

**THE SPINE
AND
MEDICAL
NEGLIGENCE**

THE SPINE AND MEDICAL NEGLIGENCE

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CONTENTS

FOREWORD	x
ACKNOWLEDGEMENTS	xi
INTRODUCTION	1
GENERAL CONSIDERATIONS	
1 Why do patients sue their surgeons?	5
A changing society	5
An accident	6
Misinformation	6
<i>Case report 1</i>	10
References	13
2 The legal process and problems	15
Proof of medical negligence	15
The medical report	16
A conference	17
Pleading	17
Timescale	17
Problems for the defense	17
<i>Case report 2</i>	21
<i>Case report 3</i>	21
References	22
3 Informed consent	23
Who should provide informed consent?	23
How much should the patient be told?	24
<i>Case report 4</i>	25
<i>Case report 5</i>	25
<i>Case report 6</i>	28
How can we be sure that the patient really understands?	29
How long does it take to obtain ‘informed consent’?	30
How should the information be recorded?	31
To what degree is it permissible to influence the patient’s decision?	32
<i>Case report 7</i>	32
References	33
4 Positioning of the patient	35
Complications	36
<i>Case report 8</i>	37
References	38

SPINAL COMPLICATIONS

5 Nerve root damage	39
Pathological mechanism	39
Post-operative symptoms and signs	45
Management	46
Prognosis	50
<i>Case report 9</i>	51
<i>Case report 10</i>	52
References	52
6 Cauda equina syndrome	53
Anatomy	53
Pathology	54
Clinical presentation	56
Urgency of surgery	57
Recovery of nerve function	58
<i>Case report 11</i>	59
References	59
7 Damage to the dura	61
Anatomy	61
Method of injury	61
Immediate consequences of dural injury	62
Surgical management	62
Late consequences of a dural tear	63
<i>Case report 12</i>	63
Accidental dural puncture during an epidural procedure	65
References	65
8 Spinal infection	67
Iatrogenic discitis	67
Epidural abscess	69
Arachnoiditis	69
Wound infection	71
<i>Case report 13</i>	72
Infection with instrumentation	72
Vertebral osteomyelitis	72
Tuberculosis	74
Primary discitis	74
References	75
9 Uncontrolled haemorrhage	77
The aorta and inferior vena cava	77
<i>Case report 14</i>	78
Arterial or venous bleeding during anterior surgery	79
<i>Case report 15</i>	79

Bleeding from the superior gluteal artery	79
<i>Case report 16</i>	80
References	81

SPINAL PATHOLOGIES

10 Prolapsed intervertebral disc	83
Pathology	83
Clinical features	84
Informed consent	86
Imaging	87
The timing of surgery	90
The site and the side	91
<i>Case report 17</i>	92
Operative technique	93
Post-operative care	93
Intradiscal procedures	94
Post-discectomy syndrome	95
Thoracic disc protrusion	95
References	96
11 Root entrapment syndrome	97
Pathology	97
Making the diagnosis	98
Informed consent	99
Mistaken diagnosis	100
The operation	101
Complications	103
References	103
12 Spinal stenosis	105
Pathology	105
Clinical presentation	106
Mistaken diagnosis	108
The surgical implication of spinal stenosis	110
How much bone should be removed?	110
<i>Case report 18</i>	111
Specific surgical complications	112
13 Spinal fusion	115
Indications for fusion	115
Contra-indication for fusion	118
Informed consent	119
<i>Case report 19</i>	121
Surgical techniques	123
Complications	123

