Negligence and Malpractice

by **Pierre Mallia** *MD MPhil PhD FRCGP*
Director, Centre for Bioethics, Medical School

Negligence is a departure from a due standard of care.[1] Standards of care are set up by the profession not merely as a guideline to doctors, but as a minimum requirement. It is about proper management and also about patient rights. Continuing Medical Education programmes that do not aim to divulge what the standard of care is, may not be imparting to professionals what is expected from them. Although practices may vary before they become actual 'standards', some practices may also be abandoned, and those who continue to practice them may of course be guilty of malpractice.

However, doctors may hold different standards of care. This is often referred to as the Bolam[2] principle following a case where a GP was not found guilty for giving treatment which did not meet the standard which would have been expected from a specialist giving that same treatment. Of course this inherently also means that doctors may not go outside the boundaries of their practice into more specialised areas, unless there is absolutely no alternative. In life-saving circumstances a doctor may be exempt from not keeping state-of-the-art equipment at hand – everyone knows that a defibrillator is becoming standard practise in advanced CPR, but doctors are not expected to purchase such instruments.

Breaches of duty need not only consider deliberate acts but also unintentional ones and omissions as well as commissions

We need to distinguish between malpractice and negligence. Negligence is a legal term with a specific definition derived from Tort law. In essence, for health care professionals to be found negligent, four conditions[2] must apply:

1. The professional must have a duty to the patient
2. The professional must breach that duty
3. A harm must be caused
4. The harm must be a direct result of that breach of duty.

The fourth condition is the 'nexus' condition, which means that there must be a connection between the first two conditions and the third. A closer look at these conditions reveals that it is important, in assessing situations, to define the duties of the individuals. This becomes more complicated with our concepts of teamwork etc. But each individual must function properly – a chain is as strong as its weakest link, and sometimes that weak link must be rectified.

Harm defines *invasive* actions; injury, on the other hand can involve other issues besides harm – such as loss of work. The above implies that not all injury may be claimed as a result of the breach of duty; but this depends on interpretation of the facts and on the court.

An important consideration is that breaches of duty need not only consider deliberate acts but also unintentional ones and omissions as well as commissions. Thus, failing to impart proper informed consent as described in the previous two articles, makes one negligent and legally liable should harm be caused – such as a recognized complication of which the patient was not made aware of.

An unfortunate consequence of these adversarial systems is that it may encourage patients and doctors to see themselves as adversaries; and as illogical as it may sound, even though medical protection societies encourage doctors to remain silent once proceedings have started[3], admitting a prompt, sympathetic and truthful account at the beginning has been shown to be satisfactory to many patients, who feel the need not to be left in the dark, and perhaps actually decreased litigation. In the UK there are suggestions to impose a duty on health care professionals to give candid explanations when things go wrong.[3] Even if it is not law, such a suggestion takes indeed the higher moral ground.

References

1. Beauchamp TL, Childress JF. Principles of Biomedical Ethics. 4th ed. England: Oxford University Press, 1994: 194.

2. Baxter C, Brennan MG, ColdicottY, Moller M, Medical Ethics and law. England: PasTest, 2005: 46, 195.

3. Montgomery J. Health Care Law. 2nd ed. England: Oxford University Press, 191.