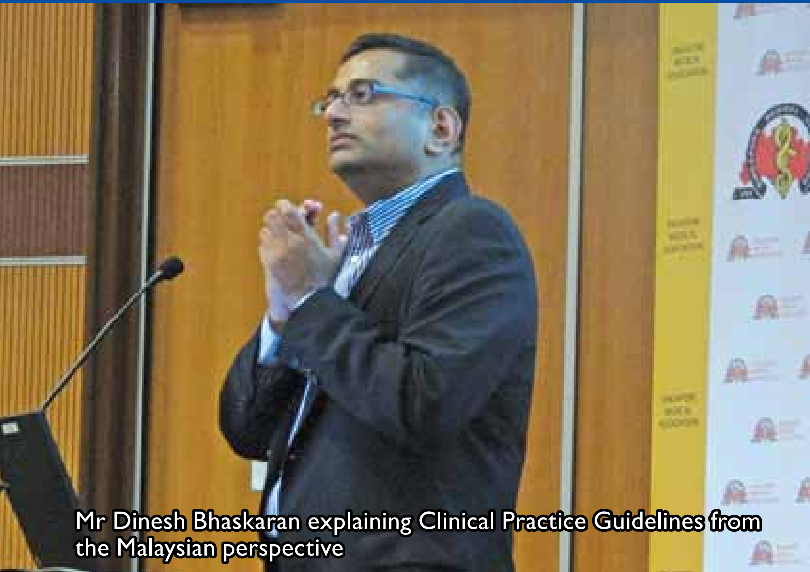
Shield or Sword?

SMA Seminar: Legal and Ethical Implications of Clinical Practice Guidelines

By Mellissa Ang


Mr Dinesh Bhaskaran explaining Clinical Practice Guidelines from the Malaysian perspective

The audience listening attentively to Mr Bhaskaran's insights

L to R: Dr Bertha Woon, Dr T Thirumoorthy, Mr Bhaskaran, Dr Seow Wan Tew, Dr Lee See Muah and A/Prof Lai Siang Hui

Following several recent Singapore Medical Council disciplinary proceedings for cases of professional misconduct, the SMA Seminar: Legal and Ethical Implications of Clinical Practice Guidelines held on 25 October 2012 was timely. Speaking at the Peter and Mary Fu Auditorium in the National Cancer Centre, Mr Dinesh Bhaskaran, an advocate and solicitor of the High Court of Malaya, shared his experience and thoughts about Clinical Practice Guidelines (CPGs).

Mr Bhaskaran noted that the Malaysian Ministry of Health defined CPGs as "systematically developed statements based on best evidence, intended to assist practitioners and patients in making decisions about appropriate management of clinical conditions." He emphasised the word assist and developed this concept of the guidelines being used to assist throughout his presentation. He reiterated that CPGs are intended as an aid to clinical judgements, not a tool to replace them, and the primary judgement call should rest with the medical practitioner. Nonetheless, Mr Bhaskaran also pointed out that CPGs also represent a school of thought in a given field, that should be followed. While there may be some contradiction in relation to the usage of CPGs, Mr Bhaskaran stressed the importance of periodic reviews on CPGs as new evidence become applicable, in order for them to remain relevant to that particular field.

Mr Bhaskaran, who is also the Vice President (Legal) of the Medico-Legal Society of Malaysia, recounted an instance where he acted on behalf of the hospital for a doctor-patient case. Two experts from UK, who had been called in by the patient, presented the Green-top Guideline and said, "Look, there are CPGs applicable so the doctor and hospital absolutely must comply with this." The two arguments presented by the UK experts on behalf of the patient were that there were CPGs in place that presented the best practices to be undertaken, and that guidelines issued in the UK should be applicable to the Malaysian doctor and hospital. Both arguments eventually fell through as it would be unfair to hold the doctor or hospital up to certain written standards or guidelines that did not exist at the time and place respectively of the incident concerned.

