Pitfalls

Huntingdon

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Background

- Accredited ENT Consultant 1991-2003
  - Bury St Edmunds
  - Middlesbrough
- MLA 2003-07 and 2009-date
- LLM and Foundation MFFLM
  - Examiner

- Interests:
  - Regulation
  - Other jurisdictions

Summary part 1

- MDDUS
- Errors
- Adverse outcomes
- Complaints etc
  - Prevention
  - Management

Summary part 2

- Multiple jeopardy
  - Criminal court
  - Civil court
  - Coroner
  - GMC
  - NHS England
  - Employer
- Common queries
  - Your shout

Belong to an MDO and call them.

- MDDUS
- Mutual Indemnity offered to individual doctors.
- Well over 30,000 members (dentists and doctors)
- UK only
- > 50% of members outwith Scotland
- Fully funded for claims etc and "occurrence based"
  - Reported
  - IBNR
- Occurrence based
  - Beware of new entrants to market – often "Claims made"

Errors

- Violation
  - Intentional departure from recognised good practice
  - Guidelines
  - Protocols

  - How to justify a non-malicious "violation"?
    - Thought out with professional reason
    - Documentation
    - Bolam; Hunter v Hanley

Violations

- I would never do that!!

A clinical story: part 1

- A non-malicious violation
  - 5 day ENT ward
  - Operating lists Monday morning and Thursday all day
  - Middle aged woman with a worrying discrete mass in the submandibular gland
  - List time available Thursday

