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Essay

Healthcare professional competencies in legal doctrine[☆]



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ABSTRACT

The analysis of medical malpractice claims related to adverse events in Spain reveals that it is commonly accepted as legal criteria that some doctors have innate and special abilities to carry out their activity. They also distinguish between ability and learning. This article reflects on adult learning theories and ways to facilitate professional development. It analyzes the consequences that the chosen criteria may influence the way healthcare providers are trained. It also reflects on the influence these criteria may have in judicial decisions related to the assessment of professional performance. The use of clinical simulation as a new training tool is reviewed.

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Las competencias del profesional sanitario en la doctrina jurídica

RESUMEN

El análisis de la jurisprudencia en relación a las reclamaciones por las consecuencias de la actuación de los profesionales sanitarios acepta el hecho de que algunos médicos poseen capacidades individuales innatas para el desempeño de su actividad. Asimismo, distingue entre capacidades y aprendizaje. En este artículo se reflexiona sobre las teorías de aprendizaje del adulto y formas de facilitar el desarrollo profesional. Se analizan las consecuencias que los criterios elegidos pueden tener para planificar el entrenamiento de los sanitarios y la influencia de dichos criterios en las sentencias judiciales relacionadas con la valoración del desempeño profesional. Se revisa el papel de la simulación clínica como nueva herramienta de entrenamiento.

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Liability of healthcare professionals for undesired patient outcomes is an increasingly frequent occurrence in our societies. In this regard, there is sometimes lack of information about the legal criteria used to judge the skilfulness or unskillfulness in performing an activity. Moreover, different criteria are sometimes used to analyze and judge the action, making a distinction, for example, between skills and learning,¹ creating great uncertainty for the practitioner.

This article reflects on the concept of professional liability and the legal criteria employed in assessing it. The article also reviews the basics of professional practice and development, the role of clinical simulation in facilitating professional development and, finally, the challenges associated with the selection of the criteria used for planning training of healthcare professionals.

Professional liability concept

In general terms, professional liability is defined as the individual's duty to answer for his/her actions. When applied to the healthcare profession, it is understood as the duty of all physicians, nurses and other healthcare providers to redress and answer for the consequences of their actions, omissions or errors (involuntary or voluntary) in the context of their professional practice.²

Liability claims against healthcare providers as a result of harm caused to the patient during the care process are growing in America and in Europe, in the realm of both civil as well as criminal law. This is the result of several factors, some of which are worth highlighting. To start with, today patients are different in that they are better informed as a result of the availability of information on the web, although sometimes this creates a problem because of misleading advertising. Additionally, society demands better quality of life, and the prevailing hedonism makes dealing with suffering and pain more complex. Mercantilism also comes into play, prompting the parties involved in the lawsuit to see it as a means to obtain what are, oftentimes, substantial financial gains. For all these reasons, from passive and submissive individuals, patients have become autonomous subjects with the power to participate in their own clinical management.³

Legal criteria used in the assessment of professional liability

This increase in the number of lawsuits derived from the outcomes of clinical practice creates significant uncertainty for the practitioners, many times ignorant of the legal criteria that will be applied in assessing the skilfulness or lack thereof in the performance of their actions. Támara et al. reviewed 535 expert reports on professional liability derived from 402 cases over a 5-year period in Colombia. In terms of the forensic conclusion, the opinion in 165 cases was that the care provided had deviated from the standard; 225 cases were attributed to complications; 14 cases were considered iatrogenic; 20 were described as the natural course of the disease; and 2 were considered accidents.⁴ These results push practitioners to look for standards of practice to ensure a minimum level of quality

and offer a sense of security. Consequently, it is increasingly frequent to see practitioners trying to adjust their practice to a protocol endorsed by a Scientific Society or a Healthcare Institution.

In view of this situation, professor Vallejo has published in this Journal the parameters applied in analysing the existence of malpractice. She reviews three theories commonly used in the Spanish healthcare criminal doctrine to assess the existence or not of medical malpractice.¹ The article describes how the legal doctrine reviewed accepts the fact that some practitioners have innate individual abilities for performing their activities and, in assessing the existence of malpractice, it makes a distinction between whether this is attributable to a subject possessing superior qualities over those of another individual in accordance with the "average individual" norm. That is to say that it accepts the premise that certain healthcare professionals have special or superior abilities than those of the average practitioner.

On the other hand, according to that doctrine, in order to judge malpractice, individual special or superior abilities cannot be mistaken for special knowledge. The latter is defined as the "learning that the practitioner has gained from practical experience or through the study of his/her activity, translated into special knowledge regarding specific situations or cases".

I believe that these opinions, which accept the existence of special abilities among certain healthcare professionals and make a distinction between skills and learning, may affect the way in which professionals are trained and the way in which legal doctrine is applied. An alternative approach is proposed.

The underpinnings of professional practice

In particular in civil proceedings, it is increasingly common to value redress of any harm sustained by the patient as a result of the clinical action. In those cases, the legal doctrine only requires proof of existence of the harm and the causality relationship between healthcare provision and the harmful outcome. Consequently, proof of absence of professional liability in creating the harm will rest with the healthcare institution. The criminal law doctrine requires proof of the fact that the practitioner acted wrongfully. This means then that the two doctrines consider that the healthcare practitioner acquires a duty of means and not of outcomes towards the patient.

