SPECIAL ARTICLE

MALPRACTICE AND PROFESSIONAL NEGLIGENCE IN THE HEALTH PROFESSIONS

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SYNOPSIS

There is increasing reluctance on the part of patients in our region to accept unquestioningly the words or actions of members of the health professions. In some developed countries, the problem of malpractice suits has become quite serious. Negligence is one of the commonest forms of malpractice. The elements of proof, danger areas and some instructive examples are mentioned. Measures to guard against charges of negligence are discussed. Actions to be taken when there is a threat of a law suit are listed. Finally, several kinds of offences which have led to temporary or permanent striking off from the register of medical or dental councils are discussed.

The mention of the term "malpractice" often conjures an admixture of distaste, anxiety, fear and even indignation on the part of the health professions. The charge of malpractice may evoke unpleasant images of ungrateful patients or their families who forget the tremendous self-sacrifice and dedication usually shown by the health professions in the discharge of their duties. However, it is sad but true that lapses can occur in the health professions just as with other professions.

It is only proper that the public should expect high standards of conduct from members of a profession. The word "profession" may refer, in common parlance, to "a body of persons in any calling or occupations". On the other hand, it could refer to "a vocation or occupation requiring advanced education and training, involving intellectual gifts". This is perhaps the meaning which led to the term "learned professions", though I have not heard of the converse term "unlearned professions"!

These so-called "learned professions" which originally included law, theology, teaching and medicine, grew out probably from the vow "I profess' which was taken by the lay monk in medieval Europe. Gradually each profession became characterized by a common discipline, a spirit of fraternity, scholarship and service to the community. Lord Cohen, a distinguished physician, once said, "The essence of business is the financial return to shareholders. The essence of a profession is that though men enter it for the sake of their livelihood, the measure of their success is the service which they perform and not the gains they amass". Professions have attained such high status in society that they are usually allowed to monitor and enforce their own standards of conduct. This is usually done through a code of ethics and through a disciplinary body wholly or largely constituted from leading members of the particular profession(1).

In countries of this part of the world, there were very few professional people until less than a generation ago. As long as the public was largely illiterate, the health professions usually had their own way. However, the population of countries in our region is rapidly getting more sophisticated and literate. Moreover, there is concomitant growth of the legal profession as well as the health professions. There is a perceptible increase of reluctance on the part of patients to accept unquestioningly the words or actions of the health professions. There is concomitantly a greater willingness to sue the health professions for wrongful treatment or to complain to the relevant statutory body, e.g. the Medical Council, about it. I think this trend will gather momentum during the next few years.

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In some developed countries, the problem of malpractice suits is quite a serious one. It was estimated that in 1973, one hundred million dollars was paid out in U.S.A. in professional liability claims. As a consequence, the health professions were buying insurance against that liability for three hundred and fifty million dollars per year.

Naturally, all this cost is passed onto the consumer. In that year it was estimated that every patient paid an extra fifty cents each day in hospital and every outpatient visit to fund this rather colossal sum of money. In U.S.A. it was found, however, that only one in a thousand doctor — patient encounters ended up in court. In order of risks, the doctors affected were orthopaedic surgeons, anaesthetists, general surgeons, obstetricians and gynaecologists, general practitioners and internal medicine specialists.

Negligence Negligence is one of the commonest forms of malpractice. Failure to diagnose or treat a patient's illness or injury with "due care" constitutes negligence(2).

"Negligence" is not necessarily synonymous with "carelessness, though obviously many cases of negligence do arise from carelessness. Most cases of negligence come up for judgement under civil law though a few, usually the most blatant, may be tried under criminal law.

"Health professions" refer to qualified physicians, dental surgeons, nurses and others delivering health services to the public. This paper will focus mainly on the problem as it relates to the medical profession.

A doctor is expected by law and public to have two attributes in his practice:-

(a) Possession of a reasonable degree of proficiency.
(b) Application of that proficiency with a reasonable degree of diligence.

What would be construed as "reasonable degree of proficiency" largely depends on the status, experience, qualifications and area of practice of doctor. For example, it is unreasonable to expect a newly-graduated houseman to have the same degree of proficiency as a specialist. However, the housemen is expected to have the level of proficiency of housemen, as adjudicated by the medical profession in that country(3).

