Medical negligence

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Abstract

The progress made in diagnostic and therapeutic medicine has resulted in an increase in the number of malpractice suits brought against medical practitioners. To constitute negligence it must be shown that the conduct of the accused did not measure up to the standard of care the law required of him in the particular circumstances and that he acted with guilt and therefore can be blamed for the deed. This paper describes medical practitioner negligence and reviews relevant cases.

Introduction

The enormous progress made in diagnostic and therapeutic medicine in the past decades has resulted in an increase in the number of malpractice suits brought against medical practitioners. This has been due to various factors which include: the physician's changing role in the community; legal aid becoming available to even the poor; the country becoming a democracy, with people aware of their rights; the recognition of self determination; the *res ipsa loquitur* principle, which moved the burden of proof to the practitioner; strict consent procedures; and the creation of higher patient expectations.

Negligence

To constitute negligence it must be shown that the conduct of the accused did not measure up to the standard of care the law required of him in the particular circumstances and that he acted with guilt and therefore can be blamed for the deed. South African courts regard negligence merely as a fault and use an objective test in the ascertainment thereof (*S v Ngubani*). In the case of *Kruger v Coetzee*, the appeal court expressed the test for negligence as follows.

'For the purpose of liability, *culpa* (guilt) arises if:

1. A *diligens pater familias* (responsible head of the family) in the position of the defendant would *(i)* foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and *(ii)* would take reasonable steps to guard against such an occurrence; and
2. The defendant failed to take such steps.'

In *S v Burger* it was stipulated by Judge A J Holmes that extreme care is not expected from the *diligens pater familias*, but that 'he treads life's pathway with moderation and prudent common sense'. The objective reasonable man test takes the circumstances as well as the specific expertise of the accused into account. In *S v Mahlalela*, a herbalist was charged with murder. He gave a child herbs and beer to drink and the child died due to the poisonous content of the mixture. It was concluded that the defendant should have foreseen the death of the child, all the more as he was an expert on herbs. He was therefore found guilty of culpable homicide. In *Van Wyk v Lewis* reasonable conduct was described as follows: 'a medical practitioner is not to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care. And in deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.'

The requirements for negligence are: *(i)* the possibility of the occurrence of the consequence should reasonably have been foreseen in the circumstances; *(ii)* reasonable guarding against the possibility should have been taken; and *(iii)* there is failure to take steps that should reasonably have been taken.

Negligence and medical practitioners

Where a person enters a profession he becomes an expert and the standard of care expected is raised to the level of a practitioner of such vocation.

The circumstances in which medical negligence occurr are taken into account (*Van Wyk v Lewis*). The same standard of care is not expected from a doctor called out at night in a rural setting as from a doctor working in a fully equipped and staffed hospital.

On a number of occasions the courts have accepted different standards of care for specialists and general practitioners. Performance should comply with the standard of conduct

for a reasonable specialist of the same specialty.

Existing knowledge and methods of treatment at the time are taken into account (*Van Wyk v Lewis*).

Knowledge of new developments in medicine will be taken into account. The practitioner must ensure that he acquaints himself with new developments and that his patient is not prejudiced by use of outdated methods. Where different schools of opinion exist on a method of treatment, a practitioner does not act improperly where he makes use of a method favoured by a respectable minority.[1] In *Kovalsky v Krige*, a doctor used ferric chloride to stop bleeding. Although other doctors testified that they would have used different methods, the practitioner was not held liable.

Imperitia culpae adnumeratur — lack of skill is reckoned as a fault! A practitioner is always negligent if he performs a procedure knowing that he does not have the necessary skill, knowledge or experience. In *Dale v Hamilton* a physician used an X-ray appliance to diagnose a condition and the plaintiff sustained serious burns. It transpired that the Coolidge tube had been placed too near to the patient, causing the burns. A trained radiologist would have noted the defect. The court found that the radiologist was obliged to ascertain the appliance's operational safety and that he was not entitled to rely on the expert's installation thereof.[1] In *S v Mkwetshana* the accused, a young intern, saw a patient, a woman suffering form asthma. The latter became restless and had difficulty breathing. She was agitated, restless, appeared cyanotic and foamed at the mouth. The intern diagnosed asthma and administered 20 ml of aminophyllin IVI. With no improvement after 5 minutes, he decided that it was epilepsy and administered 20 ml paraldehyde. The patient improved but died 15 minutes later due to the lethal doses of paraldehyde. On appeal it was submitted that the accused was inexperienced, still an intern and the only doctor on duty and that he had acted in an emergency. The appeal court upheld the decision of culpable homicide due to the above rule.

The locality rule was set in *Van Wyk v Lewis*, viz. that the same degree of care and skill practised in a large city hospital could not be expected from a practitioner working in a rural area. Van der Merwe and Olivier[2] and Strauss[3] state that in view of modern developments no justification exists for retention of the locality rule. Neethling *et al.*[4] submit that the nature of the community where the practitioner works should be considered as should opportunities to keep abreast with new developments.

An error of clinical judgment: the law does not require the doctor to be infallible in his conduct, and an error of clinical judgment will not constitute negligence where the proper standard of care has been followed. In *Pringle v Administrator of Transvaal* it was shown that when applying a test for medical negligence, an inordinately inflexible standard of care should not be applied which blurs the distinction between surgical mishap and medical malpractice.

