MEDICINE AND THE LAW

Establishing liability for harm caused to patients in a resource-deficient environment

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In a resource-deficient environment, liability for medical malpractice depends on whether there was intentional or negligent wrongful conduct by the parties concerned, or whether they were vicariously liable for the wrongful acts or omissions of others. Departments of health and private sector hospital bodies will be liable for the wrongful conduct of their administrators where, through maladministration, they have harmed patients by intentionally or negligently diverting funds from health care services. Such bodies cannot escape liability for harm caused to patients arising from a shortage of resources where these were caused by the intentional or negligent wrongful conduct of their administrative employees. Departments of health and private health bodies will also be vicariously liable for the intentional or negligent wrongful acts or omissions of their clinical health care and support staff. Clinicians and support staff working in a resource-starved environment, however, will be judged by the standard of how reasonably competent health care practitioners or support staff employees in the same field and faced with similar conditions would have acted.

P's case

Consider the following hypothetical case involving patient P:

P is 23 years old and at full-term pregnancy. Her transfer from a district hospital to a provincial hospital is delayed by 3 hours because of lack of transport. At the provincial hospital, a fetal monitor is not available as only 4 of the 12 are functional. Only 4 midwives are available for the 9 women in the labour ward where P is in labour with a cervical dilation of 5 cm. After 45 minutes in the labour ward, P is given the first available monitor because she had a previous caesarean section with a stillborn child; the monitor shows severe fetal distress. However, all 4 theatres are busy, with the first one available in only 20 - 30 minutes' time. P is sent to theatre but waits 40 minutes for a lift before she arrives there. The lifts regularly malfunction and are continually repaired rather than being replaced or upgraded. P is taken to theatre and, within 15 minutes of her arrival, is anaesthetised and the C-section commenced. The uterus is found to be ruptured, with the fetus in the abdomen. Attempts to resuscitate the child are unsuccessful. The baby could have been saved if the inter-hospital transfer had been quicker, the fetal state had been detected earlier, and there had not been a 40-minute delay for a lift.

Management has regularly over a number of years been informed by clinicians at the provincial hospital of long delays in inter-hospital transfers, shortage of labour ward staff, deficiencies in fetal monitoring, and malfunctioning lifts. The excuse for these shortcomings has been lack of funds. However, the provincial health budget has been overdrawn for some years because of maladministration such as unlawful tendering practices, wasteful expenditure on travel, entertainment and study tours, high expenditure on consultants, etc., which has led to substantial cuts in expenditure on the provincial health care services. (This scenario is based on an actual incident at a provincial hospital.)

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Who is liable?

In such circumstances, who can be held legally responsible for the death of the fetus and the harm suffered by P? This question can be answered by considering the requirements of liability for malpractice, negligence in general and professional negligence, in the context of a resource-starved health care environment. The legal principles apply equally to the public and private sectors.

Malpractice, negligence in general and professional negligence

Malpractice

Malpractice is delictual conduct (acts or omissions) including intentional and negligent wrongs that harm other people.[1] These occur when people do or not do things which they know are unlawful, e.g. knowingly harming patients by diverting funds earmarked for the delivery of health care services to other unauthorised expenditure. Such wrongdoers will be liable for damages in monetary terms (e.g. damages for medical expenses or lost wages) and sentimental damages (e.g. damages for hurt feelings). If patients are harmed by negligence, wrongdoers may only be sued for damages that can be measured in monetary terms – not sentimental damages.[1]

For a successful delictual action, the plaintiff must prove that: there was a voluntary act or omission by the defendant; the conduct was unlawful or wrongful (infringed a lawful right, e.g. the right to life or bodily integrity); the defendant had legal capacity (e.g. was not a young child or insane); the defendant was at fault in the form of intention or negligence; the act or omission caused the loss to the plaintiff; and the plaintiff suffered loss or damages.[2]

Negligence in general

Negligence in general means that a reasonable person would have foreseen the likelihood of harm and taken steps to guard against it.[3] For example, where hospital managers know that patients will be harmed if they do not take steps which reasonable managers could take to prevent such harm, and fail to do so, they will be liable for foreseeable harm caused to patients. Therefore, health care managers could be held liable for negligently failing to repair or replace medical equipment or obtain the required medical items (including drugs) when resources were available, or when they negligently diverted resources from health care services and patients suffered harm as a result.