"A reasonable degree of diligence" also depends very much on the judgement of the medical profession. In practice, the testimony of leading members of that profession as "expert witnesses" would be crucial in determining what is a reasonable degree of diligence.

The burden of proof of negligence usually rests upon the plaintiff except where facts are so obvious that the onus is then on the doctor to prove that his own negligence did not contribute to this state of affairs.

The failure to effect a cure or to obtain a good result is not enough in itself to raise an inference of negligence in the diagnosis made or the treatment adopted.

Elements of proof

For a charge of negligence to succeed, the following "elements of proof" are usually required(4):-

1. **The duty element**
   It has to be proven that the defendant had entered into a contract to treat the plaintiff and therefore owed the latter a duty.

2. **The breach element**
   It has to be proven that the defendant did breach his duty towards the plaintiff as a patient.

3. **The causation element**
   It has to be proven that the defendant's breach of duty was the "direct and proximate" cause of a result. The onus is on the plaintiff to prove proximate cause, that is, the injury resulted from the action of the practitioner. For example, a patient who visited both a dentist and a physician on the same day and received injections from each alleged that he suffered an injury because one of the two needles was unsterilized. He had to prove which needle was not sterile and which doctor, therefore, was negligent(5).

4. **The damages element**
   The result alluded to above must be a legally cognizable injury to the plaintiff.

5. **The contributory negligence element**
   The plaintiff himself must not be negligent. He must have conformed to the reasonable directions of the doctor and must not have contributed to his own injury. Thus a physician was not held liable when the patient failed to have a prescription filled and to return for further treatment as directed(6).

It should be pointed out that no doctor is obliged to treat anyone against his will. He has to show by words or action that he has agreed to be the medical attendant of that case. Only then can the "duty element" usually succeed. There is a statute of limitations in most countries. The plaintiff has to sue the doctor within a certain number of years of the occurrence, usually within three years. Allowance, however, may be made if the effects are not apparent until later than that period.

Damages can be of various kinds, including:—

1. Loss of earnings.
2. Expenses unnecessarily incurred for treatment.
3. Reduction in the length of expectancy of life.
4. Reduction in the enjoyment of life.
5. Poor cosmetic result.
6. Pain and suffering.
7. Loss to dependants of patient.

Danger areas

There are "sins of omission" and "sins of commission".

1. "Sins of omission"

(a) No informed consent.
With a few exceptions, consent to examination and treatment is an absolute requirement before a doctor approaches the patient. Consent could be "implied" by the demeanour of the patient. For example, the fact that a person presents himself at a clinic or hospital is held to imply that he is agreeable to medical examination in the general sense. This, however, does not imply consent to more than a general physical examination. For other examinations, e.g. rectal or vaginal examinations and taking of blood for a test, "express permission" should be obtained. For more complicated diagnostic procedures, e.g. a pyelogram, or surgical operations, written permission is mandatory.

Consent should be obtained from conscious, mentally sound adults. In other instances, parents or guardians must give their consent. Where procedures involve marital relations, e.g. abortion or sterilisation, the wishes of the spouse should be sought, even if not obligatory under the law. For surgical operations and other kinds of treatment involving some risks, consent should be obtained after the doctor has explained what is to be done and why it is to be done, results expected, risks to be incurred, and possible side effects.

The Declaration of Helsinki restates the doctrine

of informed consent. The problem is that in some communities the potential subject of research may not be familiar with the concepts and techniques of experimental medicine. It must then be always stressed, through the intermediary of a trusted community leader, that participation is entirely voluntary and that any participant is free to withdraw from the experiment at any time(7).

(b) **Omission of necessary investigations or treatment.**
For example, it is usual to take an X-ray of the skull in a case of suspected fracture. It is also standard practice in dental surgery to take a radiograph of a misplaced tooth. If an X-ray is not undertaken, patients may contemplate an action for professional negligence (3).

2. **"Sins of Commission"**

(a) **Unnecessary treatment.**
This applies especially to surgical treatment.

(b) **Abandonment.**
A doctor called specially and only for one occasion owes no duty to repeat his visits or continue his treatment. A surgeon, however, must provide post-operative care unless his services have been restricted to the performance of the operation. A physician who leaves a patient at a critical stage of disease without reason or sufficient notice to enable the patient to procure the services of another competent physician is negligent (9).

