

## Medico-legal aspects of epilepsy

JOHN S. DUNCAN

UCL Institute of Neurology, National Hospital for Neurology and Neurosurgery, Queen Square, London

---

### Role as an expert

#### *Criminal cases*

A common question is whether an alleged crime has been committed when the accused has been having an epileptic seizure, or is confused following a seizure, and unaware of their actions (refer to Chapter 55 for details).

Less commonly, in an alleged murder, it may be argued by the defence that the deceased died as a result of a seizure, and not as a direct result of the assault. In such cases it is necessary to determine whether there was any prior history to suggest epilepsy and to consider the risk of death as a result.

Note that in criminal cases there is a higher burden of proof than in civil cases. The case must be established 'beyond reasonable doubt'. In civil cases, the case must be established 'on the balance of probabilities'.

The main factors to consider in such a case are:

- Is there an established, prior diagnosis of epilepsy?
- Is the alleged crime compatible with a seizure or automatisms or post-ictal confusion, in terms of nature and complexity of actions, and duration?
- Is a claim of amnesia commensurate with that individual's seizures?
- Was there evidence of motive?
- Was there evidence of premeditation?
- Was there evidence of attempts to escape, or concealment after the event?
- Do investigations suggest a diagnosis of epilepsy?

#### *Civil cases*

*Child protection.* Cases are often brought by Social Services, or in matrimonial disputes regarding child protection. The issue here is generally whether the epilepsy of one or both parents affects or prevents them from providing safe and effective child care.

If a child has developed epilepsy, it may be alleged that this is the result of non-accidental injury, and that the parents are unable to care for the child.

*Personal injury.* If epilepsy develops, it may be questioned whether a prior insult, such as head injury, difficult birth, or medical accident, was the cause of the epilepsy, or whether this was coincidental. In such cases, the veracity of the diagnosis of epilepsy may be questioned and this may be difficult to resolve.

If liability has been admitted, the issues of the effect of the epilepsy on ability to live independently and to earn, and on life expectancy, will need consideration when determining

the quantum of any settlement. The individual's life expectancy needs to be calculated according to the severity of the epilepsy and co-morbidities. It must be noted that life expectancy does not indicate how long the individual will live, but is a statistical estimate of average duration of life based on a population of individuals who are similarly affected.

*Medical negligence.* Most common claims by patients against doctors involve:

- Incorrect diagnosis, e.g. non-epileptic attacks diagnosed as epilepsy, with effect of loss of driving licence and livelihood; and failure to diagnose another treatable condition such as episodic cardiac asystole.
- Failure to diagnose and treat epilepsy, and possibly avoid subsequent serious complications or fatality.
- Failure to warn patients adequately about the effects and potential adverse effects of prescribed medical therapy or of surgical treatment. This includes the need to inform patients of the risks of discontinuing a medication and to have a 'fail safe' plan if the change of drug does not go well.
- The most common of these are: allergic reactions to medication, other chronic effects of medication (e.g. effects of retigabine on the skin and retina, vigabatrin on visual fields, effect of phenytoin on teeth and gums, effect of valproate on weight and menstrual cycle), interaction of antiepileptic drugs (AEDs) with other medication (e.g. oral contraceptive pill, warfarin), and teratogenic potential of AEDs, especially valproate.
- Failure to convey important information, e.g. the need to inform the DVLA of condition; safety issues, particularly drowning in a bath, burns from cooking; risk of death from seizures. This is a difficult area, as other professionals, such as GPs and nurses may also have a role in patient education and information.

Medical reports may be sought by firms of solicitors, from a patient's usual doctor, or from an independent expert witness, commissioned for the occasion. The conduct of Civil Cases was reorganised on 26 April 1999, following Lord Woolf's reforms of the Civil Justice System. The intention was that the legal process would become faster and more efficient. While this may be the case, a consequence is that expert reports are often requested by solicitors at an earlier stage, while considering whether to pursue a case.

### **Doctors as defendants**

Most commonly this will involve allegations of medical negligence (VS). Also, breach of confidentiality.

The standard of medical care in a case of alleged medical negligence will almost invariably be judged by what is written in the medical notes. Thus it is even more important than ever to write clear, dated, legible and comprehensive medical notes.

Lord Woolf's reforms set strict timetables for the conduct of cases. If these are not met, there is a risk of a case being found negligent by default. Warning signs are:

- A request from a patient for disclosure of records under the Access to Health Records Act 1990, in circumstances in which there is reason to believe that a patient may not have been satisfied with their medical care.
- A standard form or letter from a solicitor instructed by a patient, seeking disclosure of medical records for the purposes of a claim with which you could possibly be involved.

In the event of the above circumstances, it would be prudent to discuss the matter with your medico-legal defence organisation and, if appropriate, the Risk Management Department of the relevant NHS Trust.