Clinical negligence

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This talk will outline a range of issues that can arise when a patient alleges that clinical negligence has occurred. Negligence has been described as a “failure to act with the prudence that a reasonable person would exercise” and clinical negligence as a “civil wrong committed against a person for which compensation will be sought through a civil court”. This talk will be grounded on English civil law with a focus on one regulated professional group (radiographers). It is appreciated that each country will have its own system of civil law (and therefore its own mechanism for clinical negligence); additionally it is appreciated that variations may occur too between professional groups too. Consequently you are advised to understand the systems that are in place within your own country and not base your clinical practice purely upon the information within the talk. Nonetheless a lot of valuable information can be gained by examining one specific context (ie radiographers working within the UK), as will be demonstrated.

In recent years patients have come to expect good healthcare services and various factors have brought this about. Examples include the increased amount of evidence that has become available upon which clinical practice can be based and that communication between healthcare professionals has increased - thereby heightening their ability to share and then deliver best care and management. Patient rights and knowledge have increased too: in some countries patients and the public can influence directly how their healthcare services are managed and delivered; understanding of health and ill health has increased tremendously through information availability; and more recently within the UK patients have the right to say where they wish to be managed / treated. Against that backdrop patients also have a right to make an official complaint and also commence a clinical negligence claim.

Sadly, within the UK, patients complaints are increasing and so too are clinical negligence claims. Claims involving radiographers can arise from a range of activities, from basic care (eg ‘neglecting’ a patient who then sustains an injury as a consequence of that neglect) to advanced practice (eg the failure of the radiographer to report on an abnormality during image interpretation, the consequence being that the patient’s condition deteriorates as a consequence of the radiographer’s omission).

The process of making a successful clinical negligence claim involves the patient establishing three factors:

You owed them a duty of care
You were in breach of that duty
Your breach of duty caused predictable harm to the patient

The first is easily establish through the Code of Professional Conduct of UK Radiographers. That Code makes clear that Radiographers owe a duty of care to patients they accept for imaging (or treatment). The second is relatively easily determined too, using case law as established in 1957 and 1997. Here the radiographers actions are judged against a ‘standard’; simply put, ...the radiographer would be expected to act in a fashion as accepted by other radiographers and that their actions would be responsible.

Putting this another way, for a given clinical situation the radiographer should act similarly to their peers and that their actions should be based on a suitable evidence base (eg research, national professional guidelines and so on). The third factor is the most difficult for the patient to prove, as this has to be ‘on balance of probability’. This factor tends to be the focus of debate within clinical negligence claims processes and it is here that considerable time and energy is spend presenting arguments and counter arguments.

Putting aside the clinical negligence claim for a moment let us now consider professional regulation; for UK radiographers this is achieved through the Health Professions Council (HPC). The HPC is one of the national bodies responsible for protecting patients from harm, and they achieve this through monitoring professional standards (both practice and education). All UK radiographers must be registered with the HPC to be able to practice radiography. At regular intervals the HPC conduct evaluations of radiographers to determine their competence to practice. Whether the patient’s clinical negligence claims or not the HPC may take an interest in the what has happened with the patient and they may conduct a fitness to practice investigation. The outcome of this could be that that
radiographer is considered not fit to practice and they would be struck off the HPC register. This means that radiographer is no longer a radiographer and may not practice as such anymore (within the UK). Incidentally the title ‘radiographer’ is protected in law within the UK.

People often ask ‘will I be sued, personally’ and the answer to this would depend upon your employment circumstances and the arrangements you have for working arrangements. Within the UK most radiographers are employed within the ‘taxation funded’ National Health Service. As part of their contractual arrangement they receive a salary for undertaking a range of agreed tasks and responsibilities. As part of this contractual arrangement the radiographer’s employer would accept liability for the employee’s actions and this is called vicarious liability. Such liability includes financial underwriting for legal claims of a clinical negligence nature. Consequently for ‘employed’ work it is normal that the patient would attempt to seek financial compensation from the employer, and not the employee. However if the radiographer is doing fee for service work then that radiographer would be advised to acquire their own insurance cover. In this context some radiographers interpret (‘report’) medical images and provide full diagnostic reports for a financial fee. Given they are effectively working for themselves then they could be sued, personally. Not surprisingly many radiographers now have their own personal insurance for clinical negligence claims.

It is reasonable to say that until recently medical practitioners (doctors) have taken the brunt of clinical negligence claims; in some respects it is a professional expectation. With the advent of advanced practice, within the UK, Radiographers too have become increasingly involved in clinical negligence claims. Such investigations (both clinical negligence and regulatory body) can be harrowing experiences for clinical professionals and ‘support’ for these professionals is paramount. Consequently membership of a professional body is strongly advised, as they normally provide support and guidance during regulatory body and clinical negligence investigations.

All claims will have time limits placed upon them beyond which the patient would not normally be able pursue the claim. Within the UK, from the point at which the adult patient realises ‘something has gone wrong’ they have 3 years to start the claim process. There are instances when this time frame can be substantially longer. For children they have up to 18 years plus a further three (in line with adults), making a total of up to 21 years beyond the point at which it was realised something had gone wrong. Whichever scenario is considered the time delay from the patient feeling that they have been harmed to the point at which the claim process is commenced can be quite substantial. Incidentally, it is not unusual for healthcare professionals to be brought out of retirement to help defend a negligence claim, even though the incident occurred many years earlier. This brings into sharp focus the need to keep detailed notes of events surrounding the care and management of patients, as lawyers are extremely keen to examine accurate and authenticated details of what had occurred around the time the patient claimed they had been injured. In particular lawyers are very keen on having available contemporaneous notes from the time surrounding the point when harm was alleged.

Notes of care and management are typically recorded within the patient records, electronic or otherwise. Additional places where information can be recorded include within the medical imaging report itself and also within ‘comments’ boxes within computer-based radiology / radiography information systems. All of these places where information can be kept are legal documents. During clinical negligence claims investigations such sources will provide a rich supply of information for lawyers to defend the clinical negligence claim. For those radiographers undertaking advanced practices (eg reporting of diagnostic images) it is extremely valuable to base practice upon formally approved written protocols. Like patient case notes these protocols can provide an evidence base upon which the claim can be defended, assuming that the protocols are compliant with best practice and archived in a fashion such that they can be easily retrieved. Looking at protocols another way, should they be based upon suitable evidence (eg research material) and peer practice. They would also describe suitable ways in which patients would be cared for and managed. Within themselves the protocols would help to minimise variations in care between healthcare professionals, also they would help to ensure that care would not fall below an established standard. That said, there would be occasions when radiographic practice would vary from the stated protocol (eg in an emergency situation) and retrospectively the radiography should write notes in a suitable place that could be referred to at a later date. Such notes would explain why and how practice varied from that indicated within the protocol. Within the UK, for advanced radiographic practices, there is widespread use of these evidence-based protocols.

A final important point to note is one of knowing the limit of your ability and acknowledging what to do when it has been reached. The formula is simple: know where you limit lies; having reached your limit stop what you are doing; then formally and safely pass the responsibility to a healthcare professional...
who knows what they are doing and has the responsibility to do it.

**Suggested Reading**

Advanced radiographic practice—the legal aspects, Radiography, Volume 9, Issue 4, November 2003, Pages 305-314, C. J. Alderson, P. Hogg

Legal issues of extended practice: Where does the responsibility lie?, Radiography, Volume 14, Supplement 1, December 2008, Pages e33-e38, Susan J. Buttress, Tim Marangon