

5 LEGAL LIABILITY

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Expeditions offer an exciting challenge to their expedition medical officers. While their role is key to the success of an expedition, medical officers may find themselves liable for the care that they give if it is deemed to be inadequate or incorrect.

Fortunately, I am not aware of any case in which a doctor is being sued for treatment given on an expedition and the Medical Defence Union has confirmed that, as of January 2002, there are no such actions involving their members. However, society is becoming more litigious (*Woodroffe Hedley v Cuthbertson, English High Court 1997*) so doctors, and others acting as expedition medical officers, should not be complacent in their role as medical officer. Medical professionals must inform their defence organisation in advance if they intend to act as an expedition medical officer. In most instances they will receive cover against litigation arising from care given on an expedition (possibly for a small additional fee). Since October 1999, the Medical Defence Union provides “Good Samaritan Cover” for every country in the world, including the United States and Canada. Insurance will not take away the danger of being sued, but certainly it should give piece of mind. The most important thing is to check what insurance cover you have before you act as an expedition medical officer.

MEDICAL NEGLIGENCE

To understand the potential risks of taking on the role of expedition medical officer it is necessary to understand the legal terminology involved.

Duty of care

In any potential court action, a “duty of care” must be established between the person giving the treatment and the patient. Clearly, if any doctor treats a patient, whether as an expedition doctor or in a rescue situation, a “duty of care” will be established. It is important to remember that a “duty of care” is not owed to the world at large, but to those who may become injured if the duty is not observed.

Standard of care

Any person acting as an expedition doctor has to exercise the “standard of care” expected of an expedition doctor. A doctor cannot plead, in essence, inexperience. In England “standard of care” is governed by the court’s decision in *Bolam v Friern Hospital Management Committee* 1957 (1 WLR 582) in which it says: “The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established that it is sufficient, if he exercises the ordinary skill of an ordinary competent man exercising that particular art.”

Inexperience

A doctor who holds himself out as a specialist (for the purposes of this chapter, an expedition doctor) will be held to the standards of a reasonably competent expedition doctor even if he is a novice and even where he is performing the procedure for the first time (see *Jones v Manchester Corporation* 1952, 2 All ER 125 and *Wilsher v Essex Health Authority* 1986, 3 All ER 801).

Different opinions

Where different opinions exist as to the acceptability of a course of action, if a doctor can show that the course he or she followed was one that has the backing of a body of respectable opinion within the profession, then liability will not be imposed merely because the treatment may be disproved by a section of medical opinion. Therefore, if one is able to obtain support from various doctors involved with Medical Expeditions Limited (MEDEX), who run courses and whose members publish books that have itemised lists or follow protocols laid out in the British Antarctic Survey Medical Handbook, this could do much to protect any doctor, paramedic or trek leader. (See *Bolitho v Hackney Health Authority* 1997, 4 All ER 771.)

Emergency situations

Expeditions work in remote areas, often with limited resources. The circumstances in which medical care is provided may influence a court’s decision as to what constitutes a reasonable “standard of care”. An expedition doctor is highly likely to face what could be described as an emergency situation, and in determining what is reasonable care the court will take account of the particular situation as it presented itself to the defendant as part and parcel of all the circumstances of the case. Clearly the court would take into account the fact that expeditions work in remote areas, that resources are limited and that the setting is not an accident and emergency (A&E) department. This is highlighted by the case of *Wilsher v Essex Health Authority* 1986 (3 All ER 801), where the judge considered that “An emergency may overburden the available resources and if an individual is forced by circumstances to do too many things, the fact that he does one of them incorrectly should not lightly be taken as negligence”.

Expectations of expedition members

Expedition members should not expect to receive the same “standard of care” as they would in a hospital A&E department, but should expect to receive a similar standard to that of any competent doctor in a similar situation. Prior to the expedition it is useful for an expedition medical officer to discuss with expedition members what “standard of care” they can expect to receive, given the limitations of the expedition environment. They should also have members fill out a relevant health questionnaire.