Right plan but poor execution

- Slip
  - Attention failure

- Lapse
  - Memory failure

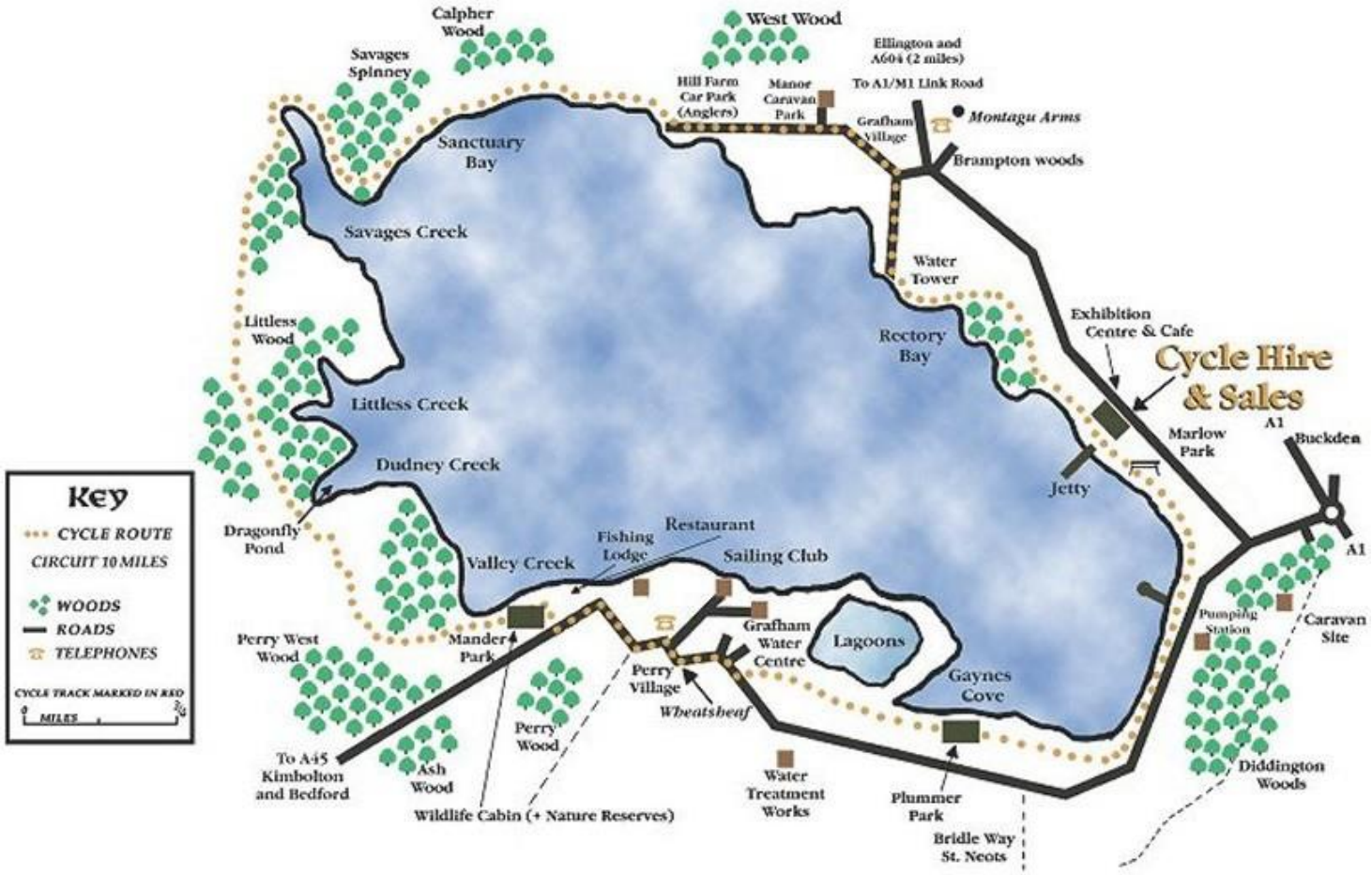
Mistake 1

- No plan

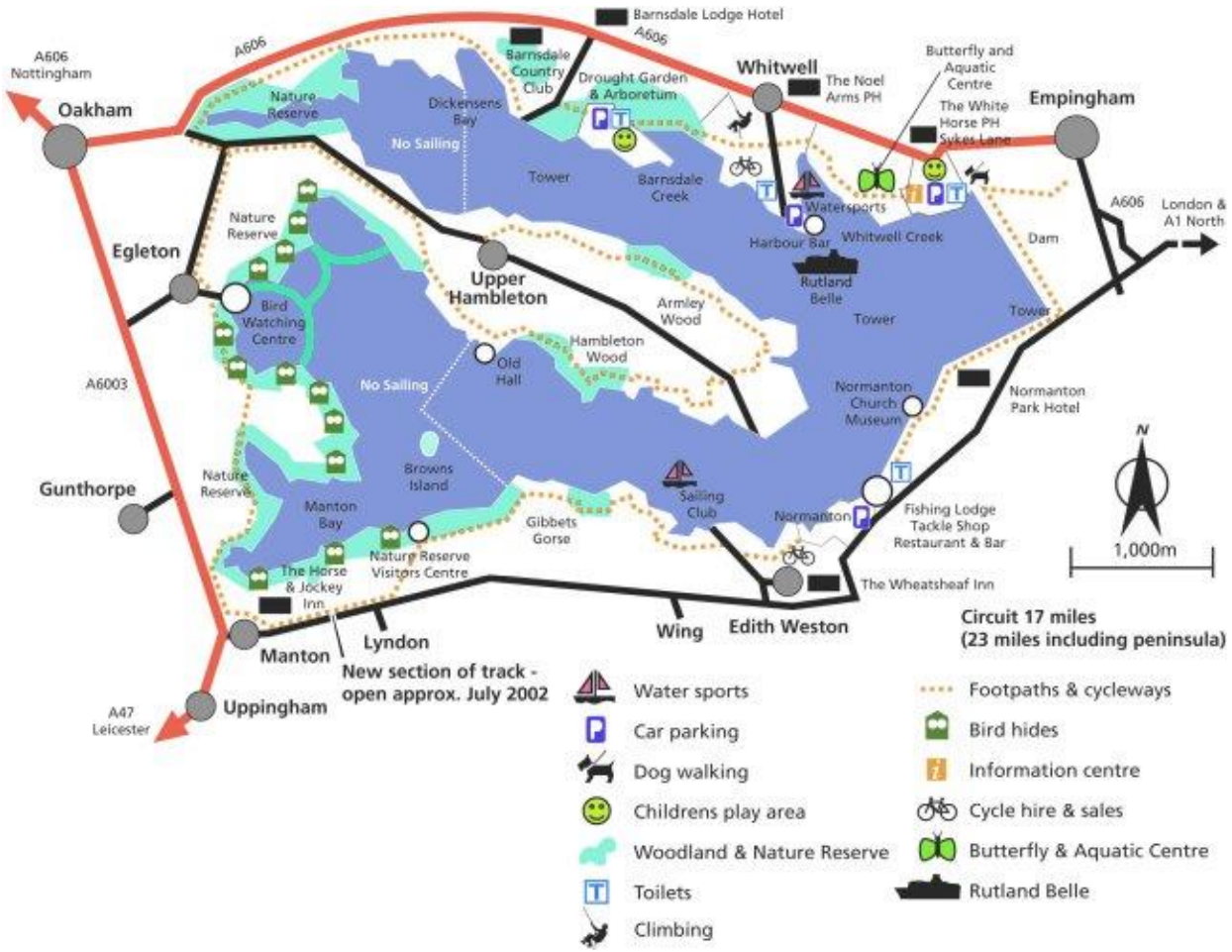
Mistake 2

- Wrong plan

Rutland Water



Rutland Water



A clinical story: part 2

- A slip
  - Obvious only in retrospect
- System issue interlinked with violation
  - Transfer on Saturday morning (after I had reviewed her) to busy female general surgical ward. Likely to go home in the afternoon so minimal (no) obs.
- Planning failure
  - Drain removal
  - Brisk immediate bleed

Management of haemorrhage in ENT

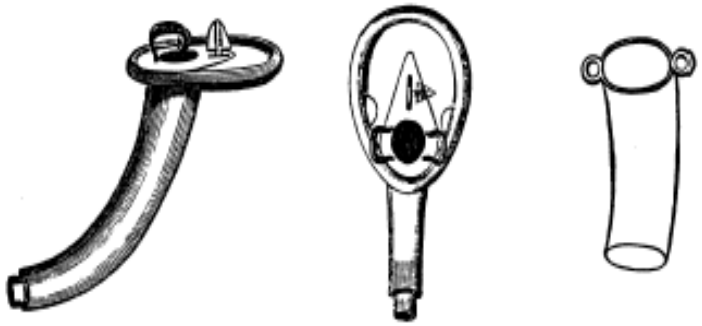
- Surely it's
  - Pressure
  - Elevation?

So we sat the lady up and pressed on the bleeding and it stopped.

BUT I was an experienced consultant with an interest in Voice and swallowing so I should have remembered:

"C" is only the third letter of "ABC"

- Neck swelling; airway compromise
- Unintubatable – no view
- System issue that kept me out of the Coroner's Court.
  - 1st on call from 2 SHOs, 1 Staff Grade and 1 Associate Specialist
  - Assoc Spec was on call that day
  - He was an experienced Head and Neck Surgeon from Malaysia



Tracheostomy tube circa 1860–1865.

A clinical story: part 3

- Patient on ITU with two cuts in her neck
- Benign histology
  - A mixed blessing for me but good for the patient
- Understandably angry and anxious husband

  - The slip in retrospect was the ligature on the facial artery

Harvard Medical Practice Study

- 30,000 files
  - Avoidable harm
    - Negligent
    - Non negligent
  - Litigation

- What is the link?

Why do patients complain (and claim?)

- Money
- Acknowledgement
- Understand what has happened and why
- So someone says sorry
- Retribution
- Correct failings

- Robert Francis QC and mid Staffs
- Duty of candour – GMC & RCS Eng Guidance

Which patients complain?

