MEDICINE AND THE LAW

'Over-servicing', 'underservicing' and 'abandonment': What is the law?

D J McQuoid-Mason

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

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

The *Ethical Rules* and *Policy Document* of the Health Professions Council of South Africa (HPCSA) do not define 'over-servicing', 'underservicing' and 'abandonment'. The HPCSA *Guidelines on Over-servicing, Perverse Incentives and Related Matters* define 'over-service' only. The converse of this definition can be used to define 'underservicing'. The courts do not refer to these concepts, but apply general rules regarding professional negligence and malpractice based on what a reasonably competent doctor in the same position would do. In deciding the standard to be adopted, the courts may consult the ethical rules of the medical profession, but are not bound to take them into account.

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The Health Professions Council of South Africa (HPCSA) rules[1] mention 'over-servicing' and 'underservicing' of patients in terms of fees and over-charging (rule 7(3)). However, 'over-servicing' and 'underservicing' are not defined, and they are silent on 'abandonment' of patients. The *Guidelines on Over-servicing, Perverse Incentives and Related Matters*[2] define 'over-servicing' but not 'underservicing' or 'abandonment' of patients. The definition of 'over-servicing' in the *Guidelines* can assist in defining a meaning for 'underservicing'. 'Abandonment' of patients may sometimes be linked to 'underservicing'.

The legal standard of care required of doctors is often influenced by the ethical rules of the profession, but the courts are not bound by them. As South Africa (SA) has no ethical guidelines for practitioners defining 'underservicing' and 'abandonment' of patients, the courts will apply the general principles of legal liability for professional negligence and malpractice.

What does 'over-servicing' mean?

The HPCSA *Guidelines*[2] define 'over-servicing' as:

> '[T]he supply, provision, administration, use or prescription of any treatment or care (including diagnostic and other testing, medicines and medical devices) which is medically and clinically not indicated, unnecessary or inappropriate under the circumstances or which is not in accordance with the recognised treatment protocols and procedures, without due regard to both the financial and health interests of the patient.'

They also state that healthcare practitioners shall not '[p]rovide a service or perform or direct certain procedures to be performed on a patient that are neither indicated nor scientific or have been shown to be ineffective, harmful or inappropriate through evidence-based review'. The same principle applies to referrals to another healthcare practitioner for a service or a procedure that is not indicated or unscientific, or that evidence-based review has shown to be ineffective, harmful or inappropriate.

The HPCSA *Policy Document on Undesirable Business Practices*[3] provides that '[i]ncentives may not be used to encourage either "over" or "under" servicing of patients' and that '[a]ppropriate care should be provided at all times' (para 4.8), but does not define the terms.

The *Guidelines* and *Policy Document* are consistent with the law, which requires doctors to act with reasonable skill and care when treating patients.[4] In a sense, 'underservicing' is the opposite of 'over-servicing'. The converse of the *Guidelines* definition of 'over-servicing' could therefore be used to define 'underservicing'.

What is the meaning of 'underservicing'?

'Underservicing' generally means failing to provide a patient with the standard of care that a reasonably competent doctor in a similar situation and in the same field of medical practice would be expected to provide.[5] This definition can be refined by formulating one that is the converse of the 'over-servicing' definition in the *Guidelines*[2] (para 2.14), which could read as follows:

> The failure to supply, provide, administer, use or prescribe any treatment or care (including diagnostic and other testing, medicines and medical devices) which are medically and clinically indicated, necessary or appropriate under the circumstances or which is in accordance with the recognised treatment protocols and procedures, without due regard to the patient's financial and health interests.

This definition could also be incorporated into the *Guidelines*, as could the converse of the two examples of 'over-servicing' in the *Guidelines* (para 2.1.4). The latter could be used to indicate that healthcare practitioners should not 'underservice' patients by 'failing to provide a service or perform or direct certain procedures to be performed on a patient that are indicated or have been shown to be effective and appropriate', or by 'failing to refer a patient to another healthcare practitioner for a service or a procedure that is indicated or has been shown to be effective and appropriate'.

These definitions and examples of 'underservicing' are consistent with the law[5] and could be used to guide the courts.

The treatment of cancer patients in the USA is a good example of 'underservicing'. Research concluded that the 'slow pace of adoption of early palliative care for patients with serious cancer is a tragic under-service of health care, leading to much unnecessary suffering'.[6] This is because many hospitalised patients receive 'aggressive care' instead of hospice services,[6] which indicates that 'underservicing' may sometimes be linked to 'over-servicing'. Unnecessary interventions in terminally ill cancer patients, causing patients to suffer needless expense and pain, are examples of 'over-servicing'. The use of unnecessary treatment in futile situations is also unethical and unlawful.[7]

Continual 'underservicing' of patients by medical practitioners may also constitute 'abandonment' if this forces patients to terminate their doctor's services.

What constitutes 'abandonment'?

'Abandonment' of a patient occurs when a doctor unilaterally ceases treatment before the patient has recovered or terminates the patient's contract,[8] without giving adequate notice or referring the patient to another practitioner.[9] 'Abandonment' may include doctors: (*i*) closing their practices without proper notice; (*ii*) denying the doctor-patient relationship; (*iii*) refusing to see a patient previously seen; (*iv*) failing to visit a hospitalised patient; (*v*) failing to provide follow-up care; and (*vi*) failing to provide a competent substitute when away from practice[10] or closing their practice.