If several wrongdoers contributed to the harm suffered by a patient, the damages can be apportioned between them.[4] Usually, the wrongdoers will be jointly and severally liable, meaning that one can be made to pay all the compensation and may then claim a contribution from the others in proportion to their fault.[4]

Professional negligence

Professional negligence occurs when medical practitioners or other health professionals negligently fail to exercise the degree of skill and care of a reasonably skilled practitioner in their field of practice. Greater skill and care is expected by specialists[5] and in more complicated medical procedures.[6] Therefore, general practitioners would be negligent if they undertook work for which they did not have the required specialist skills, unless it was an emergency when the standard of care may be relaxed.[7] In emergencies, the test will be whether the practitioner reacted as a reasonable practitioner in that branch of the profession would have reacted in a similar situation. This only applies if the emergency was not created by the practitioner concerned.[8]

Working in a resource-starved environment

In a resource-starved health care environment, the ethical rules of the health care professions should not be compromised – except in emergencies.[9] The Constitution provides that everyone has the right of access to health care services within available resources,[10] every child has the right to basic health care,[11] and nobody may be refused emergency medical treatment.[12]

Where health administrators reduce health services to bring them within available resources, they must demonstrate a rational connection between the aims and the means to achieve it. These should be made in consultation with the medical and health care professionals concerned and not simply be imposed by non-medical administrators.[11] If reduced services affect a constitutional right (e.g. the rights to life, dignity or security of the person[13]), health authorities must show that their decision was reasonable and justifiable.[14] However, health administrators and clinicians may not justify their conduct on reduced resources when they have intentionally or negligently wrongfully caused this.

Where a hospital has limited resources to repair or replace equipment or medical items, hospital administrators may have to set up alternative referral systems and restrict patient intake. Except in emergencies, health care administrators would be negligent to allow patients to be accepted for procedures that cannot be properly done at the facility concerned. Hospital administrators may allocate resources within a facility but must do so in consultation with the clinicians.[11] Failing to do so may be regarded as intentional or negligent wrongful conduct if reducing resources causes harm to patients.

The courts take into account the financial resources of the hospital when judging the standard of care required of medical and health care personnel, e.g. if there are 5 neonates to 1 nurse in a paediatric intensive care unit when there should be 1 neonate to 1 nurse, the court will judge the conduct of the nurses against the former ratio.[8] The courts are reluctant to interfere with the allocation of resources to medical facilities by the state,[14] but may consider individual cases and review the allocation of resources on clinical grounds.[15]

Vicarious liability

Vicarious liability refers to a person being liable for another's unlawful conduct even if there is no fault by the first person. Vicarious liability is mainly covered by the common law, especially in respect of employer-employee relationships. For employers to be vicariously liable for the wrongful conduct of their employees, it must be shown that there was an employer-employee relationship; the employees had committed an unlawful act or omission; and that the employees were acting in the course and scope of their employment – even if they did so improperly.[16] The state is vicariously liable for the delictual acts or omissions of state employees,[17] and it is in the same position as other employers. [18] For example, provincial members of the executive committees responsible for health, and the provincial departments of health, may be held vicariously liable for the wrongful acts of their employees committed within the course and scope of their employment even if they were disobeying instructions.

Hospitals and vicarious liability

Hospitals are vicariously liable for the unlawful acts of their employees who commit wrongful acts or omissions during the course and scope of their employment.[19] Hospitals will be liable despite having warned their employees against using certain procedures, or when the employees' acts or omissions amount to intentional wrongdoing[20] – provided that these fall within the course and scope of the employees' employment.

Although hospitals are liable for the acts and omissions of their health care practitioners, the courts have held that, where there is a shortage of resources, a standard of excellence cannot be expected which is beyond the financial resources of the hospital authority.[9] However, should there be a shortage because of intentional or negligent wrongful conduct by the hospital administrators, patients would have a valid claim against them for any resulting harm. The state would be vicariously liable for such conduct by the administrators of state hospitals.

Even though the state or other authority is vicariously liable for the conduct of its medical and health care employees, the employees may be held personally liable.[21] Therefore, employees may be personally sued or may be liable to reimburse their employers for damages paid out to patients, depending on their employment contract.

Who is liable in P's case?

We assume that a causal link can be established between the harm suffered by P and the acts or omissions of the parties concerned. It is possible that more than one could be held jointly and severally liable for her damages.

Is the provincial Department of Health liable?

For the provincial Department of Health to be held liable, P would have to show that either the administrative staff or the health care staff had acted unlawfully, intentionally or negligently in the course and scope of their employment. For example, in the case of the administrative staff, P would have to prove that they had wrongfully and intentionally or negligently squandered resources that should have been used for service delivery (such as providing sufficient transport, fixing the fetal monitors, appointing more midwives and replacing the lifts), and that this had harmed her. In respect of the health care professionals or support staff, she would have to show that some or all of them had intentionally or negligently contributed to the harm she suffered while they were acting in the course and scope of their employment. In both instances, although the Department may be held vicariously liable for the damages suffered by P, the departmental employees could also be held personally liable.

Is the hospital management liable?