- 80% of claims from 20% of patients
  - (80% of files from 20% of members)
- 5%; 90%; 5%
- High external locus of control

Why are patients dissatisfied?

- Not respected and listened to
  - End the story
  - Encouragers
  - Body language
  - Summarisers
  - Touch and go empathy
- Not competent
  - How do they judge
- (Perceived) poor outcome
  - Expectations

Dealing with complaints

- Review current local and national guidance
- GMC obligation
  - 61: You must respond promptly, fully and honestly to complaints and apologise when appropriate. You must not allow a patient's complaint to adversly affect the care or treatment you provide or arrange.
- Local resolution
- Ombudsman
- Reporting obligations
  - NHS England

What to say?

- It's a big issue for the patient – ACKNOWLEDGE this
- Say "SORRY" – it's not an admission of fault
  - GMC obligation to apologise when appropriate
  - Guidance on professional duty of candour
- Get the patient's STORY straight and respond to it
- If the complaint is unclear, INQUIRE to clarify it
- Respond and provide SOLUTIONS and learning
  - Try to find a middle ground
- TRAVEL to the end of the complaint
  - What if local resolution fails

Meeting dissatisfied patients

- Same approach
- Keep a note
- Your chance to deal with this before it becomes confrontational and very time consuming.

When it all goes wrong…

- Stories grow in the telling
  - Neighbours, friends, family
  - Clinicians – often entirely accidentally
  - Internet etc
  - People with something to gain!!!
- People want empathetic validation
  - What is empathetic validation?
  - Who is very good at it?

Empathetic validation – the experts

- Their friends and family
- Ambulance chasers
- "Where there's blame there's a claim!"

- So you need to be first and just as good at Empathetic Validation as the lawyers

Legal pitfalls – what we tend to see

- Criminal Court
  - Unlawful Killing
  - Indecency
  - Fraud (clinical counter-fraud)
- Civil Court
  - Clinical negligence
  - (Breach of contract)
  - (DPA)
  - (HRA)

More legal pitfalls

- Coroner's Court - Inquisition to establish
  - Who?
  - Where?
  - When?
  - How?
  - (In what circumstances?) especially when Article 2 engages
  - Obligations to inform NHS England if "Interested person"
- GMC
  - Interim Orders Panel
  - Fitness to Practise Panel

If you are an NHS employee

- Employer disciplinary
  - Maintaining High Professional Standards in the Modern NHS
  - Conduct
    - Professional
    - Personal
  - Capability

Performers' list regulations

- Supported by a "Procedure" and guidance on the roles of
  - Performance Advisory Group (PAG)
    - Very dependent on the nature of the concerns reported to them.
    - One option is for PAG to request a practice audit and report back.
  - Performers' List Decision Panel (PLDP)
- Immediate suspension is now an option

Criminal Court

- Unlawful killing
  - Murder
    - Intent
  - Manslaughter
    - Gross reckless negligence
    - Causation
- Indecency
  - Rape
  - Indecent assault

CHAPERONES!

Manslaughter

- Intra-thecal vincristine
  - Found guilty – custodial sentence
- Nephrectomy of healthy kidney
  - Failed on causation
- Knife wound to chest
  - Not pursued on causation
- David Sellu
  - 2.5 years custodial sentence

Rare to go to prison but Sellu's problem was deceit to avoid the issue

What is "Clinical Negligence"

- Not criminal
  - On balance of probabilities
- A subset of torts or civil wrongs
- Four elements all necessary
  - Duty of care
  - Breach of duty
  - Causation of harm
  - Compensation or setting right the harm

Coroner

- How to stay out of Coroner's Court
  - A good report when requested
    - Liaise with Trust or MDO
    - Mini CV
    - (Sorry – empathy not apology)
    - Your understanding at the time
    - Your actions at the time
    - Final date you saw deceased
    - Other significant players

How can the Coroner hurt you?