CONTENTS

<i>Case report 20</i>	124
References	126
14 Fractures of the spine	127
Pathology	127
Clinical assessment	128
<i>Case report 21</i>	130
Management	131
<i>Case report 22</i>	132
Osteoporotic compression fractures	134
<i>Case report 23</i>	135
References	136
15 Spinal tumours	139
Pathology	139
Diagnosis	139
<i>Case report 24</i>	143
References	147
16 Scoliosis	149
Types of scoliosis	149
Idiopathic scoliosis	149
Management	151
Complications	152
<i>Case report 25</i>	152
Post-operative immobilization	153
Reference	153
17 The cervical spine	155
Whiplash injury	155
Cervical fracture/dislocation	155
<i>Case report 26</i>	156
Cervical disc protrusion	156
Degenerative disease of the cervical spine	157
<i>Case report 27</i>	157
Physiotherapy	157
References	158
PROCEDURES	
18 Negligent medical reports	159
Examination of the records	159
<i>Case report 28</i>	159
<i>Case report 29</i>	160
The severity of an injury	160
<i>Case report 30</i>	160
Admit ignorance	160
<i>Case report 31</i>	160

19 Risk management	163
Why risk management?	163
Audit	163
Education	165
<i>Case report 32</i>	166
<i>Case report 33</i>	166
<i>Case report 34</i>	167
The harmful surgeon	168
The harmful environment	169
The inexperienced surgeon	171
<i>Case report 35</i>	172
References	172
APPENDIX A: Glossary	175
INDEX	181

FOREWORD

It is a double pleasure to be asked to write this Foreword. In the first place, Professor Richard Porter is an outstanding clinician and teacher with the gift of clear exposition. Many will have heard him speak at the weekend conferences of the Professional Negligence Bar Association and Action for Victims of Medical Accidents. Secondly, he has an instinctive knowledge of what lawyers require in a medico-legal report. He has been of incomparable value in a number of cases in which I have been involved and we have an unbroken record of success. Now he produces a volume which comprehensively covers the medical and legal aspects of spinal surgery. Its contents will direct and educate both doctors and lawyers in a wide specialist area, where damages, if awarded, will often be substantial. The explanations, glossaries and references are especially valuable for both professions.

Richard Hone QC

ACKNOWLEDGEMENTS

I am indebted to my friend Richard Hone QC for writing a generous foreword. Three friends have supplied a number of illustrations in Chapters 5, 8 and 10 to 15. Dr Paul Butt is a consultant radiologist at St James University, Leeds and has allowed me to include many of his CT scans. Dr John A. McCulloch is Professor of Orthopaedic Surgery, Northeast Ohio Universities College of Medicine, USA and he has provided many excellent illustrations of MRI. Dr Francis W. Smith, MRI unit, Woodend Hospital, Aberdeen, UK has provided the bone scan images. I am grateful to them and to Churchill Livingstone for permission to include several illustrations previously used in my book *Management of Back Pain* (1993) 2nd edition, chapters 10, 11 and 12. I thank the Royal College of Surgeons of Edinburgh for photographs of two skeletons from their museum.

INTRODUCTION

The principal goal of every surgeon is to provide good quality care. Unfortunately there are occasions when they miss the mark, and a careful assessment of why things went wrong can then be helpful. Some patients believe that their treatment was below the standard expected, and they are justified. There are claims which have merit and others which seem frivolous. Most surgeons face claims of alleged negligence at some time during their career, and spinal surgeons are particularly vulnerable.

A strong wind of change is blowing through the practice of surgery. It affects surgeons and lawyers alike. A generation ago, doctors knew what was best for the patients, or they thought they did, and patients did as they were told. There were occasional mistakes but patients accepted that the doctor had always done his best. Allegations of medical negligence were uncommon. The sun shone in the sky, and surgeons could sleep in their beds.

Now, however, most doctors know the discomfort of being sued. There has been an exponential increase in litigation. The *Sunday Times* reported in November 1996 [1], under a heading 'Legal aid soars as Britons sue the American way', that the British legal aid bill had increased from £166m in 1990 to £544m in 1995. The government's bill for NHS indemnity had increased three-fold in those 5 years. The Medical Defence Union (MDU) reported a 50% increase in awards in the past 3 years, paying £67m in 1996 to defend accused doctors. Over £18m went in legal costs.

