MEDICINE AND THE LAW

Unforeseen ethical/legal complications with screening tests in the capitation model of medical aid schemes

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In the South African health care system patients/consumers are divided into those who can afford private care and those who rely on state medical assistance. The system is under pressure to fund delivery of medical care to its beneficiaries. We consider the effects of different funding models on medicolegal liability of health professionals serving the private sector. Medical reasons should determine the service rendered. However, financial implications of services rendered and defensive practice of medicine also contribute to treatment received by a patient and its remuneration. Practitioners who commit to delivering a predetermined set of services within a particular time for a predetermined 'lump sum' are only paid for the service specifically requested. Should disease be found other than those contracted for, we argue that inaction with regard to that disease would be deemed to be negligent or unethical according to legal and ethical considerations.

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In South Africa, the private healthcare funding industry is under enormous pressure to fund delivery of medical care to its beneficiaries. We consider the effects, if any, different funding models have on medicolegal liability of health professionals, and use a detailed example in ophthalmology to clarify the position of health professionals.

Funding models fall into three categories: pure fee-for-service arrangements, global fees and capitation.[1] Fixed salaries, as in the public sector, might be included as a fourth, with unique medicolegal implications for doctors.

In fee-for-service arrangements, as in the private health care industry in South Africa, doctors are remunerated purely for what they do for a patient. What is not done has no direct and immediate financial implications for the patient, and the doctor takes responsibility for what is done or omitted.[1-3] The doctor can be seen as having the widest level of medicolegal liability. Ideally, purely medical reasons should determine the service rendered. However, the financial implications of the service rendered and defensive medical practice due to the threat of litigation also contribute strongly to the extent of a patient's treatment and the remuneration thereof.[4]

Global fees are an intermediate arrangement where treatment for a particular condition is ring-fenced, and the total remuneration for such treatment is predetermined. After delivery of the service, the total amount is paid to the doctor, who in turn carries all the downstream costs. This arrangement shifts financial risk from the funder to the service provider,[1,2] e.g. the contract ophthalmologists have with Transmed to deliver cataract surgery to Transmed pensioners outside the fee-for-service arena. Surgeons are paid the global fee, from which they must pay the hospital (theatre), the anaesthetist, and for the disposable items and intra-ocular lenses used. The surgeon determines the level of care such as the type of lens used, prophylactic and postoperative antibiotic cover and the type of anaesthetic (local or general). The total remuneration is predetermined, and the practitioner decides what to do.

In the capitation funding model, a service provider takes responsibility for a defined group of patients and commits to delivering a predetermined set of services within a particular time for a predetermined 'lump sum'.[1,3-5] An example is the Centre for Diabetes and Endocrinology (CDE) programme for the care of diabetics, in which a medical practitioner is paid a particular amount for the care of a defined group of diabetics. The scope of this treatment typically includes annual visits to a podiatrist, dietician and ophthalmologist (for screening for diabetic eye disease). The medical practitioner remunerates the other service providers, such as the ophthalmologist, only for the service requested.

The dilemma

In the forms supplied to the ophthalmologist for the screening, the examiner must document, for example, whether an eye is normal or not, and has cataract or glaucoma or not. If, for example, the patient did not have diabetes mellitus (DM) retinopathy and this was documented, but had some other sight-threatening condition that was not addressed because the aim of the examination was purely DM screening, what would the ophthalmologist's ethical and legal responsibility be?[1,4] Should the doctor refer the patient for further diagnostic and curative therapy, must treatment be commenced, although not included in the capitated fee? Should the patient present with an acute condition at the time of screening, would it not be essential for the doctor to commence definitive treatment?

Ophthalmologists' dilemma is that their medical acumen precludes this compartmentalised approach. They are simply remunerated to determine the presence or absence of diabetic eye disease, but their medical ethical codes require taking responsibility for the total care of the patient. This includes problems other than pure diabetic eye disease, which raises the question of the limits of liability. Would doctors not reacting to a medical problem outside the funder's mandate be deemed negligent? And if so, could they argue that the limits of their liability are indeed determined by the funding model in which care took place?

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Economic factors and financial pursuits can reshape the attitudes and expectations of healthcare professionals whose roles and responsibilities have in the past been clear and well understood.[4] 'Professional integrity can easily become tainted when the nature of the practitioner-patient relationship becomes transactional and patients are viewed as customers and healthcare as a commodity.'[6]

Legal and ethical framework

The most authoritative statement of the test for negligence in our law is found in *Kruger v Coetzee*,[7] namely that a defendant is negligent if a reasonable person in his position: (*i*) would foresee the possibility of his conduct causing damage to another; and (*ii*) would take reasonable steps to guard against such occurrence, and the defendant failed to take such steps. Obviously this general test for negligence cannot be applied when considering the conduct of an expert, such as a medical practitioner. A reasonable measure of the relevant expertise is therefore added, and the test used will be that of the so-called reasonable expert.[8] The common law in South Africa describes reasonable and acceptable medical practice as follows: '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.'[9]