(c) **Assault and battery.**
Assault and battery is wrongful, harmful or offensive contact with another's body or putting the other person in fear of such an attack. Most cases involve errors of judgement involving a failure to obtain the patient's informed consent to treatment. However, a suit is occasionally brought by a patient against a doctor for deliberate physical attack or sexual assault. For example, a patient was strapped to a mechanical table and given stretching treatment in spite of his vehement protests. In another example, a woman went to a psychiatrist for treatment of sexual difficulties. The psychiatrist had an affair with her. She subsequently sued him for malpractice and assault.

Some instructive examples of causes of suits for negligence
Surgical negligence

1. **Cardiac arrest**
If the patient's preoperative condition contraindicates surgery and the operation proceeds as scheduled, the charge of negligence may succeed. However, if the problem occurs during surgery under circumstances in which cardiac arrest could not be reasonably anticipated and if the surgeon acts promptly to cope with the problem, no charge of negligence need succeed.

2. **Wrong operation**
A patient may be operated on the wrong part of the body or a wrong patient may be operated on. If the facts can be proved, the charge of negligence cannot be rebutted.

3. **Injuries to parts of the body other than that scheduled for operation.**
In most instances, the surgeon will be held responsible. An example is damage to the recurrent laryngeal nerve during thyroid operations.

4. **Mishaps on diagnostic procedures**
Common examples include:—
(a) Perforation of the oesophagus during oesophagoscopy or gastroscopy
(b) Adverse effects from angiograms and aortograms.
(c) Allergic reactions from pyelograms.
(d) Urinary infection from cystoscopy.

5. **Instruments left in body after operation**
Forceps, sponges and other surgical materials have constituted causes for litigation. Delegation of counting to the nurse does not necessarily exonerate the surgeon.

6. **Poor results**
Common examples include.—
(a) Fractures may be badly-set. Plaster casts may cause circulatory problems. Infection, including gas gangrene, may arise.
(b) Plastic surgery for face or breasts.
"Beauty is in the eye of the beholder". The problem arises if the patient does not see "eye to eye" with the doctor who chose to improve upon nature!

Medical negligence

1. **Negligent treatment**
For example, if a patient sees a psychiatrist and gives clear indication of a serious intent to commit suicide and the psychiatrist does nothing to prevent it, he could be sued if the patient does kill himself.

2. **Investigative procedures**
The discovery of an abnormal finding and not taking measures about it, e.g. findings indicative of myocardial infarct, may be grounds for a negligence suit.

3. **Administration of treatment without guarding against adverse effects**
An example is anaphylactic shock from penicillin administration without the doctor having carefully checked for a history of allergy.

Dental negligence

1. **Over exposure from investigative procedures**
An example is the development of X-ray burns from overexposure during dental X-rays.

2. **Damage to other parts**
A common example is the cutting of the tongue by a rotating emery disc.

3. **Foreign matter in the respiratory passages**
For instance, the
(a) inhalation of fillings, teeth and roots.

4. **Foreign matter in the jaws**
Tooth roots may be left after extraction and broken ends of hypodermic needles may be embedded in the jaw. Almost all courts agree that a dentist who leaves roots after an extraction is negligent.

5. **Administration of an anaesthetic**
Mishaps from anaesthetics are common causes of suits for negligence.

6. **Fracture of the jaw**
This constitutes one of the common grounds for lawsuit. Usually patients cannot win these cases unless they show specific negligence as well as proving the jaw was actually fractured during an extraction.

7. **Ill-fitting dentures and bridges**
The dentist is usually protected as long as he exercises reasonable skill and care.

8. **Non-referral to specialists**
If a dentist finds a problem he himself cannot cope with competently, he has a duty to refer the patient to someone who can.

Involvement by other health practitioners

Sometimes, the doctor becomes liable to a suit for negligence as a result of the actions of other health practitioners. Ordinarily, a general practitioner would not be sued for the actions of a specialist to whom he referred the case. However, if he was careless in selecting that specialist, he could be held to be liable. The actions of partners, agents or subordinates may lead to negligence suits. For example, surgeons are responsible for the actions of nurses working under his orders in the operation theatre.

