

Medico-legal Risk in Practice

ACSEP Scientific Conference

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Session Overview

- Identifying risk in clinical practice
 - Defining risk
 - Potential areas of risk for SEP
 - Reducing risk
- When to ring your insurer
- Case scenarios
 - Breach of privacy
 - Certifying fitness
 - Preparing medico-legal reports
 - Inadequate equipment

Defining Risk

- Risk is the chance of danger, loss, injury or other adverse consequence
- Medico-legal risk is the chance that loss, injury or other adverse consequence arising from medical care or treatment may result in a claim or complaint against a medical practitioner

Potential Areas of Risk for SEP

- Competing and sometimes conflicting duties between:
 - Sportsperson and team/coaches/club administration
 - Practitioner and employer
 - Sportsperson and the general public
 - Parent and child
- Privacy and confidentiality
 - Disclosing information to third parties
 - Social media
 - Boundaries

Potential Areas of Risk for SEP

- Balancing clinical need with an athlete's "right to participate" and voluntarily assume risk
- Changing location of practice (i.e. differing venues)
 - Inconsistency of equipment between venues
- Use of new techniques/treatment approaches which are not recognised as mainstream

Reducing Risk

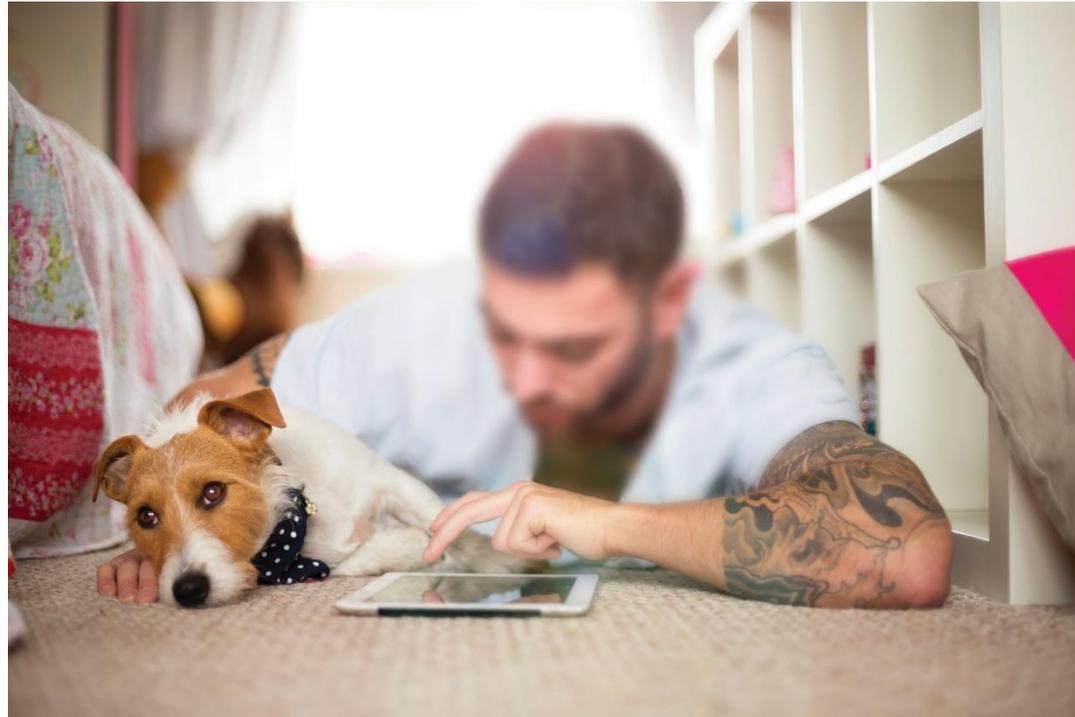
Conflicting duties

- In a team doctor role, the SEP's primary duty is to the patient/sportsperson
- A contractual obligation should not conflict with the practitioner's ethical or legal duty
 - Patients should be made aware of the practitioner's competing loyalties – ideally before any advice or treatment is provided
 - Consent should be sought prior to disclosure of the sportsperson's health information to a third party

Reducing Risk

Privacy and confidentiality

- Can be easily breached – particularly with social media



Reducing Risk – Social Media Boundaries

- “Professional boundaries are integral to a good doctor–patient relationship. They promote good care for patients and protect both parties”

Medical Board of Australia. Good Practice Guidelines

- While... doctors are entitled to a private personal life, online social media have challenged the concepts of “public” and “private”.

