Review Article

Preventing medico-legal issues in clinical practice

Bevinahalli N. Raveesh, Ragavendra B. Nayak, Shivakumar F. Kumbar[1]

Department of Psychiatry, Dharwad Institute of Mental Health and Neurosciences, [1]Anesthesiologist and Medico Legal Consultant, Dharwad, Karnataka, India

Abstract

The medical profession is considered to be one of the noblest professions in the world. The practice of medicine is capable of rendering noble service to humanity provided due care, sincerity, efficiency, and professional skill is observed by the doctors. However, today, the patient–doctor relationship has almost diminished its fiduciary character and has become more formal and structured. Doctors are no longer regarded as infallible and beyond questioning. Corporatization of health care has made it like any other business, and the medical profession is increasingly being guided by the profit motive rather than that of service. On the other hand, a well-publicized malpractice case can ruin the doctor's career and practice. The law, like medicine, is an inexact science. One cannot predict with certainty an outcome of cases many a time. It depends on the particular facts and circumstances of the case, and also the personal notions of the judge concerned who is hearing the case. The axiom "you learn from your mistakes" is too little honored in healthcare. The best way to handle medico-legal issues is by preventing them, and this article tries to enumerate the preventive measures in safeguarding the doctor against negligence suit.

Key Words

Courts, doctors, medical negligence, prevention

For correspondence:

Dr. Bevinahalli N. Raveesh, Director, Dharwad Institute of Mental Health and Neurosciences, Dharwad - 580 008, Karnataka, India.
E-mail: raveesh6@yahoo.com

Ann Indian Acad Neurol 2016;19:S15-20

Introduction

Medical profession has its own ethical parameters and code of conduct. However, negligence by doctors has to be determined by judges who are not trained in medical science. They rely on experts' opinion and decide on the basis of basic principles of reasonableness and prudence. There is often a thin dividing line between the three levels of negligence; *lata culpa*, gross neglect; *levis culpa*, ordinary neglect; and *levissima culpa*, slight neglect.[1] The level of negligence depends on the entire context – which includes the place, the time, the individuals involved, and the level of complications. The difference between medical negligence and medical error is well-settled, and the principles are well-founded being clearly laid down in numerous cases by the Supreme Court.[2] Thus, there is a need to appreciate this differentiation by the society so that doctors do not get indicted for impractical reasons.

The duties which a doctor owes to his patients are a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give, and a duty of care in the administration of that treatment.[3] A breach of any of these duties gives a right of action for negligence to the patient. A doctor should know that the plaintiff (patient) in order to succeed in the action of establishing negligence must show that the damage would not have occurred but for the defendant's (doctor) negligence; or the defendant's negligence materially contributed to or materially increased the risk of injury; or if the claim is for negligent nondisclosure, had he/she been adequately informed he/she would not have accepted the treatment.[4]

A victim can seek any of the following actions against a negligent medical professional.[5] Compensatory action: Seeking monetary compensation before the civil courts, high court or the consumer dispute redressal forum under the constitutional

Access this article online

Quick Response Code:

Website: www.annalsofian.org

DOI: 10.4103/0972-2327.192886

How to cite this article: Raveesh BN, Nayak RB, Kumbar SF. Preventing medico-legal issues in clinical practice. Ann Indian Acad Neurol 2016;19:S15-20.

Received: 28-07-16, **Revised:** 30-08-16, **Accepted:** 04-09-16

law, law of torts/law of contract, and the Consumer Protection Act. Punitive action: Filing a criminal complaint against the doctor under the Indian Penal Code (IPC). Disciplinary action: Moving the professional bodies like Indian Medical Council/ State Medical Council seeking disciplinary action against the health-care provider concerned. Recommendatory action: Lodging complaint before the National/State Human Rights Commission seeking compensation.

