MEDICINE AND THE LAW

Hospital-acquired infections – when are hospitals legally liable?

David McQuoid-Mason

Hospital-acquired infections (nosocomial infections) are acquired in healthcare settings by patients admitted for reasons unrelated to the infection or not previously infected when admitted to the facility. Liability for hospital-acquired infections depends on whether the hospital: (*i*) has introduced best practice infection control measures; (*ii*) has implemented best practice infection control measures; or (*iii*) will be vicariously liable for negligent or intentional failures by staff to comply with the infection control measures implemented. A hospital and hospital administrators may be held directly liable for not introducing or implementing best practice infection control measures, resulting in harm to patients. The hospital may also be held vicariously liable where patients have been harmed because hospital staff negligently or intentionally failed to comply with the infection control measures that have been implemented by the hospital, during the course and scope of their employment.

S Afr Med J 2012;102(6):353-354.

The prominent politician Amichand Rajbansi recently died from a hospital-acquired infection after admission to hospital for pneumonia.[1] Mr Rajbansi's widow stated that after receiving a pacemaker her husband had contracted an untreatable infection in hospital. The hospital responded that its infection control measures comply with the recommendations of the Centers for Disease Control in the USA, and are regularly monitored by the Department of Health (DOH).[1] When are hospitals legally liable to patients who have been harmed by hospital-acquired infections?

Hospital-acquired infections (nosocomial infections) are acquired in healthcare settings by patients admitted for reasons unrelated to the infection or not previously infected when admitted to the facility.[2] Hospital-acquired infections occur in a patient in a hospital or other healthcare facility in whom the infection was not present or was incubating at the time of admission. It includes infections acquired in hospital but appearing after discharge and as occupational infections among staff of the facility.[3] Hospital-acquired infections may be caused by bacteria, viruses, fungi or parasites. They may develop from surgical procedures, catheters in the urinary tract or blood vessels, or material from the nose or mouth that is inhaled into the lungs. The most common types of hospital-acquired infections are urinary tract infections, pneumonia and surgical wound infections.[4]

Whether or not a hospital will be held legally liable for harm caused to patients by hospital-acquired infections will depend upon whether the hospital and hospital administrators have: (*i*) introduced best practice measures to minimise infections; or (*ii*) negligently or intentionally failed to implement designated infection control measures in their hospital; or (*iii*) hospital staff who negligently or intentionally fail to comply with infection control measures implemented by the hospital while acting in the course and scope of their employment have caused harm to patients.

David McQuoid-Mason is Professor of Law at the Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban, and publishes and teaches in medical law.

Corresponding author: *D J McQuoid-Mason (mcquoidm@ukzn.ac.za)*

Failure by the hospital or hospital management to introduce best practices to prevent hospital-acquired infections

The World Health Organization (WHO) provides guidelines on the prevention and control of hospital infections[5] that can be used to determine whether such healthcare providers are legally liable for negligence.[6] The WHO recommends the following to reduce hospital-acquired infections:[7] (*i*) providing direct patient care using practices that minimise infections; (*ii*) following appropriate practices of hygiene (e.g. hand washing and sterilisation of instruments and surfaces); (*iii*) protecting patients from other infected patients and hospital staff who may be infected; (*iv*) complying with the practices approved by the infection control committee; (*v*) obtaining appropriate microbiological specimens when an infection is present or suspected; (*vi*) notifying the infection control team of cases of hospital-acquired infection, and the admission of infected patients; (*vii*) complying with the recommendations of the antimicrobial use committee regarding antibiotic use; (*viii*) advising patients, visitors and staff on techniques to prevent the transmission of infection; (*ix*) instituting appropriate treatment for any infections that they have; and (*x*) taking steps to prevent such infections in staff from being transmitted to other persons, especially patients.[5] Many of these guidelines are similar to those recommended by the US Centers for Disease Control,[6] which the hospital that treated Rajbansi claims to apply.[1]