Measures to take against charges of negligence

1. **Keeping knowledge up to date**
What is a reasonable degree of care and skill has to be determined according to the evidence in the particular case and may vary from time to time as knowledge increases[10]. The level of knowledge and skill among those with whom a defendant practitioner may be fairly compared determines the degree of skill and standard of care required of him.

Hence it is vital for a doctor to keep himself up to date by attending lectures in continuing education, conferences, workshops and seminars and to read regularly journals and books which are related to his practice.

2. **Keeping good records**
Careful and legible records of consultations, examinations, treatments, operations and postoperative care should be kept. The consent of a patient to an operation or any unusual treatment should be in writing whenever practicable and should signify that the patient understand its nature and effect. On the other hand, if a patient refuses to undergo a diagnostic test or insists on discontinuing treatment or on leaving a hospital against medical advice, an appropriate and signed statement should be obtained from the patient.

3. **Using standard forms of investigation or treatment**
While a doctor has to keep abreast of the current state of medical knowledge and progress, he also has a duty to use standard and accepted methods of investigation and treatment. It is a general rule that doctors should not experiment on a patient. If an experimental method has to be used, the informed consent of the patient is essential. Nevertheless, the physician must use reasonable skill and care in carrying out the experimental procedure. The overriding rule is for the doctor to pursue only that course which, in his judgement, is in the best interest of his patient. To subject a patient to experimental procedures solely for the purpose of trying new methods or obtaining clinical information and evidence is not acceptable.

4. **Keeping equipment up-to-date and well-maintained**
Some negligence suits result from faulty or outmoded equipment. Hence regular servicing, proper repairs and checking of equipment are vital. Outmoded equipment shown to be ineffective or dangerous should not be used.

5. **Checking credentials of associates**
It is important to ensure that any hospital a doctor works in checks the credentials of staff (full-time or visiting) adequately. Associating with unqualified practitioners incurs a great risk.

It is controversial whether a practitioner is liable for the actions of his "locum tenens". This hinges on whether the "locum tenens" may be regarded as the agent of the practitioner or not [11].

6. **Promoting good team-work**
In procedures which require team-work, proper understanding and co-operation among team members are essential. For example, the members of a team in the operation room must understand each other well and know the tasks within the responsibility of each person. Counting of swabs and surgical instruments, for instance, cannot be assigned on a haphazard basis. Regular consultations should be held among team-members so that decisions could be made on a corporate basis and thus reduce changes of errors of judgement.

7. **Using all available data before making conclusions**
For instance, a radiologist should not read X-rays without looking at a brief summary of the clinical findings about the patient.

8. **Keeping patient and his family fully informed**
If something goes wrong, the doctor may be well-advised to inform the patient or his family first rather than to keep the matter to himself. A full and candid explanation may sometimes avert the wrath which may descend on the doctor when the patient or his family finds out the matter later on and not from the doctor.

9. **Keeping patients fully informed**
Specialists who are referred patients by general practitioners must make sure that the latter are kept fully informed. The onus is on the specialist to ensure that the general practitioner is given the necessary information so that the patient's condition could be treated.

10. **Obtaining and maintaining proper and adequate insurance cover**
It seems foolhardy to me that any health practitioner should practise without adequate insurance cover against liability for his professional activities. Damages and legal fees can be extremely high. Even if it is for nothing else except peace of mind, a proper and adequate insurance cover undertaken by a reputable company is well worthwhile.

What to do when threatened with a lawsuit

1. **Keep calm**
Do not admit liability. Tell the plaintiff to communicate with you through your lawyer.

3. **Notify your insurance company directly**
This is vital so that they could brief their own lawyers and give you proper advice.

3. **Retain a lawyer**
It is often advisable to have one's lawyer in addition to that representing the insurance company. Discuss with him about the matter as soon as possible so that he could prepare a credible defence.

4. **Inform your local professional body about your problem**
Often your local professional body could give you good general advice and suggestions about who to enlist as expert witnesses in your defence. As was mentioned earlier, the testimony of expert witnesses can be crucial

to prosecution or defence.

5. **Settle quickly if at fault**
Consider very carefully the advice of your insurance company and your own lawyer whether you have a credible defence. If not, it is usually advisable to settle quickly.

Negligence suits in South-East Asia
There are not so many negligence suits in South-East Asia against the health professions. However, the few which come to mind can be very instructive.