Expedition leader/paramedic

The “standard of care” expected of a paramedic is not that of a doctor but that of an ordinary skilled paramedic professing to have the special skill of a paramedic. The expedition leader would likewise have to exercise the standard of skill expected of an expedition leader.

Expedition doctor and Good Samaritan acts

Generally speaking, if one were travelling as an expedition doctor, even if there were no payment for your services, there would be no “Good Samaritan Cover”. Quite often a doctor will not get paid *per se* but will receive a discount or some other benefit. Generally, Good Samaritan Cover is available only if you are there as an ordinary person (i.e. as a layman) and not as a doctor and decide to treat someone in your party, or you treat someone unconnected with the expedition. Obviously if one is acting under the auspices of a Good Samaritan, the “standard of care” is only that expected from a normal GP if you happen to be a GP.

Appointment as a doctor to a commercial expedition or trek

There is a duty on the part of a commercial expedition or trekking company to appoint a competent doctor if it is appointing one. As a trek company, it should check the doctor’s experience. If a doctor is directly employed by an expedition organiser or trekking company, the organisers will be liable for the actions of this doctor. Even if the doctor is held to be an independent contractor, he or she is usually still under the control of the company and it will be responsible for his actions.

Can a doctor avoid liability by disclaimers?

Arguably, if the doctor is not getting paid and has asked every expedition member to sign a disclaimer of liability prior to giving treatment, he or she might avoid liability. Generally speaking, such disclaimers are caught by the Unfair Contract Terms Act 1977 (as amended). Equally, trekking companies sometimes try to persuade clients to sign disclaimers, but these are caught by the Act as the Act applies to anything arising in the course of business and this is generally given a fairly broad interpretation.

This should be compared to the position in the United States and Canada where companies can certainly ask clients to sign disclaimers which, subject to being written

clearly and properly, will be effective in absolving the companies of all liability for negligent acts. (See the American case *Patricia Vodopest v Rosemary Macgregor*, Supreme Court of Washington, 8 March 1996 and the Canadian case known as *Bay Street Court Decision*, Supreme Court of British Columbia, 20 September 1996.)

Provision of drugs for expeditions

A doctor (whether or not present on the expedition) who prescribes or advises on the use of drugs on an expedition retains the “duty of care” towards the individual for whom they are prescribed and remains responsible for the effects of these drugs. GPs, giving advice on prescribing to expedition leaders or medical officers, or if they are going to prescribe drugs for use by unknown third parties, should clearly label the drugs, give indications for the use, contraindications and possible side-effects, and state how to use them. Clearly the person then using the drug should be knowledgeable.

The Crown Report (1999) recommends that prescription-only medications (POMs), when given by a person not registered as a medical practitioner, should be governed by written and signed protocols. It is therefore advisable for any expedition medical officer who is not a doctor to have written and signed protocols for all expedition drugs.

SUMMARY

Perhaps the most important thing for anyone contemplating going on an expedition as the medical officer is to ensure that he or she has the appropriate insurance (indemnity) cover. This must be checked with the relevant professional body prior to departure. In addition the medical officer must ensure that the correct procedures are in place for the prescription of drugs by non-medical personnel.

Lastly, those considering acting in a capacity other than a Good Samaritan should satisfy themselves that they are able to deal competently with any medical problems that arise. They should also try to obtain a written letter of engagement, ideally from the expedition organisers, setting out what their duties are, what is expected of them and who is in overall command (especially when relating to medical matters). They should also make enquiries about the company/organisation appointing them as to their reputation and track record, so that they can make an informed judgement whether or not to accept the appointment.

This chapter is a very brief synopsis of some of the legal issues relevant to expeditions but is by no means definitive or exhaustive on what is a complex subject. Clearly, matters should be discussed with the relevant professional indemnity organisations and with their legal advisers before setting out.