Failure to comply with one or more of the above recommendations in the WHO *Guide* will not be negligence *per se* but may be evidence of negligence on the part of the hospital administrators or staff. A patient wishing to sue a hospital for harm caused by a hospital-acquired infection would have to prove that a reasonable hospital or hospital manager would have foreseen the likelihood of harm to patients if certain steps were not taken to prevent such infection, and the hospital or hospital manager concerned had failed to take such steps.[8] The common law provides that patients who contract hospital-acquired infections due to medical negligence by healthcare providers may sue such providers for damages.[9] The negligent or intentional conduct of the hospital staff may also be breach of the Constitution[10] or the National Health Act.[11] For example, the Constitution provides that everyone is entitled to an environment that is not harmful to their health and well-being,[9] and the National Health Act states that health establishments must implement measures to minimise disease transmission.[11] Other relevant statutes are the Occupational Health and Safety Act,[12] the Environmental Conservation Act[13] and the

Foodstuffs, Cosmetics and Disinfectants Act[14] and its Regulations dealing with the analysis and control of biological, chemical and physical hazards from raw materials.[15] Generally a breach of a statute is not negligence *per se* but may be evidence of negligence.

It has been suggested that when bringing a common law action based on negligence the acquisition of an infection from the hospital should be regarded as *prima facie* evidence of negligence by somebody employed by the hospital, and that the principle of *res ipsa loquitur* or 'the facts speak for themselves' should apply. This means that the court should infer negligence by the hospital where the cause of the infection is unknown – unless the hospital can give a plausible explanation for how the patient may have acquired the infection without fault on the part of the hospital or its employees.[16] However, South African courts have been reluctant to apply the *res ipsa loquitur* doctrine to medical negligence cases.[17] It has been argued that this approach is outdated and the maxim should apply because 'the majority of nosocomial infections are transmitted by contact, primarily by the hands of hospital workers, the application of *res ipsa loquitur* in such cases may be appropriate'.[16]

Failure by the hospital administrators and staff to introduce best practices for preventing hospital-acquired infections should therefore be regarded as *prima facie* evidence of negligence on the part of the hospital concerned.

Failure by the hospital or hospital management to implement designated best practices to prevent hospital-acquired infections

A negligent or intentional failure by the hospital or hospital management to implement designated best practices to prevent hospital-acquired infections may result in their legal liability.

A negligent failure to implement adequate infection control measures occurs where a reasonable person in the position of the wrongdoer ought to have foreseen the likelihood of harm if such measures were not implemented and to have taken steps to guard against it.[5] For example, where hospital managers know that patients will contract hospital-acquired infections if they do not implement the steps that reasonable managers in their position would take to prevent such harm, and fail to implement such steps, the hospital and they will be directly liable for any foreseeable harm caused to patients. Such steps may include disinfection and sterilisation measures to eliminate pathogenic micro-organisms and microbial organisms. It is common knowledge that in the hospital, surfaces can be disinfected by applying specific chemicals, and sterilisation can be done by using heat, steam under pressure, liquid chemicals and hydrogen peroxide gas plasma.[2] Healthcare managers and hospitals will be held directly liable for negligently failing to implement adequate infection control measures where such failure causes harm to patients – whether or not such measures were regularly monitored by the DOH as alleged in the Rajbansi case. The test for negligent conduct in this context is objective and measured against the behaviour of a reasonably competent hospital authority or hospital manager in a similar position.

An intentional failure to implement adequate infection control measures means that the hospitals or hospital managers concerned had either 'actual' or 'eventual' intention not to implement such measures, e.g. implementation of control measures is minimised to save costs. Where 'actual' or 'direct' intention is present the wrongdoers decide not to provide certain infection control measures and know that this is wrong.[18] Where 'eventual' intention is present the wrongdoers subjectively foresee the likelihood of harm to patients if adequate infection control measures are not implemented and do not care whether or not such harm results, i.e. they act with reckless disregard for the consequences of such failure.[19] The test for intentional acts or omissions is subjective and measured by considering the state of mind or subjective foresight of the hospital managers concerned.

Hospitals and hospital managers that negligently or intentionally do not implement suitable precautions to prevent the spread of hospital-acquired infections may be found directly liable for harm caused to patients by such infections.