Accountability of Medical Professionals

It has been argued by the medical association in Shantha's case that the medical practitioner should be kept out of the purview of the Consumer Protection Act 1986 as there is scope for disciplinary action under the Medical Council Act for violating the code of medical ethics and for the breach of duty to exercise reasonable care and skill in rendering medical service to the patient. The Supreme Court held that the medical practitioners are not immune from a claim for damages for negligence. The fact that they are governed by the Medical Council Act and are subject to the disciplinary control of the medical council is no solace to the person who has suffered due to their negligence, and the right of such person to seek redress is not affected.[6]

Accountability of Hospitals

Hospitals liability with respect to medical negligence can be direct liability or vicarious liability. Direct liability refers to the deficiency of the hospital itself in providing safe and suitable environment for treatment as promised. Vicarious liability means the liability of an employer for the negligent act of its employees. An employer is responsible not only for his own acts of commission and omission but also for the negligence of its employees, so long as the act occurs within the course and scope of their employment.[7]

Common Errors by Medical Professionals

Patients sue because of a feeling that they were not heard, that their needs were not attended to, and that nobody seemed to care, and as a result, a bad outcome resulted due to a mistake or negligence.[8] Some of the instances where errors do happen by medical professionals are as follows:

Avoidance

Compassionate gestures count. If a hospitalized patient has a bad outcome, some physicians may avoid making rounds in the presence of relatives. It is important to let the patient and their caregivers to know that as a treating doctor their problems are understood.[9] It is a good practice to maintain eye contact while addressing the patient and put a comforting hand on the individual's arm (comforting touch).

Defensive medicine

It is better to avoid practicing defensive medicine. Particularly when affordability is an issue, victim is very likely to complain. Moreover, it amounts to medical malpractice (a medical practitioner intentionally advising unwanted investigation).

Failure to communicate

Communicate clearly and effectively. Take time to ensure your patient understands their diagnosis, treatment, and medication plans, and then check their understanding by asking them to explain it back. This ensures instructions are properly followed and demonstrates your care toward patient.[10]

Failure to diagnose

Failure to diagnose is the number one reason a physician gets sued for medical malpractice. A techno-savvy patient may give/explain/ask more information or psychologically less sophisticated patient may withhold the information and make diagnosis difficult.

Failure to identify a complication

If a certain complication is a known risk, it should be on the consent form for the medical procedure. However, the consent form need not list every single complication that has ever occurred for that procedure. Often there are mistakes in communicating the complications. If, for example, the complication is known to occur 10% of the time during a given procedure but the consent form states that it occurs only 1% of the time, then the consent form was wrong.

Inadequate follow-up

There are instances when tests results are not received by the ordering physician. On other occasions, patients do not follow through with tests as directed or the results come in are filed away before the physician reviews them, and the patient is not briefed about the findings. It is essential that physicians and their staffs are able to track the status of these orders to make sure that none are overlooked or forgotten. Another aspect of care needing better follow-up involves referrals to specialists. Every step has to be documented not only for preventing medico-legal issues but also for good patient care as well.[11]

Patient time

The time spent allowing the patient to fully explain his/her concern determines the physician's ability to show concern, empathy, and likeability. The longer the quality time a physician spends with the patient, the less likely will that physician be sued.[12]

Prescribing errors

Before prescribing any medication, a physician should be aware of all medications the patient is taking, including over-the-counter drugs and alternative medicines. Physicians should reinforce the importance of taking the medications only as prescribed. Patients should be advised that if they feel any medication is not having its intended effect, they should immediately contact their physician. An important way to prevent inadvertent drug interactions is by working in concert with hospital pharmacists. Avoid handwriting prescriptions and utilize instead electronic medical recording with electronic prescribing.

