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View Points

Getting sensitized about malpractice lawsuits in practice of Pathology

Medical malpractice is defined as any act or omission by a physician during treatment of a patient that deviates from accepted norms of practice in the medical community and causes an injury to the patient. In the United States, Medical malpractice is a specific subset of tort law that deals with professional negligence. "Tort" is the Norman word for "wrong," and tort law is a body of law that creates and provides remedies for civil wrongs that are distinct from contractual duties or criminal wrongs.[1] Although the laws of medical malpractice differ significantly between nations, as a broad general rule liability follows when a health care practitioner does not show a fair, reasonable and competent degree of skill when providing medical care to a patient.[2]

Sometimes the terms "negligence" and "medical malpractice" are used interchangeably. However, there is difference between them. In the case of medical malpractice, the medical provider takes action or fails to take action with the knowledge that the patient may suffer harm. In the case of negligence, the medical provider makes a mistake and/ or doesn't know that his or her actions will be harmful.[3] Negligence is medical practice that falls below the standard of care. Standard of care is the professional behavior expected of a prudent, careful and informed physician. A pathologist has duty to "to act as an ordinarily reasonably prudent pathologist under the same or similar circumstances." When a pathologist falls below this minimum standard of care, the pathologist has breached the duty owed to the patient and can be sued. In a tort claim against pathologists, the complainant must prove the following elements: (1) the undertaking from the pathologist is recognized as a form of actionable damage; (2) the pathologist owed the patient a duty of care; (3) the pathologist's conduct was a breach of that duty because it fell below the standard of care to which a reasonable pathologist should conform; (4) the breach was the cause of the injuries the patient suffered; and (5) the injury must not be too remote a consequence of the breach.[4]

The famous Bolam test was established in 1957 following the decision of the court in (Bolam v Friern Hospital Management Committee) case in which the court concluded that "a medical professional is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art . Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view".[5] If the Bolam test be applied in Pathology, other practicing pathologists have to give the opinion that the incorrect diagnosis was due to negligence and not an acceptable error in each individual case.

Pathologists are viewed as ''the doctors' doctor,'' rendering a ''final diagnosis''. A wrong diagnosis by a pathologist could lead to delayed or inappropriate treatment and may result in a legal action from the patient who suffered damages.[6] In some countries, such cases have resulted in the suspension of the pathologist from practice on the grounds of incompetence.[7]

Pathology errors can be due to error in processing or error in reporting. Pathology labs receive specimens of numerous patients and those specimens are handled by different staffs who may be a non pathologist or pathology trainee. It is well known and most of us practicing pathology have experienced also that processing errors frequently occur, ranging from the intermingling of specimens from different patients to placing the wrong patient's name on tissue blocks or slides or a report that is sent to the treating physician. Error in reporting can occur due to various reasons when a pathologist can give a false positive or false negative report. An incorrect diagnosis in a laboratory test, which subsequently causes damage to the patient, raises the question of medical negligence on the part of the pathologist. Incorrect diagnostic interpretation of a non malignant lesion as malignant can result in the patient undergoing potentially

damaging chemotherapy or needless surgery where as incorrect diagnostic interpretation of a malignant lesion as non malignant can deprive patient of proper and timely treatment. Making a diagnosis is subjective and prone to human error. Inconsistencies have been reported in diagnoses between various pathologists and the diagnoses by individual pathologists studying the same histopathological material (slides) at different times. Discrepancy rates between the original and the review histopathological diagnoses of up to 30% have been reported with a mean of approximately 10 percent.[8]

Malpractice lawsuits are common. A report published by medscape which derived information from 4000 physicians across 25+ specialities mentioned that 55% physicians were named in lawsuits at some point of their career. Top reason for law suit was failure to diagnose or delayed diagnosis.[9] In an article published in NEJM, the researchers found that every year 7.4% of all physicians had to face a malpractice claim, and 22 percent of all claims led to payment to claimants. Surgeons and obstetrician/gynecologists were at high risk where as the pediatricians and the psychiatrists were at low risk. It was estimated that by the age of 65 years, 75% of physicians in low-risk specialties had faced a malpractice claim, as compared with 99% of physicians in high-risk specialties. According to this study, more than 5 percent pathologists faced malpractice claim every year and by age of 45 years 37.5 percent pathologist had faced a malpractice claim which increased to 80.8 percent by age of 65 years.[10] Since Nepalese patients are getting sensitized about the importance of correct diagnosis, sooner or later pathologists practicing here will also have to face such claims.