Vicarious liability of the hospital for the negligent or intentional wrongful conduct of hospital staff resulting in hospital-acquired infections

In the private and public sectors, vicarious liability occurs where one person is liable for another's unlawful conduct without fault by the first person and usually relates to employer-employee relationships. For employers to be vicariously liable for the wrongful conduct of their employees, the claimant must show that: (*i*) an employer-employee relationship existed (i.e. employers can tell their employees what to do and how to do it); (*ii*) the employees committed an unlawful act or omission; and (*iii*) the employees were acting in the course and scope of their employment – even though improperly carrying out the work.[20]

Hospitals are vicariously liable for the unlawful acts if their employees commit wrongful acts or omissions during the course and scope of their employment.[21] Hospitals will be liable even though their employees have negligently disobeyed instructions or protocols, or the employees' acts or omissions amount to intentional wrongdoing[22] – provided the employees' conduct falls within the course and scope of their employment. For example, if nurses negligently or intentionally do not wash their hands or sterilise instruments, as required by the hospital protocol, resulting in a patient contracting a harmful infection, the hospital may still be liable for damages. Even though hospitals are vicariously liable for the conduct of their medical and healthcare employees, the employees may also be held personally liable[23] and may be personally sued or, depending on their employment contract, be liable to reimburse their employers for damages paid out to injured or harmed patients.

Hospitals may be liable to patients who acquire hospital infections through the negligent or intentional conduct of their employees acting in the course and scope of their employment. This applies even though the hospital and hospital managers have introduced best practices for infection control and these have been negligently or intentionally ignored by their employees.

1. Comins L. Netcare rejects blame for Rajbansi death: manager. The Independent on Saturday, 14 January 2011.
2. Hospital-acquired infections a menacing trend in health care settings. http://www.waterandhealth.org/newsletter/new/winter_2003/hospital.html (accessed 14 January 2012).
3. World Health Organization. Prevention of Hospital Acquired Infections: A Practical Guide. Geneva: World Health Organization, 2002:1.
4. Hospital-acquired infections. http://medical- dictionary.thefreedictionary.com/Hospital-Acquired+Infections (accessed 23 January 2013).
5. World Health Organization. Prevention of Hospital Acquired Infections: A Practical Guide. Geneva, World Health Organization, 2002:10-15.
6. Cf. Carstens P, Pearman D. Foundational Principles of South African Medical Law. Durban: LexisNexis, 2007:814-815.
7. See generally, http://www.cdc.gov/ncidod/hip/training/infctctl.htm (accessed 14 January 2012).
8. Cf. Carstens P, Pearman D. Foundational Principles of South African Medical Law. Durban: LexisNexis, 2007:816.
9. Cf. McQuoid-Mason D, Mahomed D. A-Z of Medical Law. Cape Town: Juta & Co., 2011: 223-224.
10. Section 24(a) of the Constitution of the Republic of South Africa, 1996.
11. Section 20(3)(b) of the National Health Act No. 61 of 2003.
12. Section 8(1) and 8(13) of the Occupational Health and Safety Act No. 85 of 1993.
13. Environmental Conservation Act No. 73 of 1989.
14. Foodstuffs, Cosmetics and Disinfectants Act No. 54 of 1972.
15. Carstens P, Pearman D. Foundational Principles of South African Medical Law. Durban: LexisNexis, 2007:815-816.
16. Cf. Carstens P, Pearman D. Foundational Principles of South African Medical Law. Durban: LexisNexis, 2007:817.
17. Van Wyk v Lewis 1924 438.
18. McQuoid-Mason D, Mahomed D. A-Z of Medical Law. Cape Town: Juta & Co., 2011:242.
19. McQuoid-Mason D, Mahomed D. A-Z of Medical Law. Cape Town: Juta & Co., 2011:276.
20. Minister of Police v Rabie 1986 (1) SA 117 (A).
21. Cf. Esterhuizen v Administrator, Tvl. 1957 (3) SA 710 (T).
22. Zungu v Administrator, Natal 1971 (1) SA 284 (D).
23. Cf. Feldman (Pty) Ltd. v Mall 1945 AD 733.