Prevention of medical negligence

In recent times, medical science has witnessed exponential technological progress. However, health-care delivery remains very much a human endeavor. Evidence shows that errors are often the result of not from a lack of knowledge but from the

mindless application of unexamined habits and the interference of unexamined emotions.[13]

Asset protection and indemnity

It is vital to the survival of physicians to develop an asset protection plan, in addition to professional medical liability insurance. Not only does a malpractice lawsuit reduce the physician's ability to make a living in medicine but also it can adversely impact or devastate both earned and invested assets. There are two categories of professional indemnity such as personal or individual: This takes care of the risk of liability of the doctor and his qualified assistant. Errors and omissions policy: This covers an institution, nursing home, or hospital along with its staff members. If a doctor is the owner of a hospital/institution, it is recommended to take both individual and error policy as the hospital/institution is a separate legal entity and often can be made a party to medico-legal case.[7]

Burden of proof

The court has held the opinion that medical negligence has to be established and cannot be presumed.[14] In cases of medical negligence, the patient must establish her/his claim against the doctor. The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. A doctor can be held liable for negligence only if one can prove that she/he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care. The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise to support an allegation of negligence against a doctor. In Bimalesh Chatterjee case, it was held that the onus of proving negligence and the resultant deficiency in service was clearly on the complainant.[15] When the damage is too remote, it is not considered as an immediate result of medical negligence.

Change in attitude

Change is the unchangeable truth in human life. A readiness to change can prevent medical errors and improve the quality care of a doctor. Self-awareness and attitudinal changes have been found to be beneficial and recommended.[16] They are as follows:

Always to do the best

A treating doctor should not let fatigue or anything else gets in the way of doing your work. While no one is perfect, many medical mistakes that end up in malpractice suits can be avoided by being conscientious.

Apology

When physicians are honest about medical errors and apologize to the patient, the overall cost of medical malpractice is reduced in the end. However, it depends on the type of error (gross and real), motive of the victim (nonmischievous), and situational influences (indefensible).

Blaming others

One should refrain from blaming other health-care providers for adverse outcomes. The latter can happen despite everyone providing reasonable care. They can be called for evidence either as a witness or as an expert.[17]

Clinical guidelines

Adherence to clinical guidelines is an effective way to improve quality care and reduce variation in care. Clinical guidelines have been systematically developed nationally and globally to assist clinical decision-making (practice of evidence-based medicine). In medical negligence claims and in court, these guidelines may act as a source of information, provided they are the product of a recognized body and are deemed reliable.[18] They can be seen as normative standards and are used as explicit standards of care at the time of the index clinical event and also to assess the degree to which a questionable practice was in line with accepted standards.[19]

Documentation

If the treating doctor does not document something happened, it is difficult to prove it occurred. Charting accurately and thoroughly can help to understand what happened to the patient. In addition, it will help in answering the questions raised about duty of care when called for a deposition months or years after an event has occurred. One cannot rely on their memory for the facts. Regardless of the system used, the purpose of documentation, from a legal perspective, is always to accurately and completely record the care given to patients, as well as their response to that care. Documentation has legal credibility when it is contemporaneous, accurate, truthful, and appropriate.[20]

Empathy

Patients want to believe they are the most important person that doctor will see that day and the doctor focuses 100% on them. While this is not feasible, taking time to think like a patient and understand the condition from their perspective can help in becoming more empathetic physician and build a better relationship. People are less likely to sue a physician with whom they have a positive relationship, even if something goes wrong.[21]

Expectations

Medical malpractice lawsuits are not quick. It could take years after an incident for a malpractice case to be resolved. Malpractice cases have to go through a long process including discovery, which is the investigation process. It could take months for this phase alone. While in the midst of a malpractice case, one needs to stay focused on other areas of your life. The support system needs to be mobilized and obsessing over the case should be avoided. The medical malpractice stress syndrome is real. It is experienced to some degree by all physicians who are sued.

Hospital policies

If the physician follows hospital policy regarding treatments and protocols, they are less likely to get into trouble. If the physician diverts from regulations and hospital rules in managing the patient, the facility is less likely to defend.