Where doctors continually 'underservice' their patients, so that they must seek healthcare from somebody else, this may amount to 'constructive abandonment' because it forces the patients to terminate the doctor-patient relationship.

These definitions and examples are consistent with the law regarding professional negligence and malpractice in situations where the doctor's conduct amounts to an actionable omission.

The law regarding 'over-servicing', 'underservicing' and 'abandonment' of patients

Doctors are expected to exercise the same degree of skill and care as reasonably competent practitioners in their branch of the profession.[4] Although the courts usually follow what the medical profession regards as reasonable professional conduct, they are not bound to follow this.[5] When deciding the level of skill and care required, the courts may take into account the ethical rules of the profession where they are consistent with statute or common law.[5] Failure by practitioners to measure up to the expected standard of skill and care may result in legal action by patients for professional negligence or malpractice.[4]

In deciding whether the harm suffered by a patient was caused by 'over-servicing', 'underservicing or 'abandonment', the courts must decide whether the doctor failed to measure up to the standard of a reasonably competent doctor in the same field of practice.[4] The courts may refer to the HPCSA's *Ethical Rules*,[1] the *Policy Document*[3] and the ethical *Guidelines*[2] regarding 'over-servicing' and 'underservicing' of patients. However, they will rely on what they consider to be professional negligence or malpractice according to the law[4] – which may or may not be based on what the medical profession considers to be 'underservice', 'over-service' or 'abandonment'.

Overservicing

There are few reported court cases on 'over-servicing'. The former SA Medical Council disciplined doctors who engaged in such practices, especially when they charged excessive fees, e.g. removing teeth surgically instead of by ordinary extraction, unnecessary house calls by a general practitioner, and having unnecessary tests done.[11] The Council also disciplined practitioners in cases where the procedures were unnecessary, e.g. unnecessary X-rays and the needless amputation of toes.[11]

In these circumstances, according to the common law, the patients could refuse to pay the healthcare practitioner's fees for the services not required. They could also claim damages in a civil action provided they could prove to have suffered harm as a result of such over-service. These definitions and examples in the *Guidelines*[2] could assist the courts in deciding whether there was 'over-servicing'.

Underservicing

The law does not mention 'underservicing', but it usually takes the form of an actionable omission based on a failure to treat a according to good medical practice.[12] Many cases of 'underservicing' have come before the courts, usually involving the failure to provide follow-up treatment and postoperative care,[13] e.g. the patient is not informed by the doctor when test results after discharge from a hospital indicate that further diagnosis or treatment is necessary, or the doctor does not advise the patient to return if abnormal symptoms are experienced after treatment.[12]

In these situations the test is whether a reasonably competent practitioner in the same position would have exercised the same degree of skill and care as the practitioner concerned.[5] This is inherent in the suggested definition and examples of 'underservicing', which could assist the courts but would not be binding on them.

'Abandonment'

A patient is abandoned 'when a doctor interrupts a course of necessary treatment without proper notice and referral to another practitioner'.[14] A doctor who causes harm by such action will be liable for damages.[8] Once a doctor engages in treating a patient, treatment may not be abandoned if this would harm the patient – unless the patient makes treatment by the doctor impossible.[15]

In SA law, 'abandonment' is generally not mentioned by the courts, as it is treated as an actionable omission (as in the case of 'underservicing') under the general principles of liability for professional negligence or malpractice. Professional negligence or malpractice resulting from failure to provide follow-up treatment and postoperative care usually involves: '(a) A complete and unreasonable refusal to look after a patient after the completion of the immediate treatment; (b) withdrawal from the doctor/patient relationship at a critical stage and without the consent of the patient and without reasonable notice … to the patient; [and] (c) the premature discharge of a patient'.[16] In the USA the courts have found doctors liable for 'abandonment' of their patients where they terminated their professional relationship at an unreasonable time or without affording the patient an opportunity to find an equally qualified replacement.[17]

The former SA Medical Council also disciplined practitioners for refusing to treat patients after being requested to do so, not visiting a patient in hospital who subsequently died, and failing to treat a patient in labour after he had treated her from the beginning of her pregnancy.[11] The courts are likely to take a similar approach – provided the patient can prove harm as a result of such 'abandonment'. The decisions of the courts will be based on the principles of professional negligence and malpractice.[18] The above definitions and examples could provide useful guidelines for the courts when deciding whether the doctors concerned had abandoned their patients.[11]

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3. Health Professions Council of South Africa. Policy Document on Undesirable Business Practices. Pretoria: HPCSA, 2005.
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5. Van Wyk v Lewis 1924 AD 438.
6. Wiencke MC. Cancer care: 'Tragic underservice'. Dartmouth Medicine, Spring 2011. http://www.dartmed.dartmouth.edu/spring11/html/disc_cancer.php (accessed 3 November 2014).
7. Cf. Airedale NHS Trust v Bland [1993] 1 All ER 821 (HL).
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13. Cf. Webb v Isaac 1915 EDL 273.
14. Dube v Administrator, Transvaal 1963 (4) SA 260 (W).
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