Stroke

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Understanding Medical Malpractice Lawsuits

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Physicians are at increased risk for medical malpractice if they fail to provide care a minimally competent physician would do under similar circumstances.[1,2] Physicians providing stroke care have even greater exposure since they are engaged in high-risk care due to time-sensitive and complex decision-making as well as the potential for serious patient injury. A study published in *The New England Journal of Medicine* estimated that by the age of 65 years, 75% of physicians in low-risk specialties would experience a malpractice claim, rising to 99% of physicians in high-risk specialties.[3,4]

If a malpractice claim is filed against a physician, it can induce Medical Malpractice Stress Syndrome. Medical Malpractice Stress Syndrome involves having a traumatic reaction impacting the provider's emotional and sometimes physical health. Moreover, Medical Malpractice Stress Syndrome impacts not only the provider's well-being but also patient safety during and after litigation.[5-7]

One common recommendation to alleviate some of the effects of Medical Malpractice Stress Syndrome is through provider empowerment via process knowledge and participation.[8] We agree, and lay out a brief overview of key malpractice concepts and its accompanying procedural process, as well as some tips on how physicians can assist in their defense.

WHAT IS MALPRACTICE?

Medical malpractice claims are based on the legal theory of negligence. To be successful before a judge or jury in a malpractice case, the patient-plaintiff must show by a preponderance of the evidence (it is more likely than not, ie, there is a >50% probability that professional negligence did occur based on the evidence presented[9]) the physician-defendant had

- a duty to the patient to render non-negligent care;
- breached that duty by providing negligent care;
- this breach proximately caused the injury or damage; and
- the patient suffered injury or damages.

To be clear, the plaintiff must show each element by a preponderance of evidence to obtain a successful judgment.[9] Generally, physician duty and patient injury are simple to demonstrate. Most cases turn upon breach of the standard of care and causation and thus will be our focus below.

Breach of Standard of Care

What is the standard of care physicians must adhere to or be considered in breach? Such a question is often difficult to answer with detailed precision.

First, states, not the federal government, are predominately charged with establishing medical malpractice law, and accordingly, not all states are in exact agreement. Some states attempt at legislatively defining the standard of care; others allow their respective state courts to define it. Second, even if parties can agree upon a legal definition, determining specifically what clinically represents the standard of care is usually not a straightforward issue.

For example, using the Mississippi Supreme Court's definition, standard of care is measured as providing care a minimally competent physician in the same field would do under similar circumstances.[10] However, it becomes quickly apparent that determining what would be required of a minimally competent physician is not obvious to a layperson, particularly in the complex and time-sensitive scenarios frequently found in stroke care. Hence, most malpractice cases are heavily reliant on medical expert testimony to determine this professional standard.

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Note that expertise in a court of law differs from expertise in medicine. Medical experts in court may testify on the standard of care despite never having treated the condition afflicting the plaintiff as long as the expert has general experience with the clinical issue and causation. Experts in malpractice cases also do not need to be in the same specialty as defendant, nor be physicians even when a physician is defendant. However, in all cases, the standard testified to must be relevant to circumstances and exist at the time of the event. This means if medical advances happened between the time of the alleged malpractice event and the trial (which is commonly years apart), the physician cannot be held to that newer standard.

A further parameter of medical expert testimony is it cannot be based on personal anecdotes. Rather, medical experts are required to review the relevant medical record for the case and ground their opinion on how the physician's actions compare to the relevant standard of care, using tools like medical practice guidelines to make such a comparison.[11]

Finally, some state courts have embraced a more deferential approach to physician clinical judgment, as found in the respectable minority rule. The respectable minority rule is a judicial doctrine that precludes liability when a respectable minority of physicians endorse the course of treatment in question. Although deciding what constitutes a respectable minority is no doubt wrought with contention, physicians practicing in these states can be at a bit more ease when deviating from the majority opinion in their practice.

Causation: Proximate Cause

Finding proximate cause requires showing such harm to the plaintiff would not have occurred but for the actions of the physician. Additionally, the harm must have been a reasonably foreseeable result of the treatment decisions as physicians are not liable for remote/unforeseeable results.[12] Practitioners should be aware that a plaintiff need not show a physician's actions were the sole cause of their harm. All a plaintiff needs to show is some injury was caused by the physician's breach of the standard of care that is supported by expert testimony indicating it proximately caused that harm.[13] However, liability will be reduced for the physician if the plaintiff contributed to their own injury by acting unreasonably.

AVOIDING LAWSUITS

There is no surefire way to prevent a patient from suing a physician for medical malpractice. However, there are tactics to reduce its likelihood.