This can also be stated in another way: a doctor will generally not be considered negligent if his/her actions would be accepted as proper by a responsible body of medical professional opinion. The courts will not, however, consider a body of opinion responsible if that opinion is not capable of withstanding logical analysis.[10]

A greater degree of skill is expected of a specialist than a general practitioner.[9] A patient may successfully sue the ophthalmologist if it can be proved that his/her conduct was negligent in the circumstances, that is, that a reasonably competent ophthalmologist would have foreseen the likelihood of harm and would have taken steps to prevent its occurrence.[11] In the UK it is stated that a doctor will be liable for negligence if he/she breaches his/her duty of care towards the patient, who is harmed as a result thereof. An ophthalmologist may, therefore, be found negligent if the screening is careless, imprudent or unprofessional.

In a lawsuit, the defendant doctor is required to provide evidence, from the medical literature and/or in the form of expert evidence, that the way the screening is done is acceptable and effective.[12]

These cases often end up in a battle of experts. Experts for the plaintiff will try to prove that the defendant's conduct deviated grossly from the standard practice. On the other hand, experts for the defendant doctor will try to demonstrate that his/her conduct was in accordance with what other doctors are doing, and therefore in accordance with ordinary protocol.[13] The court will apply a legal test and not one that may be decided by the particular profession.[12] The Supreme Court of Appeal in South Africa emphasised that, although the court will pay much attention to the evidence of the professional experts, it is not bound to adopt them. Ultimately, it is for the court to decide what is reasonable in the circumstances.[10,14]

The common law position is further complemented by the ethical rules and guidelines of the Health Professions Council of South Africa (HPCSA). Court findings will inevitably be strongly influenced by these rules and guidelines, as will conduct enquiries by the HPCSA.

The following guidelines have been adopted concerning the example of the ophthalmologist who must decide whether to take responsibility of the total care of the patient, or to simply do what the medical fund pays for:

- What are the likely consequences of each option?
- What are the most important values, duties and rights, and which weighs the heaviest?
- What are the weaknesses of the health care practitioner's individual view concerning the correct option?
- How would the health care practitioner want to be treated under similar circumstances, i.e. apply the Golden Rule, namely *primum non nocere:* 'First do no harm'.
- How does the health care practitioner think that the patient would want to be treated in the particular circumstances?[15]

Additional core values and standards for good practice are that health care practitioners should act in the best interests of patients even when this conflicts with the practitioners' self-interest. Furthermore, 'health care professionals should refrain from withholding from their patients any information, investigation, treatment or procedure the health care provider knows would be in the patient's best interest'.[15]

Legislation also prescribes proper conduct of health care providers relevant to the problem posed above. The National Health Act[16] (section 6) states that the ophthalmologist must inform the patient of the range of diagnostic procedures and treatment options generally available to the patient, and the benefits risks, costs and consequences generally associated with each option.

Patients also enjoy the protection of the Consumer Protection Act,[17] which regards patients as consumers and physicians as service providers and introduces a different standard relating to the type of risk that must be disclosed. Section 58 creates an obligation on the supplier/service provider (healthcare professional) to specifically forewarn the patient of any risk of unusual nature or risk that could lead to serious injury or death or risk that the patient cannot reasonably be expected to be aware of. If the Consumer Protection Act conflicts with other concurrent legislation, the Act offering the greater protection will apply. Generally speaking, however, protection afforded by health care legislation is so specific and detailed that it affords better protection to the patients than that provided for in the Consumer Protection Act. An exception is probably the strict liability created in section 61 of the Act, which comes into play when the health care practitioner uses a defective product to treat the patient.

'The ethical and moral duties accorded to health practitioners impose an obligation of effacement of self-interest on the practitioner that distinguishes health practice from business and most other careers or forms of livelihood.'[1]

Conclusion

Ethical guidelines and legal prescriptions expect the following conduct from the ophthalmologist, when screening a patient in a capitation funding model environment:

- Deliver the predetermined set of services as requested by the funder.
- Should other sight-threatening conditions or any other health condition become apparent the patient should be informed thereof, together with any information including treatment options that would be in the patient's best interest.
- Depending on the circumstances, the health care provider can either render the appropriate treatment, or refer the patient to a specialist, or to the public health sector, should a patient be unable to afford the recommended treatment.

Ophthalmologists failing to follow these three guidelines may be held liable. Of course health care providers can render services at discounted rates. According to section 48 of the Consumer Protection Act, the patient may not be subjected to unfair, unreasonable or unjust contract terms, which include an unfair price. The wise words from an anonymous physician in 1882 may be inspiring: 'When in doubt what to charge, look around you (to what others charge), then upwards (God), then make out your bill at such figures as will show clean hands and a clear conscience.'[18]

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