For this reason, healthcare practice in our countries has been based over the past few years on the use of the most efficient diagnostic and therapeutic methods based on the best scientific evidence available each time. This means that the practitioner is expected to use the most efficient means available in his/her setting to help restore the health of the patient, but is unable to guarantee a successful outcome.

Consequently, healthcare professionals must acquire the necessary competencies to meet these criteria.⁵ These competencies are generally defined as the knowledge, skills, attitudes and general and specific behaviours required to perform the job of a clinical specialty. Now, what determines the ability of a physician, nurse or any other healthcare

professional to acquire those competencies? Are there people with special abilities for providing patient care? What criteria should be followed to judge professional performance?

Professional development and adult learning theories

In 1985, Benjamin Bloom from Chicago University published his book "Developing Talent in Young People" in which he reviewed a series of studies in individuals who had accomplished success in sports, science or music. The author did not identify any superior or special indicator that could predict virtuous success in those individuals. On the contrary, the sole common factors identified were great drive and intensive practice.⁶

In later studies, Ericsson et al. identified the common characteristics of what he defined as "Deliberate Practice" that enabled individuals to master their professions. These included having specific goals from a young age, the support from a dedicated mentor/teacher, and family support.⁷

In turn, Kolb stated that although experience is the basis for adult learning, the latter cannot take place without "rigorous reflection". This means that practicing an activity repeatedly (which in medical terms is often described as "having the experience") does not translate necessarily into expertise. Under his theory, "rigorous reflection" is the process that helps reveal and solve technical and behavioural dilemmas, and any confusion emerging after finding oneself in a given situation, or dealing with a clinical case in healthcare.⁸ Therefore, learning is a process that starts when the individual is faced with a situation that he/she is unable to solve fully with the resources habitually used. This creates a feeling of uncertainty and uneasiness, and drives the individual to examine the nature of the problem, his/her interpretation thereof, his/her resources and intentions, as well as the difference between desired results and those actually realized. This drives or motivates the practitioner to search for new answers and integrate more effective strategies which, once conceptualized, he/she may bring to bear in similar future situations. Most people have different learning styles. Some place more emphasis on abstract concepts in relation to the concrete experience, while others value reflective observation in relation to active experimentation. Kolb's theory includes these dominant learning styles as well as those resulting from varying combinations thereof. Interestingly, regardless of the individual's dominant style, in order for learning to occur, he/she must pass through all the different stages of experience, reflection, conceptualization and experimentation.⁹

In this context, where the liability of the physician or nurse must be judged against a duty towards the means but not the outcomes, the expectation should be that every healthcare practitioner must achieve a level of professional performance, consistent with competency criteria defined in a clear and transparent way for the relevant specialty, and based on the best scientific evidence available at any given point in time; all this with the goal of providing optimal care and ensuring patient wellbeing and safety.

Training methods in healthcare: clinical simulation

In view of the above, the development of the healthcare professional must be based on training methods that use the principles of deliberate practice and experiential learning, with no predetermined individual differences for achieving success. However, under the traditional training systems, education occurs through practical work on the patients, increasing the risk of complications. In this approach, teaching contents depend on the characteristics of the individual institutions, the time available for practicing, and the random possibility of coming into contact with specific diseases. Moreover, patient populations are ageing, there are more associated comorbidities, and functional reserve is very limited. This results in a high risk of complications, creating the need to assign those patients to more experienced practitioners thus limiting the ability of the learners to practice. Other factors that come into the current equation are the variability of the clinicians, making it more difficult to standardize teaching contents, and the lack of learning opportunities with infrequent cases.¹⁰

Against this backdrop, clinical simulation emerges as a training tool for healthcare professionals that complements traditional methods and helps solve some of the issues described above. Hence a paradigm shift is under way, and there has been an exponential growth of this teaching modality over the past decade. During this time, a large number of studies have shown that it is an effective way to foster the integration of knowledge and complex clinical skills, enabling a high degree of retained learning. Moreover, the new skills acquired in the teaching realm are transferred to the work environment. A growing number of work teams are finding that this improved performance in healthcare results in better clinical outcomes,¹¹ without placing patients or practitioners at risk during training.¹²

Future challenges

This being the situation, the legal criteria used to judge malpractice must take into consideration these concepts of acquired and applied competencies used for solving a specific clinical situation, and the non-existence of special individual abilities. In my opinion, the doctrine used so far may send a message that is contrary, at least in part, to the idea that the expert is not born but made. I believe it behoves academic, professional and government institutions to promote the implementation of training methodologies based on practice and reflection, suited to adult learning modes, that may enable professionals to reach mastery, ensuring patient safety at the same time.

Conflicts of interest

I work at the Valdecilla Virtual Hospital in Santander (Spain) which is affiliated to the Center for Medical Simulation in Boston (USA). These are two non-profit teaching institutions with the mission of improving healthcare quality and patient

safety through the use of clinical simulation as a training modality for healthcare professionals. Both institutions offer formal training courses for practitioners and simulation instructors.

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