Moving on to the legal implications when the CPGs are complied with and when they are not, Mr Bhaskaran quoted a decision from Malaysia's Federal Court in 1970. It

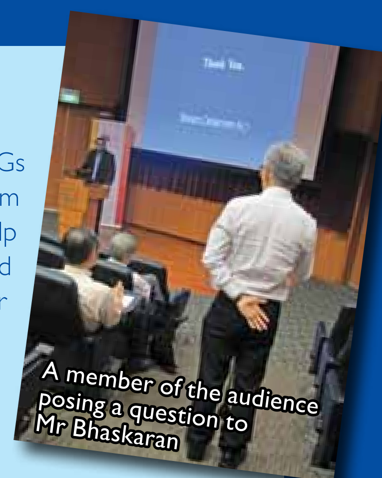
summarised the gist of the Bolam test, generally suggesting that a medical practitioner cannot be held negligent if he follows the general approved practice in a situation, and he is only expected to provide a fair and reasonable standard of care and skill in his treatment of his patients. Nonetheless, CPGs are relevant as a benchmark in the event that there is a failure to provide the required standard of medical care. Mr Bhaskaran explained that even if medical practitioners comply with CPGs, it does not automatically mean that they are exonerated because those guidelines could be of poor quality, outdated, or encompass a sense of sponsor bias in them. On the other hand, if medical practitioners are non-compliant with CPGs, they should be prepared to justify why they have deviated or departed from those guidelines during legal proceedings, with the support of documentation.

Highlighting that disciplinary proceedings may be commenced for ethical breaches, with charges most commonly based on infamous conduct in a professional respect, Mr Bhaskaran indicated that "under the Code of Professional Conduct in Malaysia, infamous conduct in a professional respect basically means conduct that merits disciplinary action, which could also be known as ethical misconduct." He explained that the case of gross negligence and extremely blatant errors should be only the cases that medical councils investigate, such that anyone looking at these cases will say there is gross negligence that could amount to infamous misconduct. Nonetheless, Mr Bhaskaran noticed a trend where medical councils would also vigorously investigate complaints of negligence in the last few years.

Mr Bhaskaran referred to a recent case, where he defended three doctors who were facing complaints about diagnosis and treatment. He explained that sometimes, the Medical Council members in the disciplinary panel may not be experts in a particular specialty and may not be in a good position to establish that the medical practitioner in question had committed gross negligence. Prior to any medical council enquiry, Mr Bhaskaran shared that he counsels doctors so that they are prepared to be queried and grilled on every aspect of their clinical judgement. When dealing with negligence-based issues regarding ethical misconduct, Mr Bhaskaran mentioned that he would ensure that it is a defensible decision and use an expert to back his doctor up in front of the medical council, as non-compliance, deviation or departure from CPGs could give rise to serious ethical issues.

Mr Bhaskaran concluded by highlighting two opposite ends of the spectrum for compliance of CPGs: "Compliance with a well-recognised and applicable CPG is strong evidence of the absence of negligence or ethical breaches. If you don't comply, you will have to justify and defend but all is not lost, it could still be a very defensible situation." SMA

Q&A


A member of the audience posing a question to Mr Bhaskaran

Q: Should we be writing CPGs because we started this from the medical point to help ourselves, but it has turned into a legal piece that puts our colleagues at risk?

Mr Dinesh Bhaskaran – DB: I think we must understand why one comes up with CPGs. I think it's meant to be a beneficial thing. And I keep telling doctors that they cannot practise in a way that removes benefits from their own field of practice because of the fear of potential legal or ethical implications. Neither do I think that doctors should practise without recognising the potential ethical and legal consequences. My answer to that will be I think yes, CPGs should be written because they are certainly useful, but there is a broader issue that one has to be concerned about on the horizon in Malaysia and perhaps, it has already arrived in Singapore.

Q: In your experience, what is the kind of standard of documentation that is necessary to be able to defend mediation of a CPG?

DB: Let me start on a more general note, the standard of documentation. Speaking from the Malaysian perspective, documentation, to me, is the weakest link in a doctor's practice. And it is the Achilles' heel in any litigation against doctors. I would say that in my experience, about 90% of doctors have substandard documentation and that's now, it used to be probably about 99% of doctors when I started doing medical legal work. It is now, through education, that it has become 90%.

Medical councils tell the doctors this all the time, "The reason that we're telling you that you've got to improve your practice is to help yourself because a problem arises, you need to be able to defend yourself and be able to show that you've done what you now said you've done." I think that absence of documentation when you've deviated and departed from a reputable, accepted CPG is very important. If not, I'm afraid that the inference a third party will draw is that you probably don't even know about it or you overrode it. To answer your question, yes, I think it's absolutely critical.