Social media and the medical profession

MJA 2011;194(12):642-644

Reducing Risk – Social Media

Traditional professionalism standards apply to online conduct

- “Friending” patients – blurs the line between professional and personal
- Email use – exercise caution with Gmail, Yahoo
 - Only use email with consent, and make sure you have the correct address before sending

Reducing Risk

Balancing clinical need with a patient's right to choose

- Competent patients have the right to make “bad” decisions providing they have been warned of the risks and potential consequences
- If the risk of a severe or catastrophic outcome is high, patients should be actively discouraged from making such a choice
- Practitioners can and should say no where they form the view that the risks associated with returning to competition, for example, are unacceptable

Reducing Risk

Using new treatments/approaches/techniques

- In determining whether treatment and advice was appropriate, a court will consider:
 - Any supportive scientific based evidence
 - The views of the practitioner's peers – is it in accordance with accepted practice?
 - Does it expose patients to a risk of harm which cannot be justified?
 - Was the treatment reasonably required, and in the patient's best interests?

Reducing Risk

Keep good clinical notes – *If it's not written it didn't happen*



When Should You Ring Your Insurer?

Obligations under your policy

The simple answer is – when things go wrong

- Most insurance policies require that you promptly notify if:
 - A claim is made or has been threatened against you in relation to your provision of medical treatment
 - You become involved in an investigation or inquiry
 - A dispute arises in relation to your employment
 - You lose documents or data containing personal health information

Policy Coverage

In addition to claims, most policies provide coverage for matters such as:

- Employment and credentialing disputes
- Whistleblowing notifications
- Complaints made to entities such as the Office of the Information Commissioner and AHPRA
- Obtaining an apprehended violence order against a patient
- Medicare investigations

When Should You Call Your Insurer?

Your insurer (MDO) can provide assistance and support in relation to:

- Drafting a statement or report for the police (i.e. following an assault) or the Coroner
- Clarifying what documentation should be produced in response to a request for information from solicitors, or a court subpoena
- Running you through what is involved in giving evidence, if you are subpoenaed as a witness
- Preparing you to attend investigative or other interviews
- Responding to a patient complaint

When Should You Call Your Insurer?

Even if you are employer indemnified, you can ask your MDO to check any statement or report which may have been prepared on your behalf by your employer or their lawyers

- This will enable the report to be independently reviewed
- If a conflict is identified between your interests and those of your employer, your insurer may be able to provide you with separate legal representation at a Coronial inquest, or instruct independent solicitors to assist you with a disciplinary matter

Case Study 1 – Breach of Privacy

- Dr A is the team doctor for a state cricket team
- The team's star bowler has been plagued with shoulder problems in recent months and retired injured in the latest match
- Dr A refers the bowler for imaging, which shows the presence of partial thickness rotator cuff tear
 - He refers the bowler to an Orthopaedic Surgeon for opinion and management

Case Study 1 – Breach of Privacy

- The bowler is noticeably absent from the selected team at the next match
- During post match interviews, the coach is asked about the bowler and whether his injury is serious
- The coach defers to Dr A
 - Dr A briefly outlines the nature of the bowler’s injury, stating that he will be seeing a specialist and may need a shoulder reconstruction

Has Dr A breached the bowler’s privacy?

Case Study 1 – Breach of Privacy

- Whether (or not) Dr A has breached the bowler's privacy will likely depend on the contractual arrangements in place between players and the team, in relation to the sharing of information with the press, and Dr A's previous discussions with the bowler
- Although some player contracts provide that relevant information can be provided to the media, Dr A should still have obtained the bowler's permission to discuss his condition before speaking to the media
 - This is assuming Dr A's contract also allows him to speak to the media

Case Study 1 – Breach of privacy

- How should Dr A conduct himself in the future?
 - Seek player consent to discuss (in the briefest terms possible) their injury with the media, but only if asked
 - Document any such discussion (including the player’s consent or refusal) in the medical records
 - If the player refuses permission for their injury/condition to be discussed, it would be appropriate for Dr A to inform coaching staff that the player does not want his/her injury to be publicly discussed

Case Study 2 – Certification of Fitness

- Jane is a professional marathon runner who has recently returned from competing in three marathons in Europe
- Over the past week, Jane has felt extremely fatigued and arranges to see her GP for a check up
- In light of Jane's punishing schedule, her GP recommends that she be reviewed by a Sports Physician
- Jane agrees to see Dr B, even though she thinks her GP is being unnecessarily cautious

Case Study 2 – Certification of Fitness

- Dr B diagnoses extreme exhaustion
- There are no indications – either on history taking or physical examination – to suggest that Jane is otherwise unwell
- For abundant caution, Dr B orders blood tests (the results of which are NAD)
- When Jane returns to see Dr B to obtain her blood test results, she informs him that she will be entering a cross country marathon in 6 weeks that has elements of steeplechase for part of the course, and
- That event organisers require all entrants to provide a medical certificate confirming their fitness to compete