Keeping updated

While most physicians stay up to date with the latest continued medical education programs/conferences/workshops/symposia, increasing advances in healthcare make it important to know what is happening in the world of medical news. Often medical news is reported in consumer publications and the

Internet. Often patient may discuss what is in the social media, the ability to discuss about those news with your patients will reinforce their confidence even though they may not be practiced by the treating doctor.

Merit of the case
Not everyone who sues has a case. There are many instances where a doctor is served with a lawsuit and the case either never goes to trial or the doctor wins and is not found negligent.

Potential litigant
A reasonable doctor should consider every patient as a potential litigant. It is to keep a doctor in constant awareness to stick to a prescribed standard of care and avoid any adventurous attempt. A doctor should not ignore any allegation in any form (oral or written) and should be able to handle allegations with clear and firmness in an intelligent and sympathetic manner.

Risk management
When a doctor is working for a hospital, the defendant doctor should notify risk management department of the hospital whenever a notice is served. Risk management employs lawyers who specialize in medical malpractice. The lawyer will help the defendant doctor through the process.[22] Moreover, becoming educated and understanding (preparedness) what will happen help reduce anxiety.

Contributory negligence
When a patient by his/her own want of care, contributes to the damage caused in the process of treatment then they are said to be guilty of contributory negligence. For example, if the patient refusing to carry out the remedial treatment recommended by the doctor or indulging in activities forbidden by the doctor further exacerbates the damage. When there is negligence of two or more persons toward the patient resulting in a particular damage, it is called composite negligence. They are jointly or severally held liable for the damages.[23]

Informed consent
Informed consent means that the patient specifically consents to the proposed medical procedure. Informed consent is more than just consent. For a patient to give informed consent to a medical procedure, the health-care provider must inform the patient about all of the risks and complications that may reasonably occur during that procedure, however, minor they may be. Furthermore, the treating doctor should mention about alternatives treatments available and what happens if no treatment is done. Only after a patient is truly informed about the potential risks of a medical procedure can a patient give informed consent to the procedure.[24] The treating doctor should understand that the patient has given consent to the procedure and not to all medical errors while on treatment. The failure to obtain informed consent can be a form of medical negligence or may give rise to a cause of action for medical battery.

Indian Penal Code

No human being is perfect and even the most renowned specialist could make a mistake in detecting or diagnosing the true nature of a disease. It has been held in different judgments by the National Commission and by the Honorable Supreme Court that a charge of professional negligence against a doctor stood on a different footing from a charge of negligence against a driver of a vehicle.[25,26] The IPC describes in following sections below regarding this difference:

IPC Section 52: (Good faith). Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention. Good faith implies genuine belief on the part of the doctor that his/her act of omission or commission would be in the best interest of the patient. The onus lies on the defendant (doctor) to prove that not only the good intentions but also a reasonable skill and care are exercised for the discharge of duty.

IPC Section 80: (Accident in doing a lawful act). Nothing is an offense which is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. Accident implies without the prior knowledge or intention of causing the evil effect.

IPC Section 88: (Act not intended to cause death, done by consent in good faith for person's benefit). Nothing which is not intended to cause death is an offense by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm. The section highlights the importance of acting on good faith and with informed consent of the patient.

IPC Section 89: It is similar to IPC Section 88 with the point of view of consent in case of children below 12 years and persons with a mental disorder where a guardian is authorized to give consent.

IPC Section 92: (Act done in good faith for benefit of a person without consent). Nothing is an offense by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent and has no guardian or other person in lawful charge of him/her from whom it is possible to obtain consent in time for the thing to be done with benefit. In all such cases, it is prudent to involve another senior colleague in making the decision and recording in detail the justification or circumstances under which the decision was taken.

IPC Section 93: (Communication made in good faith) No communication made in good faith is an offense by reason of any harm to the person to whom it is made if it is made for the benefit of that person. However, the doctor would be prudent enough to ensure that the communication is based on verifiable facts of the case, in a good faith for the benefit of the person it was made and in view of the delicacy of the matter, conveyed appropriately in the presence of spouse/relative/guardian.

