The Current Medico-Legal Climate and Defensive Medicine

Text by Dr Ng Shu Li and Dr T Thirumoorthy

Dr Ng is currently a Senior Manager in Clinical Services at Woodlands Health Campus. She has a keen interest in health administration, global health and medical ethics.

Dr Thirumoorthy has been with the SMA Centre for Medical Ethics and Professionalism (SMA CMEP) since its founding in 2000 and most recently been given the responsibility of being the SMA CMEP Academic Director.

Over the last 60 years, medicine has grown from a cottage industry into a complex multi-dimensional, international, humanitarian, biomedical, business and political enterprise. As medical practice becomes more complex, there is a natural increase of regulations of medical practice and practitioners. Medical practitioners are being called to be accountable for their performance not only by the medical licensing board, but also by the hospitals they practise in, patients and their families, insurance payors, and not to mention complaints to mainstream and social media. There has been a significant shift from accountability to only one's patients and colleagues, to accountability to many different stakeholders.

In recent times, there has been a consistent and progressive increase in complaints and claims, fines and payouts at the medical council and the courts. There has been a progressive increase in the premiums of medical malpractice indemnity coverage in response to the cost of malpractice defence. There has also been a recent surge in legal cases against medical practitioners to the court of appeal perpetuated by appeals on judgements from patients, doctors and even the medical council.

Medical practitioners, whose education has been focused on the biomedical scientific aspects of disease, diagnosis and treatment, know little about the current legal and professional disciplinary systems. Doctors are ill-equipped to navigate this new medico-legal climate, and this has led to confusion and quandary about judgements of the professional disciplinary tribunal and a prevailing smog of confusion, apprehension, fear and paranoia within the profession. The doctors feeling besieged, unaware of how to mount a legal defence and not confident that they would have a fair hearing, tend to go for guilty pleas with the hope of a lighter sentence. The

besieged doctor just wants to get over these unwelcomed obstacles and get back to his/her daily clinical practice.

Defensive medicine

Another consequence of harsh disciplinary penalties is the emergence of defensive medicine. Many have started or increased their practice of defensive medicine.[1] A survey among doctors in the UK showed that 78% reported practising some form of defensive medicine.[2]

Defensive medicine is a deviation from good, accepted medical practice and is induced primarily by a threat or fear of professional legal liability.[3] The aim of this practice is to reduce adverse outcomes, deter patients from filing malpractice claims, as well as attempt to persuade the legal system that the standards of care were met. Defensive medicine can manifest in an assurance behaviour or avoidance behaviour.

Assurance behaviour

Assurance behaviour is where the medical practitioner orders additional tests and therapies that may not normally be required.[4] The practitioner attempts to exceed the accepted standard of care in order to reassure patients that they have been thorough and that the quality of care is better. There are increased unwarranted referrals to other medical specialists. Assurance behaviour seems to provide medical practitioners with psychological reassurance that the behaviour will reduce their legal risk.[5]

The consequences of assurance behaviour include increased inappropriate investigations and therapeutic procedures. The inappropriate investigations put patients at risk of harm and false positive tests that may entail more invasive investigations. Patients also have to bear the cost of these unnecessary tests.[6] For those covered by medical insurance, there is a resulting increase in premiums. Inappropriate referrals to other medical specialists impede good decision-making and reduce the time available to other patients who may truly require the referral.

Avoidance behaviour

Avoidance behaviour is where the medical practitioner intentionally avoids any beneficial investigations or therapy that may carry risk, and avoids or refuses access to care of patients with chronic complex medical problems. They would also demonstrate defensive communication and behaviour with extensive inappropriate documentation. This behaviour is aimed to avoid potential adverse events that could result in complaints or medico-legal action.

The impact of avoidance behaviour on patients and medical practitioners is the denial of beneficial therapy and increasing refusal of access to care for patients with complex medical problems. Patients who are perceived as litigious by virtue of their history, family members or profession may be denied care, which is a form of discrimination. Avoidance behaviour not only impedes good clinical judgement, but also reduces trust and confidence in the doctor-patient relationship and the profession.

Professionalism vs defensive medicine

Defensive medicine raises a professional ethical dilemma – whether it is an acceptable risk-management strategy or an unprofessional practice. The fundamental principle of medical professionalism is the primacy of the patient's welfare. While professionalism is based on professional principles, values and knowledge, defensive medicine is based on fear and anxiety. While professionalism encourages respectful, empathetic communication, defensive medicine only propagates defensive, guarded communication.