Many surgeons are learning not only new surgical skills, but also how to protect themselves from allegations of negligence and how to defend themselves in court. They have had to become alert to the dangers of transgression. They also recognize that there is a bonus. By understanding how these incidents occur, there is an opportunity to change practice and improve patient care. Surgeons and management alike have to take the observations of patients seriously. Claims of alleged negligence provide useful information about standards of care. If they result in an improvement in practice, this is more important than just conducting an exercise in customer relations.

From time to time mistakes will inevitably occur, but doctors hope that with goodwill and understanding on both sides – apologies and a genuine attempt to prevent a recurrence – this will satisfy the injured party, and it will not

result in litigation. There are many patients who have the right to sue, and fail to do so. In the USA there are eight times as many acts of medical negligence as claims for compensation, and 14 claims for every successful claim [2, 3]. Thus, even in the litigious USA there is potential for more litigation than is currently experienced [4]. We need to understand why patients sue their doctor, but also why they do not sue when it would be justified. Most claims do not go to court. In one study only 11% of orthopaedic claims reached court and, of these, 85% resulted in a defence verdict; 56% of claims were withdrawn or dismissed and 31% were settled out of court [5].

The express provision of the legal aid scheme is that the litigation has to be justified. However, many doctors feel that there is an increasing number of unsubstantiated claims causing much wasted time. There is a view that British lawyers are now finding “ways of suing for almost any injury or slight however trivial” [1]. Doctors find themselves having to spend much time in the defence of unsuccessful claims, and in the development of undue protectionism. The time, cost and turmoil is often out of all proportion to any compensation due, or to the extent to which the public interest may be served by the outcome of any legal proceedings [6].

Spinal surgery is an important aspect of alleged negligence. In financial terms the defence of mismanaged spinal surgery is considerable. Spinal operations, when compared with other types of surgery, are associated with significantly high risk, and mismanaged spinal surgery is the most costly of all orthopaedic procedures to defend. The American Academy of Orthopaedic Surgeons reported that the average defence costs for an orthopaedic surgeon who performed spine surgery was US\$49 837, whilst the defence costs of other orthopaedic procedures was half that amount [5].

In this book we shall be examining both general and specific issues of negligence. All medical specialities are interested in the general concepts of why patients sue their doctors, what is informed consent and reasonable risk management. These are important issues for all disciplines. We shall, however, also be addressing problems of negligence in relation to spine surgery. Allegations are frequently about lack of informed consent, technical complications and systems failure, poor surgical performance, misdiagnosis and failure to identify and manage a complication. In this book we shall be looking at these in detail.

There are a number of case studies which have been used to illustrate the complex problems of litigation. They all have an element of truth, but details have been changed to preserve anonymity. Some of the clinical information will be simplistic to the surgeon, but it has been included to help the lawyer who may not be so familiar with medical details. There is also a glossary of terms to help the non-medical reader. References are included for those who want to explore the medical literature in more detail.

Hopefully this book will assist surgeons and managers to reduce the risk of negligence claims. More importantly it might improve their clinical practice. The book is also written to help lawyers understand the particular problems and difficulties which face spinal surgeons, and when allegations of negligence are reasonable and when they are unjustified. We are exploring a difficult but important aspect of medico-legal practice.

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AGENCIES TO HELP A SICK DOCTOR

- The Sick Doctor's Trust (Tel. 0123 234 5163) for addictive physicians.
- The British Doctor's and Dentist's Group (Tel. 0171 487 4445) for drug and alcohol misuse.
- Overseas Doctors Association (Tel. 0161 236 5594).
- BMA 24 Hour Stress Counselling Service (Tel. 0645 200169).
- National Counselling Service for Sick Doctors (Tel. 0171 935 5982).
- Doctor's Support Network (Tel. 0171 727 3738) self-help group/mental health problems.