Overview

*Anaesthesia Update* is written specifically for you – our Anaesthetist Members to:

- keep you informed of the emerging and perennial medico-legal issues
- equip you with practical medico-legal advice
- support your delivery of quality medical care.

This edition covers: complex co-morbidities; how complaints can be made even after an excellent recovery; and providing expert evidence.

We would love to hear any specific issues or medico-legal topics you would like covered in future editions so email us at specialtyupdates@mdanational.com.au.

MDA National is here to support so please contact us with any medico-legal questions on 1800 011 255 or advice@mdanational.com.au.

MEDICO-LEGAL CASE STUDY

**Complex Co-morbidities and Anaesthesia**

**The case**

Ms X is a 40-year-old patient who has a number of co-morbidities. She is married with young children and works full time. She is a Type 2 diabetic and has sleep apnoea. She is categorised as morbidly obese with a BMI of 45. She also has a past history of ischaemic heart disease and suffered a myocardial infarct at age 35. She suffers from left-sided sciatica and has seen a Neurosurgeon and an Orthopaedic Surgeon. She has no neurological signs but has considerable pain. She is keen to proceed with surgery to relieve symptoms.

Dr A runs a regular anaesthetic list for the patients of the Orthopaedic Surgeon. As per her normal practice, she sees Ms X in her rooms the week before surgery.

Dr A obtains a detailed history. She notes all of the medications currently being taken by the patient and her treatment for sleep apnoea. She also notes that the patient sleeps routinely sitting up in an armchair, as this assists her in achieving more effective sleep, and she has been unable to lie flat in bed for several years. Dr A views the pre-operative blood tests and physical measurements including the patient’s collar size.

After considering this information, Dr A is concerned that the patient is at very high risk for an anaesthetic. She explains to the patient the increased risks from anaesthesia for morbidly obese patients, indicating that they have a higher potential for difficult mask ventilation, laryngoscopy and intubation. She also explains that she would like a pre-operative cardiology review.

Dr A explains with assistance from diagrams that the patient’s co-morbidities and obesity mean she presents as a potentially difficult patient to anaesthetise. The doctor indicates that she would like to refer the patient for further investigation before making a decision about whether she is willing to proceed with anaesthetising her.

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Dr Brown first met Mrs Smith in the anaesthetic holding bay prior to surgery. Dr Brown explained the process of the general anaesthetic and gave a brief overview of possible risks.

Induction of anaesthesia was initially successful. Dr Brown used a classic laryngeal mask airway, which provided adequate ventilation initially. However, Mrs Smith was still noted to be breathing abdominally. As a result, the Surgeon requested Dr Brown to immobilise the surgical field with relaxant to expedite the procedure.

Subsequent ventilation through the laryngeal mask was unsatisfactory with a large leak so Dr Brown then decided to attempt endotracheal intubation (ETT) using a bougie and glidescope. Mrs Smith was noted to have a small neck, which made intubation more difficult. He had assigned Mrs Smith a Mallampati score of grade 3.

The first attempt was unsuccessful. Dr Brown attempted the procedure once more and succeeded to intubate with some difficulty resulting in some bleeding in the airway.

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Dr Brown expected that Mrs Smith would be extubated later the same day. However, on the advice of ICU Physicians, she remained intubated until the following morning. Unfortunately, Dr Brown was taken ill the following day and was not able to review Mrs Smith. When he eventually saw Mrs Smith the following day, she was upset and accused Dr Brown of trying to kill her.

Despite Dr Brown’s attempts at reassurance, Mrs Smith lodged a number of complaints (including to AHPRA and the hospital) alleging that Dr Brown “botched” the anaesthetic and caused unnecessary pain and suffering. This was despite Mrs Smith making an excellent recovery.

Dr Brown was ultimately found to have behaved appropriately in his treatment and management of Mrs Smith. However, the complaints process was protracted and resulted in a great deal of anguish and stress for Dr Brown.

At this point, Dr A contacts MDA National and receives assistance to respond.

The investigation takes some time, and requires expert reports to be obtained regarding the assessments made and the anaesthetic risk the patient presented. Ultimately, the conclusion reached is that Dr A carried out the consultation in an appropriate manner. She was dealing with an extremely difficult presentation and it was not unreasonable for her to decline to proceed with the anaesthetic until further investigations were undertaken.

Discussion

If you have reason to believe it is too risky to proceed with treatment, you can decline and advise your patient of this. In this case, the Anaesthetist was placed in a difficult position of assessing the patient after she had already agreed to and booked for surgery. Assessing patients with significant co-morbidities or complex medical conditions may benefit from a team approach between the specialists involved so that patient expectations are not raised before all aspects of the clinical presentation are considered.
Providing Expert Evidence

Case history
You receive a letter from a solicitor asking if you will provide an expert report in a case in which a patient experienced a post-operative brachial nerve palsy following a prolonged surgical procedure.

Providing a report as an independent expert is different to providing a report as a treating doctor.