Criminal Procedure Code Section 174: This section does not preclude the right of aggrieved relatives of a deceased patient

to prosecute the doctor for criminal liabilities under IPC Section 304A (whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term, which may extend to 2 years, or with fine, or with both), it prevents doctors from being arrested immediately after the unfortunate death of a patient. It also offers doctors an opportunity for being assessed by their peers for any of the alleged professional lapses.[27]

Immunity of Government Doctors

The National Commission by its judgment and order has held that persons who avail themselves of the facility of medical treatment in government hospitals are not "consumers" and the said facility offered in the government hospitals cannot be regarded as service "hired" for "consideration." It has been held that the payment of direct or indirect taxes by the public does not constitute "consideration" paid for hiring the services rendered in the government hospitals. It has also been held that contribution made by a government employee in the Central Government Health Scheme or such other similar scheme does not make him a "consumer" within the meaning of the act.[28]

Media trials

In the current situation, media is often referred as the fourth pillar of the democracy. However, it has no right to present the facts of a case in an unfair and prejudicial manner. A doctor cannot become a victim of malicious or defamatory reporting. A doctor should not be silent and should rebut the allegations. The doctor can take help of their professional association to convey the facts and support to resist a trail by media.[7]

Prevention of harassment of doctors

Taking the judicial notice of incidents where the doctors are being harassed by the police in the guise of investigation and unnecessary delay in the medical evidence by way of frequent adjournments or by cross-examination, the court held that unnecessary harassment of the members of the medical professional should be avoided. They should not be called to the police station to unnecessarily interrogation or for the sake of formalities. The trial courts should not summon medical person unless the evidence is necessary, even if he/she is summoned, an attempt should be made to see that the people in this profession are not made to wait and waste time unnecessarily, the law courts have to respect for the people in the medical profession.[29]

The Supreme Court has warned the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew's case. Even a threat was given to the police officers that if they did not follow these orders they themselves have to face legal action. The Supreme Court went on to say "To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent."[30] The Supreme Court has attempted to remove apprehension that prevents medical people from discharging their duty to a suffering person.

Conclusion

The practice of medicine is capable of rendering great service to the society provided due care, sincerity, efficiency, and skill are observed by doctors. The cordial relationship between doctor and patient has undergone drastic changes due to the corporatization of medical profession, resulting in commercialization of the noble profession, much against the letter and the spirit of the Hippocratic Oath. Although rapid advancements in medical science and technology have proved to be efficacious tools for the doctors in the better diagnosis and treatment of the patients, they have equally become tools for the commercial exploitation of the patients. Medical law is undergoing a massive change. The development of law pertaining to professional misconduct and negligence is far from satisfactory. The legislations are not adequate and do not cover the entire field of medical negligence. Lawsuits for medical negligence can be minimized or avoided by taking steps to keep patients satisfied, adhering to policies and procedures, developing patient-centered care, and knowing ways of defending against malpractice judgments. Having comprehensive professional liability, insurance is a necessity in the present-day litigious society.

Financial support and sponsorship

Nil.

Conflicts of interest

There are no conflicts of interest.

