COMMENTARY

Malpractice claims: prevention is often a better strategy

Malpractice claims are on the rise and insurance costs are escalating.[1] Our society is following western trends in becoming increasingly litigious.

Medical malpractice may be defined as damage suffered by a patient resulting from professional negligence on the part of the carer.[2] Modern medicine is an art of healing and caring backed by scientific evidence. Doctors can promise in good faith to do their best for patients but they cannot warrant cure or desirable outcomes. It is clear therefore that mere damage is not a sufficient condition for a suit. With an undesirable result, though, the litigious patient might try to find evidence suggesting negligence to sustain a claim.[3] The inherent danger is that a medical practitioner, who has not been negligent but not prudent or informed enough to have taken the necessary measures, could actually become incriminated.

In a malpractice claim, typically a triad of three parties is involved: the patient-claimant who suffered damage (and possibly also paying third parties); the health care personnel and his/her working institution; and the lawyers, doing their best to argue one way or another.

One therefore has to handle the patient well in the first place, and to be prepared to face the legal representatives' challenge.

Research studies have demonstrated that a good doctor-patient relationship is immensely important in reducing the risk of complaints.[4,5] Factors like empathy, patience, time, attention, careful listening, and adequate explanation count, whereas unfavourable consequences stem from detachment, lack of sympathy, hastiness and rushing, and insensitivity to the patient's concerns. The latter predispose to ill feelings, and readily give rise to complaints should an undesirable outcome ensue.[6] Equally important, once an undesirable result occurs, open and candid explanation and a sympathetic and active attitude may well reduce the risk of claims.[7,8] In this regard, important causes of mistrust are negative comments made against earlier doctors caring for the patient by current doctors, as these can be very potent in stimulating suspicions.[9]

For the claimant's lawyer, it is vital that nothing exists which would allow an inference of negligence. Proving negligence requires establishing that a sub-standard level of care was offered.[3] The standard required by the court is that of an ordinary skilled member of the profession, as enunciated in the landmark case of *Bolam v Chelsea and Kensington Hospital Management Committee* [1968] 1 QB 428. More specifically, this refers to a similar professional in the defendant's circumstances.[10] Keeping up to date and practising within one's expertise are therefore golden rules.

Being up to standard is not confined to the commission of no errors; equally salient is the omission of critical steps or explanation. In *Chester v Afshar* [2004] UKHL 41, the defendant doctor was liable not in his execution of the spinal surgery which resulted in the cauda-equina syndrome, a known risk. The negligence lay in failure to mention the risk. The claimant contended that she would not have consented had she known the potential complication beforehand. Failure of good and contemporaneous documentation is equally relevant, because a gap in the notes might be taken as meaning that nothing had transpired.

Apart from the tortuous approach, an occasional trap is a breach of contract by a doctor who acquiesces to unrealistic requests and demands from a patient. An example would be telling a patient that there will not be an obvious scar from a surgery. Explanations should always be plain and factual to avoid expectations which are fanciful.[9] It is true to say that patient management often amounts to management of expectations.

At the level of health care institutions, guidelines, policies and regulations have to be set up and strengthened as a tool for improved risk management. Ready examples are surgical checklists for the prevention of peri-operative mishaps.[11,12] An organisational culture of safety from top to bottom needs to be inculcated and can be facilitated by educational newsletters, quality improvement projects and seminars. Indeed, recent trends in hospitals seeking accreditation provides an opportunity to review many existing processes and a chance to re-engineer them for more robust and error free execution.

Accepting the fact that there could be the slight chance of an occasional mistake or an inadvertent error by the most prudent practitioner, a malpractice suit could be viewed as an occupational hazard. Securing a reliable insurance is thus very important. This could mean entering into a professional insurance scheme or joining a defence society. The purpose is to share out the risk so that the brunt is borne by a majority of members; each shouldering a small and relatively insignificant portion. An 'occurrence-based scheme' has the advantage of coverage so long as the mishap occurred at a time when cover from the scheme was operational, irrespective of when action is taken.

Protection societies do not merely provide for compensation. Publication of cautionary tales reminds members of risky areas in their practice. Educational programmes serve to teach members safer ways to handle patients. Legal advice can be offered to needy members and discretion can be exercised in weak cases to settle the claim, so as to save expenses that would otherwise be incurred.

Escalating protection society fees are a great concern, and obviously related to increasing payouts in an atmosphere of increasing litigation. Clearly, if they are to survive, insurance companies and indemnity societies do not run money-losing businesses. As most of the compensation or settlement payouts are actually caused by a very small minority of members who are often repeat offenders,[13] penalties can be imposed on them such as a scale of heavier premiums or actual exclusion of membership.

Education is obviously an important means of enhancing professionals to practise more safely. Professional societies have been regularly organising talks and seminars and publishing invited legal articles to help enhance members' knowledge and attention about medico-legal issues. The inherent problem of such efforts is that the minority outliers often distant themselves from such activities. In this regard, the Code of Professional Conduct issued by the Medical Council of Hong Kong is also relevant. Although its focus is more on ethical conduct, it also offers hints as to safe practice, such as advice in relation to record keeping, consent, patient confidentiality, termination of the doctor-patient relationship, patient referral, delegation of duties, new procedures, and clinical research.[14] This Code is regularly updated and it is the responsibility of every practitioner to be fully cognisant of the fine details of the stipulations.

Medical schools have an undeniable role in cultivating and nurturing a strong sense of responsibility and ethical awareness in future doctors. Professional conduct is a major subject in the legal practice curriculum and is formally examined. This approach could be borrowed and transposed into our undergraduate education through compulsory attendance at lectures and tutorials, submission of assignments, and including examinations on the subject.

As members of the profession, we all have a duty to uphold its reputation in the eyes of the public. A negligence claim adversely affects a doctor's credibility, and could have a lasting branding effect. It is paramount that we always act prudently and equip ourselves with the necessary knowhow to stay clear of claims. As in other disciplines of medicine, prevention is often the best strategy.

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