Discussion
Requests for an expert report may come from a variety of sources including:
• solicitors seeking a report for use in litigation
• coronial matters, either by the coroner or an involved party
• AHPRA, regarding the conduct or treatment provided by another doctor
• courts and tribunals such as Guardianship, Workers’ Compensation and Probate.

You are not obliged to act as an expert. You should only accept if you consider that you have the requisite expertise and experience, and understand your obligations in accepting the request. You will be asked to provide information in your report as to your expertise and you can expect to be questioned on this if giving evidence in court.

The expert is an independent witness whose role is to assist the court (or tribunal) to evaluate the medical issues involved in reaching its conclusion. The expert is not an advocate for a party. Your role is to remain objective and independent from any bias. It is the role of the court or tribunal to determine the outcome. Your role is to apply your expert knowledge in examining the facts and circumstances.

All states and territories have a code of conduct for expert witnesses and it is important to familiarise yourself with this. Generally, the code of conduct will require you to include in your report:
• your qualifications and experience
• the assumptions made in providing the report
• any tests or investigations relied upon
• a summary of your opinion and your reasoning
• a summary of the instructions, facts, literature and documents you considered when reaching your opinion
• any unknown matters or further investigations which you consider are needed to avoid incompleteness or inaccuracy
• if applicable, that a particular question or issue falls outside your expertise
• an acknowledgement that you have read and complied with the code of conduct.

When preparing your report, you should try and use clear language and explain any technical terms so that non-medical people can understand them.

You should respond to the questions asked of you, not what you think should be asked – but you can raise any omissions which need to be examined.

It is not unusual for the same set of facts or assumptions to be interpreted differently by different experts, and you should not allow your professional opinion to be swayed just because you differ from another expert. As part of the process of narrowing the issues, you may be asked to identify the areas of agreement and disagreement. This may involve meeting with the other expert(s), but you can still provide your own independent opinion on areas of difference. If you change your opinion at any stage before you give evidence, you should inform the party who instructed you.

If the matter proceeds to a hearing, then it is very likely you will be asked to give evidence and also be cross-examined in relation to your report. Accordingly, you will need to be familiar and comfortable with the process, and willing to attend court if required.

You may be asked by the lawyer acting for the opposite party to meet to discuss your conclusions or to provide a supplementary report. This can be done, but it raises issues regarding legal professional privilege and not revealing any confidential information you have received as part of your instructions. Also, if you have had a consultation with a patient as part of your opinion, then you will need to consider your duty of confidentiality to the patient within the context of your duty as an expert. These can be very complex issues and you should consult MDA National for advice.

Although Australian expert witnesses currently have legal immunity, there have been cases where complaints have been made to the Medical Board and AHPRA about doctors who have provided incorrect advice in expert reports and when giving evidence.
More for You

More cover for you

More communicable disease cover
Our Professional Indemnity Insurance Policy now covers three additional communicable diseases should you have to permanently cease or substantially alter your medical practice, due to a diagnosis of:
• HIV
• Hepatitis B
• Hepatitis C
• extremely drug resistant tuberculosis (XDR-TB) – new
• multi-drug resistant tuberculosis (MDRTB) – new
• New Delhi Metallo enzyme enterococci – new

Expansion of employment disputes cover
We have also expanded our legal costs cover for employment disputes with an employer or employee in relation to pursuing or defending allegations of sexual harassment should you be faced with such an issue.

More cover for your practice

Clinical trials cover
MDA National’s Practice Indemnity Policy now covers civil liability claims against the Practice or an insured person for healthcare provided as part of a clinical trial or research project carried out with approval of an ethics committee in accordance with the National Health and Medical Research Council (NHMRC) guidelines. This does not cover the trial itself or any liabilities arising from the sponsorship or administration of the trial, as these would be covered by the trial’s indemnity.

Defence costs for employment disputes
The Practice Indemnity Policy has also been expanded to cover defence costs for disputes against the entity by employees or contracted staff relating to their employment contracts with the entity.*

More online resources
Check out our Resources section at mdanational.com.au for more convenient access to articles, blogs, case studies, medico-legal FAQs and videos.

MDA National is Australia’s first medical defence organisation to launch a medico-legal blog. If you haven’t already, subscribe to The Medico-legal Blog for interesting information on breaking medico-legal issues, recent cases, court judgments and legislative updates.

More education for Anaesthetists
Register to attend our new accredited education activity in late 2016 - Anaesthetists’ Think Tank: Improving Communication and Minimising Medico-legal Risks in Sydney or Perth.

The four-hour workshop is interactive to facilitate peer collaboration. It explores practical strategies for effectively managing several key risk management areas in Anaesthetics. Visit our Upcoming Events calendar at mdanational.com.au for more detail.

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This information is intended as a guide only. Always contact your indemnity provider for specific advice in relation to your insurance policy. The case histories have been prepared by our Claims and Advisory Services team. They are based on actual medical negligence claims or medico-legal referrals; however certain facts have been omitted or changed to ensure anonymity of the parties involved.