References

1. R Sharma. Delhi High Court. Smt. Madhubala vs Govt. of NCT of Delhi and Ors; 2005. Available from: https://indiankanoon.org/doc/1286575/. [Last cited on 2016 Sep 14].
2. LS Panta. Supreme Court of India. In: Malhotra vs A. Kirplani & Ors; 2009. Available from: https://indiankanoon.org/doc/1226604/. [Last cited on 2016 Sep 14].
3. Shelat. Supreme Court of India. Laxman Balkrishna Joshi vs Trimbak Bapu Godbole And Anr; 1968. Available from: https://indiankanoon.org/doc/297399/. [Last cited on 2016 Sep 14].
4. Balachandran MK. Consumer Protection Act and Medical Profession, Department of Consumer Affairs, Govt. of India in association with I.I.P.A., New Delhi; 2008.
5. Corpus juris secundum. In: Rao CK, editor. Law of Negligence, 2nd ed. Allahabad: The Law Book Company; 1991. p. 14, 322.
6. S Agrawal. Supreme Court of India. Indian Medical Association vs V.P. Shantha & Ors on 13 November, 1995. Available from: https://indiankanoon.org/doc/723973/. [Last cited on 2016 Sep 14].
7. Kapoor L. Better Safe than Sorry; Medico-legal Do's & Don'ts. Mumbai: Association of Medical Consultants; 2011.
8. Oyebode F. Clinical errors and medical negligence. Med Princ Pract 2013;22:323-33.
9. Kreimer S. Six Ways Physicians Can Prevent Patient Injury and Avoid Lawsuits, Medical Economics. Available from: http://www.medicaleconomics.modernmedicine.com. [Last updated on 2013 Dec 10; Last cited on 2016 Sep 05].
10. Hagihara A, Tarumi K. Association between physicians' communicative behaviors and judges' decisions in lawsuits on negligent care. Health Policy 2007;83:213-22.
11. Gupta SK, Padhi PK, Chouhan N. Medical negligence: Indian

scenario. Indian J Neurotrauma 2014;11:126-33.
12. Hickson GB, Federspiel CF, Pichert JW, Miller CS, Gauld-Jaeger J, Bost P. Patient complaints and malpractice risk. JAMA 2002;287:2951-7.
13. Ely JW, Levinson W, Elder NC, Mainous AG 3rd, Vinson DC. Perceived causes of family physicians' errors. J Fam Pract 1995;40:337-44.
14. Kanhaiya Kumar Singh vs. Park Medicare and Research Centre III, CPJ 9 (NC); 1999.
15. Calcutta Medical Research Institute vs. Bimalesh Chatterjee I. CPJ 13 (NC); 1999.
16. Borrell-Carrió F, Epstein RM. Preventing errors in clinical practice: A call for self-awareness. Ann Fam Med 2004;2:310-6.
17. Yadav M. Role of expert opinion in medical negligence cases. J Indian Acad Forensic Med 2014;36:336-9.
18. Hurwitz B. How does evidence based guidance influence determinations of medical negligence? BMJ 2004;329:1024-8.
19. Davies J. Clinical guidelines as a tool for legal liability. An international perspective. Med Law 2009;28:603-13.
20. Flynn M. Medical Malpractice – Medicolegal Perspectives: Negligence, Standard of Care. Encyclopedia of Forensic and Legal Medicine. 2nd ed. Sydney: Elsevier; 2016. p. 365-9.
21. Nora LM. Law, ethics, and the clinical neurologist. Handb Clin Neurol 2013;118:63-78.
22. Singh B, Ghatala MH. Risk management in hospitals. Int J Innov Manag Technol 2012;3:417-21.
23. Joga Rao SV. Medical negligence liability under the consumer protection act: A review of judicial perspective. Indian J Urol 2009;25:361-71.
24. Rubin EB, Bernat JL. Consent issues in neurology. Neurol Clin 2010;28:459-73.
25. Chulani HL. Professional Negligence under the Indian Penal Code. 1996. Cr. L.J. 133.
26. Indian Penal Code, 1860: Bare Act. Mumbai: Current Publications; 2015.
27. Mathiharan K. Medicine and society, criminal medical negligence: The need for are-look. Natl Med J India 2002;15:351-4.
28. National Commission Judgment and Order Dated December 15, 1989 in First Appeal No. 2 of 1989.
29. Subrahmanyam BV. Jacob Mathew v. State of Punjab, the judgment stipulates the guidelines to be followed before launching a prosecution against a doctor for negligence. J Neurosci Rural Pract 2013;4:99-100.
30. R Lahoti. Supreme Court of India. Jacob Mathew vs State of Punjab & Anr on 5 August, 2005. Available from: https://indiankanoon.org/doc/871062/. [Last cited on 2016 Sep 14].