Case Study 2 – Certification of Fitness

- Jane hands Dr B a certificate and asks him to complete it
- Dr B reads the form and notes that it contains a clause which states that it will be valid for 12 months from the date of signing
- Dr B advises Jane that although she can undertake light training a few days per week, he believes she should refrain from competing in any events for several months
- Jane becomes angry, says she is fit to enter the race, and demands that Dr B complete the certificate of fitness
 - She states that she has a right to participate, and Dr B’s refusal to provide medical clearance is infringing on her civil rights

Case Study 2 – Certification of Fitness

- Although Dr B agrees that Jane is extremely fit, he is uncomfortable with the prospect of signing the certificate
- He does not believe it is appropriate for her to compete in an extreme sporting event in 6 weeks' time
- What should he do?



Image courtesy of David Castillo Dominici & Aopsan / FreeDigitalPhotos.net

The case study is based on actual medical negligence claims or medico-legal referrals; however certain facts have been omitted or changed by the author to ensure the anonymity of the parties involved

Case Study 2 – Certification of Fitness

- When faced with this situation, some medical practitioners will provide the certificate and let the patient take their chances. Others will decline to complete the certificate
- Although the provision of medical and fitness certificates is routinely performed by doctors, it is an aspect of practice that often trips doctors up

Case Study 2 – Certification of Fitness

- In this situation, it would be appropriate for Dr B to contact his insurer for advice
- Although it is stressful and confronting for doctors when a patient angrily or aggressively makes a demand, Dr B needs to remember that he is not obliged to provide a certificate just because a patient has requested one
- Further, there is nothing stopping Jane from seeing another doctor to obtain medical clearance

Case Study 2 – Certification of Fitness

- In the USA, it is becoming increasingly common for doctors in Dr B’s situation to ask patients to sign an “exculpatory waiver” or “risk release”¹
 - However, the protection afforded by such a document in Australia is questionable
 - In any event, a waiver does not cover the provision of negligent advice by the practitioner

1. (see Chen, S. & Esposito, R. *Practical and Critical Legal Concerns for Sport Medicine Physicians and Athletic Trainers*, United States Sports Academy – The Sport Digest)

The case study is based on actual medical negligence claims or medico-legal referrals; however certain facts have been omitted or changed by the author to ensure the anonymity of the parties involved

Case Study 3 – Preparing a Medico-legal Report

- On 13 August 2011 Mark Fowler, kickboxing champion, received a punch to his head during a Muay Thai kickboxing match
- Mr Fowler appeared “stunned” for several seconds and then got back on his feet to continue the fifth and final round of the match
- Immediately following the fight, Mr Fowler’s trainers found him to be fit and responsive, but less than an hour later, he became unwell (vomiting and slurred speech) and then lost consciousness
- Mr Fowler was urgently transported to Liverpool Hospital via ambulance

Case Study 3 – Medico-legal Reports

- Mr Fowler was diagnosed with a subarachnoid haemorrhage, and he died two days later
- The Coroner investigated Mr Fowler's death and relevant persons (including fight doctors, Mr Fowler's opponent and those involved in his care at hospital) were required to provide statements to the Coroner
- In late 2013 an inquest was held
- As significant changes had already been made to the *Combat Sports Act* in the wake of Mr Fowler's death, the Coroner did not make any formal recommendations

Case Study 3 – Medico-legal Reports

- Many months, if not years, can elapse between a critical clinical event and a doctor receiving a request to provide a statement or report
- It is good practice for doctors involved in an incident that *may* turn into an investigation to make a comprehensive summary of their involvement in the incident
- This summary can serve as an *aide memoire* if the doctor is asked to provide a statement or report in the future
- Doctors should always contact their insurer for advice to prepare a coronial statement

Case Study 4 – Inadequate Equipment

- Dr Keen is a second year RMO and a diehard sports enthusiast
- Dr Keen's best friend coaches the local under 18s football team
- The coach asks Dr Keen if she would like to serve as the team's doctor for the next four weekends as the usual doctor will be away
- The coach tells Dr Keen that all necessary equipment is kept at the ground and that she won't need to bring anything with her
- Dr Keen is presently doing an Emergency Medicine rotation and believes the skills she is learning will serve her well

Case Study 4 – Inadequate Equipment

- The following weekend, Dr Keen attends the sporting ground 30 minutes prior to the game, so the coach can show her around
- The tour includes stopping by a small room which is used as a treatment room/sick bay if a player is injured or becomes unwell
- There is a camp-style stretcher bed in the corner of the room and a small trolley with tape, dressings and bandages arranged on the top
- Dr Keen does not enter the room and does not inspect the trolley or its contents