1. **Death after an injection of procaine penicillin**
This case occurred in Malaya in 1960. The patient died within an hour of the injection. The doctor was held responsible because he did not make the appropriate enquiry before causing the injection to be given. In fact, the deceased had suffered adverse effects from a penicillin injection given three years earlier. Her out-patient card was endorsed with the warning "Allergic to penicillin".

2. **Peripheral neuropathy after two injections of "acetylarsan" (an arsenic compound)**
This case happened in Malaysia in 1956. Damages were awarded on the basis that
(a) The neuropathy was the direct result of the "acetylarsan"
(b) There was proof of negligence in diagnosis.

3. **Ruptured colon after sigmoidoscopy**
This case occurred in Malaysia in 1967. No negligence was established because
(a) The doctor was following the "what was the general and approved practice" in the situation he was faced.
(b) The perforation could have resulted from causes beyond the doctor's control.
(c) The doctor was deemed to have reasonable competence and experience and to have exercised reasonable care.

Malpractice and disciplinary actions
In each country, there is usually a body responsible for the licensing and discipline of each of the health professions. In many countries of this region, for example, there is a Medical Council for physicians, a Dental Council for dentists and a Nursing Council or Board for nurses. Such bodies have the power of withdrawing or suspending the licence of the particular health professional convicted of felony, misdemeanour, crime or offence, or judged after due enquiry to be "guilty of infamous conduct in a professional respect". In Britain this phrase was replaced in the Medical Act of 1969 by the words "serious professional misconduct".

The categories of "serious professional misconduct" are never closed. However, there are fairly well-defined groups of offences which lead to temporary or permanent deletion from the register of such health practitioners. Appeal to a high court against a decision of the disciplinary body is usually provided for in law. Many offences are usually common to all the health professions.

1. **Abortion**
The illegal termination of pregnancy, if notified as a result of a conviction in a criminal court, is almost always sufficient cause for striking off the register.

2. **Adultery**
Adultery with the patient or a member of the patient's family carries a high risk to the doctor's continuation on the register.

3. **Alcohol**
Drunken driving can lead to erasure, though usually a warning is given for a first offence.

4. **Addiction**
A doctor who is a drug addict is a danger to others and himself. He is usually suspended but often restored to practice after cure.

5. **Association with unqualified assistants**
Unqualified assistants can be employed by a doctor, provided he retains personal responsibility and exercises effective supervision. Dental surgeons can likewise employ dental auxiliaries but must make sure they do not practise dentistry outside the limits laid down by law. They will also have a vicarious liability for all the actions of auxiliaries under their charge ([12]).

6. **Advertising**
It is unethical for any practitioner to perform or condone any form of publicity which draws attention to his professional expertise. New patients may thereby be attracted to him and this will result in his financial gain. In most countries advertisements drawing attention to some professional skill are frowned upon by the disciplinary body and the medical profession.

Canvassing for patients by word of mouth or written communication is also wrong.

"Kick-backs" from specialists to general practitioners who have referred cases to them are not allowed in most countries.

Health practitioners are usually cautioned by their own associations to "exercise the utmost vigilance when dealing with the press". On the other hand, it is also regarded as a duty of the health professions to keep the public informed about health matters ([13]).

7. **Abuse of statutory privileges**
In Singapore many doctors have fallen foul of the Medical Council by the abuse of their statutory privileges as medical practitioners:—

(a) Selling sick certificates.
Many doctors have faced disciplinary action because they sold sick certificates to persons who they knew were not sick or sick enough to warrant sick certificates. Backdating a sick certificate is also not permitted.[14].

(b) Selling controlled drugs for non-medical usage.
The issue or sale of controlled drugs, especially addictive ones, for non-medical usage is a serious offence.

(c) Unwarranted use of unqualified personnel for duties which should be performed by the doctor himself, e.g. signing of sick certificates.

(d) Professional negligence.

CONCLUSION

Malpractice, including negligence, may be an unpleasant subject to discuss. However, it is essential for all health practitioners to guard themselves against such a possibility. They can do so by trying always to practise high standards of conduct and performance and keeping full records of their activities. They should also remember to treat patients as human beings and not merely as "cases" of disease. Although charges of malpractice can afflict even the most competent and conscientious practitioner, justice is usually done eventually. In the words of the Latin proverb, "Great is

truth and it shall prevail".

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