Understanding Medical Negligence and Litigation – Basics for the Medical Professional

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It is essential for all clinicians to understand the elements of medical negligence, reasons why patients sue doctors and the process of medical litigation. The medical expert witness who articulates the standard of care both in the report and under cross-examination needs to be skilled and acquire proficiency. Acquiring the skills and strategies required for each stage of the litigation process is therefore essential for all medical professionals. Such a skilled and knowledgeable medical professional would not succumb to the negative impacts of defensive medicine and the litigation stress syndrome[1]. Defensive medicine is stressful, wasteful and compromises professional standards[2].

Definitions

1. **Litigation** is a legal dispute or lawsuit. Medical litigation is a process of carrying out a lawsuit or civil action as opposed to criminal proceedings.
2. **Litigants** are persons (parties) involved in a lawsuit.
3. **Plaintiff** refers to the person who initiates the lawsuit. Occasionally the word **claimant** is used for plaintiff.
4. **Defendant** refers to the person sued in a civil action (or a person accused of a crime).

In medical litigation, the patient or his family are usually the **plaintiffs** while the doctor or hospital is the **defendant**.

Medical malpractice or negligence is defined as the failure or deviation from medical professional duty of care – a failure to exercise an accepted standard of care in medical professional skills or knowledge, resulting in injury, damage or loss.

Medical negligence comes under the laws of Tort, and a **Tort** is a wrongful injury, a private or civil wrong which is not a breach of contract. Torts may be intentional, when the professional intends to violate legal duty or negligent, when the professional fails to exercise the proper standard of care established by law.

In principle, the **social aims of the Tort System** in medical indemnity have three main purposes:

1. Providing compensation for injuries
2. Creating accountability for actions
3. Fostering patient safety and quality

Unfortunately, the litigation process is adversarial in its process, pitting doctors and patients against one another, resulting in the destruction of the trust required for an effective partnership of care and impeding the objectives of patient safety.

What constitutes medical negligence?

1. A duty of care is owed. The plaintiff must show that the doctor or hospital owes him a duty of care as a patient.
2. A breach of duty of care. The standard of care administered falls below the legal standard.
3. There is causation. The injury suffered was a directly or significantly caused by the breach of duty.
4. There is damage. The patient suffered injury as a result of the breach of duty.

If a breach of duty occurs, but does not lead to injury, then negligence cannot be proved. In a bad medical outcome, there are several causes for injury or damage.

The **burden of proof** of fault is with the plaintiff throughout the case. The facts of the case may create a permissible inference of negligence when the defendant had control over the process and that the injury would not normally occur without negligence.

The duty of care is owed

If the medical litigation involves a doctor in a therapeutic relationship with the patient (he offers medical treatment or carries out a surgical procedure), there is no difficulty in determining that a **duty of care is owed.**

However, if a principal doctor is sued for the negligence of his locum or nurse, then the circumstance of the case may be argued to either prove or exclude that a duty was owed.

A doctor does not owe a legal duty of care to a stranger. However, in Singapore, the SMC has ruled that a registered medical practitioner has an ethical duty to attend to strangers in distress, so long as the doctor is called to do so.

Hospitals have a duty to use reasonable care to make sure that the hospital staff, facilities and equipment provided are appropriate to ensure a safe and satisfactory medical service for the patient.

When does the duty start and end?

The duty of care starts with the beginning of the doctor-patient relationship. There is no fixed point in law where the relationship starts – on entering the clinic, or on registration or after the consultation.

The patient may terminate the relationship unilaterally. Doctors have an extra duty to transfer the care of the patient to an equally, if not more qualified, doctor before the relationship is ended. Failure to do so may construe abandonment, which is considered legally and ethically wrong.

What is the scope of the duty of care?

The doctor treating a patient owes a duty of care to a patient to take care and act diligently in all areas especially:

1. Accurate assessment and diagnosis
2. Timely and appropriate investigations
3. Safe and effective treatment
4. Giving information on disease and medication
5. Obtaining consent of patient throughout the relationship
6. Appropriate and timely referral
7. Appropriate response when called to attend
8. Maintaining medical confidentiality

Breach of duty

The plaintiff must prove that there was a breach of duty and the medical care provided was below standard expected by law.