Case Study 4 – Inadequate Equipment

- During the 2nd half of the game, Harry and Oliver crash into each other while diving for the ball
- Harry's head makes contact with Oliver's shoulder in the collision
- Harry assures Dr Keen that he is OK to continue playing and that he'll come off the field if he feels unwell
- By the end of the game, Harry has a pounding headache and feels dizzy and nauseated
- Harry's mother locates Dr Keen to let her know how Harry is feeling

Case Study 4 – Inadequate Equipment

- Dr Keen escorts Harry and his mother to the “treatment room”
- Dr Keen considers it likely that Harry has a mild concussion
- After positioning Harry on the stretcher, Dr Keen opens the drawer of the trolley to retrieve a stethoscope, torch and a reflex hammer
- Dr Keen is horrified to note that the drawer contains a pair of bandage scissors, several rolls of Elastoplast (of varying widths), a triangular sling and a soft collar only
- Dr Keen informs Harry’s mother that she cannot properly assess Harry and recommends that he be taken to the local hospital

Case Study 4 – Inadequate Equipment

- Fortunately for Dr Keen, Harry’s mother is quite accepting of the situation and she doesn’t hear anything further
- Dr Keen breached her duty to each of the players by failing to:
 - Check the “emergency” equipment prior to the game
 - Ensure that appropriate equipment was available to assess injured players
- The treatment room was nothing more than a first aid area and Dr Keen is fortunate that there were no adverse outcomes as a result of her not ensuring appropriate equipment was available

Summary

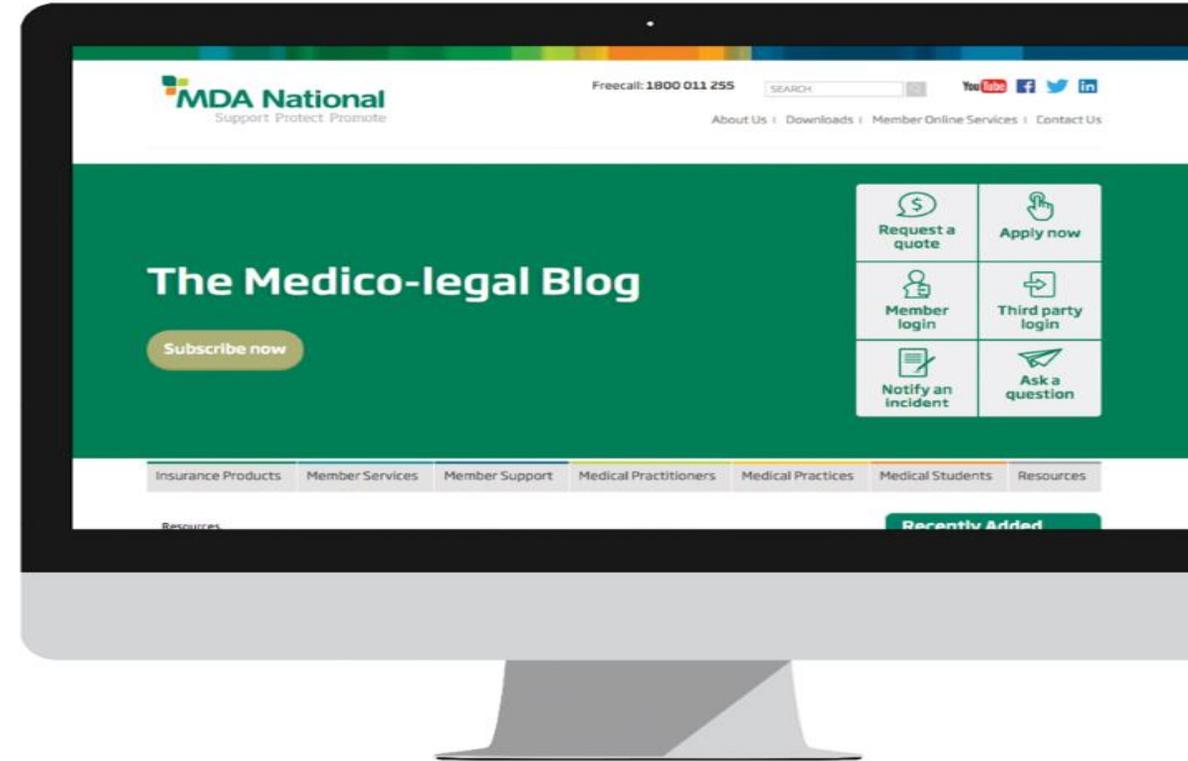
- Be mindful of the potential risks associated with your clinical practice
 - Minimise these risks by taking appropriate action e.g. ensuring that your clinical notes are detailed, and that you communicate in a timely and effective manner with patients and employers
- Don't hesitate to seek advice and support from colleagues, your insurer and your college, and
 - Remember, you can always say no!

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