Professionalism cultivates the practice of delivering good quality care in the best interests of the patients. The main focus is on addressing the concerns and expectations of the patients. Time and energy are directed towards making a good holistic clinical judgement in order to add value to care.

On the contrary, defensive medicine breeds an unhealthy focus on the phobia of complaints, claims and medical malpractice liability. Time and energy are wasted on searching for ways and means to bolster defensive practices. This distracts from patient care and adds to the complexity and cost of the process.

Defensive medicine that is carried to its far end erodes professionalism. It distorts good medical practice, causing improper medical reasoning, poor decision making, and poor quality of care; these are the factors that ironically increase the risk of law suits. This then begs the question of why defensive medicine remains so prevalent.

Factors that promote defensive medicine

Defensive medicine practices are inevitable when there is high intensity and cost of professional accountability, coupled with lack of clarity, transparency and consistency of professional regulation policies and disciplinary processes. Furthermore, the lack of a systematic professional skills development programme in the post-specialist training period, and poor institutional support for a work environment that enables the attainment of professional standards, leads the doctor towards defensive medicine. The poor development of a just and safe professional and organisational culture for continuous learning from errors, adverse events and experience is a contributing factor to defensive medicine.

The effects of an adversarial professional accountability system

An adversarial "name, blame and shame" process creates fear and stress, and destroys relationships. It is wasteful of both resources and time. The adversarial nature of the disciplinary and legal systems impedes development of patient safety and results in withdrawal of services. It increases the cost of medical indemnity insurance and causes stress to medical practitioners. This has been documented in various forms as "litigation stress syndrome" and "second victim syndrome".[7] Second victim syndrome is the emotional

turmoil experienced by healthcare practitioners who are involved in patient tragedies or medical errors that result in patient morbidity or mortality.[8,9] It has been likened to post-traumatic stress disorder where the healthcare practitioner undergoes feelings such as guilt, distress, fear and loss of self-confidence. There is often neglect and lack of institutional support for these healthcare practitioners.[10] Defensive medicine is a maladaptation and inappropriate response to the adversarial process.

A systems approach against defensive medicine

There needs to be a just and transparent system-level solution to manage the perils of defensive medicine. Effective leadership and skilful management must work at all levels. At the macro level (or societal/national level), there is a need for coordinated strategy for timely and effective medical dispute resolution. Healthcare systems that involve patients and all stakeholders in building a fair and just healthcare culture need to be created.

At the meso level (involving the hospital and healthcare system), there is a need to develop a safe culture that promotes patient safety as a top priority and a culture of continuous learning and improvement. There should be an effective and timely system in place to investigate all adverse events, as well as a system for medical disputes resolution with open disclosure and early settlement.

At the micro level (involving the healthcare professionals, teams and departments), healthcare teams should continuously strive to build collaborative therapeutic relationships with patients and their families. Healthcare professional education should involve understanding the law around medical malpractice and the reasons why patients and their families sue medical practitioners and hospitals. Healthcare professionals must be equipped with the appropriate strategies for legal risk prevention and reduction.

Building a fair and just culture in healthcare

Complex systems, such as hospitals, are inherently unsafe. Despite best practices, errors can and do occur. The professional governance system should move towards a fair and just culture. There needs to be an environment of trust, fairness and transparency in the process, to encourage a system of safe reporting of errors, near-misses and adverse events to allow the profession to learn from individual and system traps, flaws and errors.

There needs to be a clear distinction between true human error in complex systems and intentional unsafe acts of an individual. Individuals should be held accountable for intentional unsafe acts as per current practice. Good analytic skills and tools will help to identify and differentiate an intentional individual unsafe act from human factors and systems errors. A fair and just culture is critical to enable learning from errors and adverse events to improve medical practice. Continuous improvement invariably leads to better clinical outcomes and patient experience. Patient safety and good quality clinical outcomes lead to patient and public trust and confidence in the medical profession and the healthcare system. Leadership and a just culture are the keys to patient safety.

Conclusion

We need to develop strategies, knowledge, skills and professional behaviours that preserve trust and confidence in medical practitioners, even in the advent of unexpected adverse outcomes. A professional and systems approach is necessary to build a healthcare system that empowers medical practitioners to become competent, compassionate and trustworthy to promote patient safety and defend against defensive medicine. ◆

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