The standard of care is decided by applying the **Bolam test in law** – the standard of care determined by a group of respected and reasonable professionals even though there may be others who disagree. However, the court would then apply what is called the **Bolitho test**. In this case, the court would not just accept the standard as articulated by the respected and reasonable professionals, but also exercise its own critical analysis to see if the standard articulated can stand the test of logic and reason.

In summary, the expected standard of care may be expressed thus:

1. The standard of care must be in accordance with the practice accepted by a respectable body of professionals. It is expected to be up to date and current practice.
2. The standard of care is articulated by an expert witness in a report and under cross-examination in court.
3. The divergence of medical opinion does not negate the standard of care.
4. The standard of care must be reasonable and logical.
5. The test of reason and logic must include the process of reasoning which must be thorough, taking all facts into consideration and the conclusion reached must be defensible by reason.

The expert witness

The standard of care in medical litigation is based on the facts of the case and the opinion of medical experts in the field. An expert witness possesses special knowledge and experience of a subject that enables the expert to give opinions and draw conclusions relevant to the case to impartially and objectively assist the court in its work. A good medical expert must provide a valid and reliable scientific medical testimony accompanied by an appropriate professional demeanour.

Causation

The claimant (patient) must show proof that the defendant's (doctor's) negligent act or breach of duty caused the injury.

In medical negligence or tort law, causation must be **proved on a balance of probabilities** (a probability of 51% or greater).

The court often uses the **"but for" test**. The question "Would the claimant (patient) have suffered the injury but for the negligent act of the defendant (doctor)?" is asked. If yes, that means there could be other factors that could have contributed to the injury and thus the defendant is not liable.

However, when there are multiple causes for the claimant's injury, the question the court will ask is, "Was the defendant's breach of duty a necessary element in the **chain of causation**?" If the defendant's conduct **significantly or materially contributed** to the injury suffered by the claimant, the court would find that causation has been proved.

Damage and damages

Once the plaintiff has shown that the breach of duty caused an injury, it does not follow that the defendant is liable for every consequence that follows. The principle of **reasonable foreseeability** applies, i.e. the reasonable man should have foreseen that his breach of duty would have a great risk of leading to the injury. This is not critical in proving negligence but in approximating damages.

Damage is the loss or harm caused by negligence. Injury is the wrong committed whereas damage is the harm suffered. **Damages** refer to the money awarded or monetary compensation to one who suffered a loss as a result of the fault of the defendant. **Compensatory damages** are awarded for the real loss suffered. This consists of compensation for monetary loss (due loss of wages, medical expenses) or non-economic loss (like pain and suffering). **Punitive damages** are awarded in excess of actual damages to punish the defendant. **Nominal damages** are awarded as a token for an infringement where some slight injury has occurred.

Conclusion

As medical practitioners we must be aware that we owe a legal duty of reasonable care to our patients and must exercise appropriate reasoned and responsible judgment at all times.

The appropriate defence of deserving cases in medical litigation preserves the clinicians' personal and professional integrity. Professional integrity is essential to preserve and promote medical professionalism. A culture based on sturdy medical professionalism ensures and assures that the patient's and society's interests are served best in medical practice.

Medical malpractice actions can be destructive to the doctor-patient relationship and the trust between society and the medical profession. Knowledge and skills in dealing appropriately with medical malpractice are essential competencies for all medical professionals.

To have a fuller understanding and training on the various aspects of medical litigation, and on being an expert witness, all doctors are invited to attend the SMA-MPS Training Course for Medical Experts. Please see the following page for more details. SMA

References

1 Scott SD et al. The natural history of recovery for the healthcare provider "second victim" after adverse patient events. Qual Saf Health Care 2009; 18:325-30.

2 Studdert DM et al. Defensive Medicine among high-risk specialist physicians in a volatile malpractice environment. JAMA 2005; 293:2609-17.