- GMC referral
- Set up a clin neg case for the claimant
- Regulation 28 letter

GMC

- Anyone can complain.
  - Many complaints do not relate to being a doctor
- "Rule 4 letter"
  - Encloses complaint
  - Work details' form (7 days to return)
  - Circa 28 days for optional response
- Respond if certain of no further action
- GMC has option to ask employer or contract holder to investigate and will contact them regardless

GMC – Realistic Prospect Test

- Must believe there is a "Realistic Prospect" of
  - Proving facts (on balance of probability) that
  - Confirm that the doctor's FTP
  - IS CURRENTLY impaired

GMC

- Options for case examiners at Rule 4
  - No further action
  - Letter of advice
  - Contractor/Employer to investigate
  - Warning
  - Undertakings
  - Performance or Health Assessments

  - Next stage – "Rule 7 letter"
    - Allegations
    - 28 days to respond

Rule 7 letter

- Sets out allegations and requests response.
  - Same options for disposal plus refer to FTPP

- FTPP
  - Full Court hearing
  - Panel with legal assessor
  - Witnesses
  - Solicitors and barristers for each side

Fitness to Practise Panel

- 3 stage process:
  - **Facts**
    - Will accept facts proven in criminal court
    - May rehear factual evidence found not-proven in criminal court
      - Civil standard of proof
  - Is this evidence of (current) **Impairment**
    - Performance and health is altered by time
    - Misconduct is not

Fitness to Practise Panel

- **Sanction**
  - Erasure
  - Suspension
  - Conditions
  - Health Assessment
  - Performance Assessment
  - Warning
  - None

Interim Orders Panel

- Another Court
  - Right to be represented
  - Not a tribunal of fact
  - Powers
    - Interim suspension – usually for 18 months
    - Interim conditions.
      - Reviewed every 6 months
      - Can be reviewed earlier
      - Can be appealed

So how to avoid pitfalls?

- Be a better, more professional doctor
- Make no mistakes

This approach centres on personal responsibility and assumes that patients can tell that you are the sort of doctor who is very careful and makes no mistakes.

3 problems with the perfection approach.

- Patients do not know and can't check
  - How do patients judge the competence of their professionals
    - Was the pilot who flew you last time a good pilot?
- Unlike jumbo-jets, human patients are all different
- Errors happen
  - Doctors' error rate equates to two unsafe landings per day at Heathrow

So how do you really avoid pitfalls?

- Manage patient and relative expectations
  - Personal connection
  - Active listening
  - Empathetic consulting
  - Ask about expectations
  - Review understanding
- Genuine consent
- Constructive contribution to system improvement to “trap” errors

The Empathy Bank

- Every “good” consultation is a credit
- A “bad” consultation is a withdrawal
- An overdrawn account sets you up for a complaint or a claim.

Scenarios for discussion 1a

- 85 yr old mildly demented man dies
- Lived with devoted daughter who is also a patient
- Shortly after death she asks to come in to the surgery to see his notes and discuss what happened.

Scenarios for discussion 1b

- 85 yr old mildly demented man dies
- 6 months later letter from his son requests all records
- Says he is next of kin and so entitled to the records of his father
- Says worried about the care provided in last few months of life.

Scenarios for discussion 1c

- 85 yr old mildly demented man dies
- Letter from solicitors investigating validity of will
- Left everything to daughter cutting son out
- Will made 9 months prior to death

Scenarios for discussion 2

- Estranged parents: dad lives away
- Letter from dad
  - Access to child's records
  - Asks to be notified every time child brought to surgery
  - Says he has access rights so is entitled to the records

Scenarios for discussion 3

- Diabetic very keen to avoid complications
- Little warning of hypos
- Driving

Scenarios for discussion 4a

- Patient seeking to train as commercial pilot
- Past history of alcohol detox admission but now seemingly abstinent
- Request medical report to training establishment
- Absolute refusal to permit PMH to be discussed

Scenarios for discussion 4b

- Legal considerations
  - Access to medical reports act
- Refused consent
- Public interest in disclosing

Thank you

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