- Appropriate non-verbal communication

Reducing risk of litigation

- A rigorous consent and shared decision-making process, reflecting patient preferences and values
 - It is imperative that this is fully documented
- Effective handling of unexpected outcomes
- Effective handling of patient disappointment
- Thorough investigations into adverse events and complaints
 - Proportionate, appropriate, fair and reasonable
 - Also credible, thorough, timely and candid
 - Right people at the right level using the right skills at the right time.
 - Investigate once and investigate right.
- Say sorry and be open and honest about how harm occurred

Reducing risk of litigation

- Effective communication with colleagues
- Use of standardised and reliable techniques for clinical communication with colleagues.
- Avoid passing comment about the quality of care provided by a colleague.
- A good working relationship with colleagues is likely to lead to support for the patient and yourselves, should an adverse outcome occur.
- Model the communication skills you wish your staff to adopt.

Reducing risk of litigation

So that you are able to respond effectively to any challenge to your professional practice, as well as contribute to clinical care:

- Keep good documentation
- Follow up to date organisational policies and procedures
- Adhere to professional body standards

Questions



Key Contacts

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