If the hospital management were unable to rectify the long delays in inter-hospital transfers, shortage of labour ward staff, deficiencies in fetal monitoring and the malfunctioning lifts, because they had wrongfully and intentionally or negligently allowed their budget to become overdrawn through maladministration, they could be held personally liable for the harm suffered by P. The Department of Health could also be held vicariously liable for the intentional or negligent misconduct of the hospital management.

Are the ambulance drivers liable?

The ambulance drivers could be held liable if the delay in transferring P to the provincial hospital was due to their intention or negligence, e.g. an ambulance was available but the drivers took an extended lunch break. The Department of Health would then be vicariously liable for their conduct. The ambulance drivers could not be held liable if the delay was caused because Department of Health officials had wrongfully and intentionally or negligently failed to maintain sufficient operational vehicles within their available resources or had intentionally or negligently diverted funds meant for ambulance maintenance, in which case the Department would be directly liable for intentionally or negligently harming P.

Are the midwives liable?

The midwives could be held liable if they intentionally or negligently waited 45 minutes for a fetal monitor when a clinical examination would have indicated that P should have been immediately sent to theatre. Their conduct would be judged by how a reasonable midwife attending to more than 2 patients at a time would have acted in a similar situation. They would not be liable if a reasonable midwife would have waited for the fetal monitor reading before sending P to theatre. In such circumstances, if only 4 out of 12 fetal monitors were operational because of intentional or negligent omissions by the hospital managers, the latter would be directly liable to P. The Department of Health would be vicariously liable for harm caused to P by the intentional or negligent wrongful acts or omissions by the midwives and/or the hospital management.

Are the porters liable?

The porters would be liable if they knew that the lifts were not working and that it would take 40 minutes before a medical emergency patient could reach theatre, and reasonable porters in their position could have used the stairs. If, however, it was impossible to use the stairs, and the hospital management knew that the lifts were not working and that delays might harm patients, and the administrators had intentionally or negligently done nothing to replace them, the management would be directly liable to P for her harm. Again, the Department of Health would be vicariously liable for the intentional or negligent wrongful conduct of either the porters and/or the hospital administrators.

Are the obstetricians liable?

The obstetricians commenced operating on P 15 minutes after she was admitted to theatre and anaesthetised. If there were no intentional or negligent wrongful act or omission on their part in carrying out the operation, the obstetricians would not be liable to P. If the harm to P was caused because the emergency operation was intentionally or negligently delayed by the obstetricians, they could be held liable and the Department of Health would also be vicariously liable. The test would be whether the obstetricians concerned had acted in the way that reasonably competent obstetricians faced with a similar emergency situation would have acted.

Is the anaesthetist liable?

If 15 minutes was an unreasonable period of time for an anaesthetic to be administered in an emergency, the anaesthetist would be held liable. However, if a reasonably competent anaesthetist in a similar situation would have also taken 15 minutes, the anaesthetist would not be liable for intentionally or negligently harming P. If the anaesthetist were found to have engaged in intentional or negligent wrongful conduct, the Department of Health would be vicariously liable for the harm caused to P.

1. McQuoid-Mason DJ, Dada MA. A-Z of Nursing Law. Lansdowne: Juta & Co. Ltd, 2009: 89, 177.
2. Cf. Geldenhuys v Minister of Safety and Security 2002 (4) SA 719 (C).
3. Cf Kruger v Coetzee 1966 (2) SA 428 (A).
4. Sections 1(1)(a) and 2(13) of the Apportionment of Damages Act No. 34 of 1956.
5. Van Wyk v Lewis 1924 AD 438.
6. Cf Collins v Administrator, Cape 1995 (4) SA 73 (C).
7. Cf S v Mkwetshana 1965 (2) SA 493 (N) 497.
8. Brown v Hunt 1953 (2) SA 540 (A).
9. Dada MA, McQuoid-Mason DJ. Introduction to Medico-Legal Practice. Durban: Butterworths, 2001: 43-45.
10. Section 27 (1) of the Constitution of the Republic of South Africa, 1996.
11. Section 28(1)(c) of the Constitution of the Republic of South Africa, 1996.
12. Section 27(3) of the Constitution of the Republic of South Africa, 1996.
13. Sections 10, 11 and 12 respectively of the Constitution of the Republic of South Africa, 1996.
14. Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC).
15. Minister of Health v Treatment Action Campaign (No. 2) 2002 (5) SA 721 (CC).
16. Minister of Police v Rabie 1986 (1) SA 117 (A).
17. Section 1 of the State Liability Act 20 of 1957.
18. Mhlongo v Minister of Police 1978 (2) SA 551 (A).
19. Cf Esterhuizen v Administrator, Tvl. 1957 (3) SA 710 (T).
20. Zungu v Administrator, Natal 1971 (1) SA 284 (D).
21. Cf. Feldman (Pty) Ltd. v Mall 1945 AD 733.