There is no perfect test, so incorrect diagnoses are part and parcel of the practice of pathology and even the most experienced pathologists can make mistakes. Knowing which areas are most prone to errors and what steps pathologists can take to avoid them, will make it less likely we find ourselves in court one day. One report estimates that pathology currently is operating at about a 2.0% error rate.

In that review article, major error rates ranged from 1.5% to 5.7% globally for institutional Consults. Error rates also varied by anatomical site.[11] Kornstein MJ et al gathered jury verdicts and settlements of one hundred seventy-one legal cases related to pathology and found that one half of these were related to surgical pathology, followed by cytology aspirates/fluids and clinical pathology issues. The most common reason for a medical malpractice lawsuit related to pathology was the alleged missed diagnosis of melanoma on a skin biopsy specimen. Among the 48 cases related to cytology, 37 involved false-negative Papanicolaou smear. Among the 36 cases involving clinical pathology, 32 related to the blood bank--usually transfusion-acquired human immunodeficiency virus infection.[12]

Drexel et al analysed 335 pathology malpractice claims and also reported similar findings. They found that fifty-seven percent of malpractice claims involved just 5 categories of specimen type and/or diagnostic error, namely, breast specimens, melanoma, cervical Papanicolaou tests, gynecologic specimens, and system (operational) errors. Sixty-three percent of claims involved failure to diagnose cancer, resulting in delay in diagnosis or inappropriate treatment. A false-negative diagnosis of melanoma was the single most common reason for filing a malpractice claim against a pathologist, melanoma being misdiagnosed as Spitz nevus, ''dysplastic'' nevus or other tumor. While breast biopsy claims were a close second to melanoma, when combined with breast fine-needle aspiration and breast frozen section claims, breast specimens were the most common cause of pathology malpractice claims. Cervical Papanicolaou test claims were third in frequency behind melanoma and breast; 98% involved false-negative Papanicolaou tests. Forty-two percent of gynecologic surgical pathology claims involved misdiagnosed ovarian tumors, and 85% of these were false-negative diagnoses of malignancy.[13] Even a Chinese study concluded that most common cause of error (82%) was pathological misinterpretation and the most frequently claimed events were false-negative diagnoses of skin cancer, invasive ductal carcinoma of the breast, and osteosarcoma. Plaintiffs in most cases (89%) received compensation.[14]

Pathologists depend upon clinicians to provide them with relevant clinical details and findings from other investigations required to make appropriate diagnosis. Poor communication between pathologist and clinician and between pathologist and patients can often be the core of malpractice claims. Many cases are won or lost based on the quality of the information pathologists provide to clinicians, which is why a carefully written and well documented pathology report can be one of the best defenses even if a mistake is made . Proactive quality control and quality assurance methods may prove beneficial to reduce risk of malpractice liability. Consumer education about the benefits and limitations of the test is another key to limiting malpractice claims. For example a patient must be informed that FNAC cannot make the diagnosis all the time, liquid based preparations are better than conventional smears for studying cervical cytology and that there are alternative technologies like immunohistochemistry and molecular tests beyond routine histopathology which may be required in a particular case. The concept of second opinion in surgical pathology is well established. So whenever in doubt a second opinion can be advised. In western data, Dermatopathology appears a difficult specialization to practice, being sued the most. In Nepal a pathologist practices dermatopathology, cytopatholgy, breast pathology etc mostly without any further training or fellowships. Keeping the fear of

impending malpractice lawsuits in mind, time has come that Nepalese pathologists start thinking of super-specializing in different areas of pathology and limit their practice to certain areas rather than being jack of all trades and master of none. To avoid systemic errors, laboratories can ensure that there are written protocols for technical procedures and for day to day work process. Professional societies can come up with local protocols and guidelines for practice of pathology, developed keeping in mind local scenario as too ideal protocols and guidelines may not be practical when practicing in Nepal and when not followed, may effect negatively the malpractice sues. Pathologists should not only keep themselves up to date with the reporting practice but also need to educate themselves regarding the laws related to medical errors and the professional societies can come up with seminars ,workshops and other programmes for that. I will agree with Davis GG et al who mention that physicians treat the possibility of being sued as they treat the prospect of dying; that is, physicians know deep down that it is bound to happen eventually, but they live as though it will not happen to them anytime soon. Being sued is always unpleasant, but, as with dying, a bit of knowledge and preparation can make the necessary steps less painful. Unlike dying, being sued is a kind of game. It is possible to win that game, but only if you play the game correctly.[15]

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