Where a practitioner acts according to customary practice, generally approved and accepted by the profession, he will normally have a good defence against allegations of negligent conduct.

Claassen and Verschoor[1] hold that innovation and experimentation bring about two conflicting interests: the patient who is not to be exposed to abuse and the interests of the practitioner and society by furthering knowledge. Neethling *et al.*[4] argue that the standard of care required is not of the 'average' medical practitioner, but that of the 'reasonable' medical practitioner.

Proof of negligence

Proof of negligence in civil cases is on a balance of probabilities. In civil cases the onus rests on the plaintiff, and negligence as well as damage due to the negligence must be proven. Proof in criminal cases must be beyond reasonable doubt and the onus of proof rests on the state. Expert evidence is usually needed to assist the court in determining the reasonable man standard.

Examples of negligent malpractice

Incorrect diagnosis

Wrong diagnosis can lead to liability of the physician. It usually includes the wrong treatment of the patient. Incorrect diagnosis in an ill patient is a problem, but even more so where an illness is diagnosed from which the patient does not suffer. In *Ex parte v Rautenbach* a married woman was diagnosed with a venereal disease. Her husband left her and she claimed that she suffered damage from the misdiagnosis. A practitioner is only held liable if the diagnosis implies the lack of reasonable care and skill with regard to the ordinary care and skill of the profession. In *Dube v The Administrator of Transvaal* Judge A J

Corbett stated that the case should be divided in to three questions:

- What was the factual cause of the eventual condition (Volkmann's contracture)?
- Did the respondent's negligence cause or contribute to the condition due to his not exercising reasonable care and skill?
- If liability is proved, what amount must be awarded for damages?

On the first question the appeal court found that the Volkmann's contracture was due to the ischaemic condition. On the second question the following aspects were considered:

- Would the reasonable, skilled and careful physician have realised that a serious ischaemic condition was developing? The answer was yes.
- Was there a remedial action that could reasonably have been taken? The answer was yes, by removing or splitting the cast.
- Would the reasonable practitioner have been aware of the remedial actions? The answer was yes.
- Would the remedial action have prevented the damage suffered? The answer was yes.
- Did the respondent fail to take the steps? The answer was yes. This meant that the practitioner neglected his duty and was negligent.

Treatment

A physician must treat a patient after diagnosing a condition as a reasonable, skilled and careful physician should do. A physician is not asked to guarantee cure. The treatment must be completed before a physician's duties end. Withdrawal from the relationship with a patient at a critical stage and/or without consent of the patient constitutes negligence.

Procedures

- The wrong procedure.
- The wrong patient.
- The wrong part.

Foreign bodies

- The object most frequently left in the body is the surgical swab (*Van Wyk v Lewis*).
- X-rays. Where a patient is submitted to X-ray treatment, diagnostic or therapeutic, the risk of being burned or injured always exists. The lack of specialist knowledge required for the utilisation of this type of treatment will be conclusive proof of negligence. A radiologist must measure up to the standard established for specialists in his particular specialty. He will not be held liable where he executed proper care. He will, however, be liable if he deviates from the customary and recognised standards. In *Dale v Hamilton* supra the radiologist was liable for burns due to the wrong installation of a tube.

Drugs

Liability can result from administering the wrong drug, administering the correct drug in a negligent manner, inappropriate dosage, where the patient becomes addicted to the drug, where the patient is seriously injured or killed by the adverse effects of the drug (allergic reaction, where an overdose is given, where the wrong medication was chosen for the illness). The oral administration of external medication or the intravenous injection of oral medication is negligent *per se*. In *S v Van Schoor* a young physician administered a drug with arsenic acid in a lethal dosage to two patients who died, after consulting with the senior doctor. The senior doctor was not aware of the different dosage (10 times stronger) of the new batch of the drug that arrived and gave instructions appropriate to the previous batch. Dr Van Schoor was found not to have exercised the degree of care necessary as he was dealing with a dangerous drug that required a higher standard of care, and the fact that the drug was to be administered intravenously necessitated a higher standard of care. See also *S v Mkwetshana* supra. It must be kept in mind that some patients might be allergic or over-sensitive to drugs. A practitioner should know the side-effects of any drug he prescribes or administers. In the case of possible allergic reactions, the necessary precautions must be taken to ensure immediate remedial action. The possibility of side-effects should be made known to patients and they should be instructed to report any adverse effect immediately.

Defective instruments or equipment

Vicarious liability

Vicarious liability deviates from the principle of delictual liability in the sense that the employer is not at fault. The requirements for vicarious liability are:

- Master-servant relationship. This must exist at the time the delict is committed by the employee. The relationship starts when someone places his manpower at the disposal of another for remuneration. There must be control exercised by the employer. There must a contract of employment (*location conduction operarum*).
- The delict must have been committed in the execution of duties. This applies to duties of employ-

ment as direct obligation as well as actions incidental thereto or in the general course thereof.

- The act of the employee must meet the requirements for an actionable wrong. It follows that hospital authorities will be held liable for the actions of staff, including professional staff. The question on the position of the paying patient receiving treatment in a state hospital as well as the non-paying patient arises. In *Dube v The Administrator of Transvaal* it was held that hospital authorities are liable for the negligent conduct of employees at all times.
- A physician can be held liable for the negligence of his employees if a master-servant relationship exists.

References

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