Furthermore, health systems have been attempting to address this challenge to lower malpractice premiums and avoid reputational damage that flows from malpractice lawsuits. Accordingly, many health systems have implemented communication and resolution programs (sometimes referred to as CRPs).[14,15]

The core elements of a CRP include that health care organizations and clinicians: (1) be transparent with patients around risks and adverse events; (2) create action plans designed to prevent recurrences of adverse events caused by system failure or human error; (3) support the emotional needs of the patient, family, and care team; (4) disclose errors and proactively and promptly offering financial and nonfinancial resolution to patients for adverse events caused by unreasonable care; (5) educate patients or their families about their right to seek legal representation; (6) work collaboratively with other health care organizations and professional liability insurers; and (7) constantly assess and re-assess the CRP's effectiveness.[14,15]

Several hundred health care organizations continue to develop and implement CRPs, and the model has been formally endorsed by major medical professional groups.[14,15] We recommend physicians consider learning about and participating in CRPs if they are part of health systems that utilize them. For physicians who work within a nonparticipating health system, the core elements of CRPs are transferable to the physician's individual practice and should be strongly considered in patient-physician interactions.

LAWSUIT PROCESS

Learning about the medical malpractice lawsuit process can help physicians manage stress caused by the surprise and consternation associated with medical malpractice lawsuits. It may also help their attorneys by establishing mutual understanding and enabling working from a common knowledge baseline.

As discussed, malpractice lawsuits are usually state-based civil negligence disputes, that is, private negligence lawsuits, rather than criminal cases brought by public entities. The general steps include the following:

Pleadings and Initiation

Pleadings are court-filed documents setting forth each party's position. These include plaintiff Complaint and Summons (C&S) and defendant Answer. Initiation must occur within the relevant statute of limitations (1–3 years). After receiving C&S, a physician should contact his/her malpractice insurer, who will select and pay an attorney for representation. Physicians sometimes retain their own attorneys if, for example, there are issues of whether insurance cover the claims, cover only in part, or other situations where the physician and insurer have different interests. Notably, before formally filing a C&S, a patient-plaintiff can send a demand letter to the physician. The demand letter will include a demand for

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payment for the alleged medical malpractice and usually include a condition of filing a C&S if the issue is not resolved. Demand letters, like C&S, should be brought to an attorney for evaluation as well as communicated to their respective insurance carrier.

Meeting(s) With Attorney

Once served, the physician and attorney will investigate the claim, determine strategy, and draft a C&S Answer. Regarding the patient-plaintiff's Complaint, the Defendant-physician Answer must be received within a required period (15–20 days); otherwise, a default judgment may be entered against the physician-defendant.

Here, the physician should ask questions about/confirm the process and discuss how they can assist the attorney in building their defense. When meeting their attorney, physicians should be conscious of the need to develop a cooperative and productive relationship. It can often be years between a C&S and trial verdict, so starting the attorney-physician relationship off on the right foot and making efforts to maintain it are instrumental in achieving litigation success.

Of utmost importance when working with their attorney is for the physician to be open, honest, and forthcoming about the events surrounding the legal claim. A physician being nontransparent leaves their attorney subject to surprise and unprepared against opposing counsel. Conversations between the attorney and defendant physician are confidential and designed this way to encourage this type of candidness.

Also important is for a physician to heed their attorney's advice. Although physicians should question and at times challenge their attorney's strategy before it is implemented, going against counsel will most often cause damage to the physician's relationship with their attorney and damage to their case.

Judgment on the Pleadings

After completed pleadings are filed, many states allow either party to move for judgment on the pleadings, which allows for rapid resolution of a case if successful. The judge reviews the case using only pleadings to assess if judgment can be rendered on their undisputed aspects. Usually, however, there is disagreement on critical facts and issues, so judgment on the pleadings cannot occur. Without judgment on the pleadings, parties begin considering witnesses, including expert witnesses, as well as documentation/materials needed to support their case; that is, it sets the stage for discovery.

Discovery

Both sides engage in discovery, that is, pretrial examination of witnesses/documents and requests for admissions. In this phase, the physician can assist in helping to choose a medical expert witness to assist in their defense as well as help in confirming the existence and then locating materials being requested by the other party.

Each party can present written questions to the other and his/her witnesses. These are interrogatories—questions answered in writing, under oath, relating to the case facts.

Oral questions and answers provided under oath are depositions. These are used to obtain testimony if a particular witness will not be present, explore the strength of the other side's case, and for impeachment purposes at trial.

Importantly, standard rules of evidence do not apply during depositions and virtually any question may be asked. Physicians in interrogatories and depositions hence must be very cautious and clear regarding answers, as responses can be used against physician-defendants, particularly when they are testifying at trial. As such, close attorney consultation is key during this stage.

Finally, requests for fact admissions, which involve asking the opposing side to agree to a specific fact/s that is not in dispute, are also important discovery requests. If these requests are not answered/opposed, the information is considered acknowledged as true for trial.

Trial

After discovery, if either party requests a jury, one is impaneled. In doing so, attorneys can question each potential juror and reject a certain number. After final selection, the trial begins.

At trial, physicians can be invaluable in assisting attorneys, in particular in identifying weaknesses associated with plaintiff's representations made in court. As such, physicians should consider attending the trial and taking copious notes to provide ideas/thoughts to their attorneys.

At the beginning, each attorney gives an opening statement, usually a summary of what he/she intends to show. Then plaintiff begins, calling witnesses to provide information to the jury by asking questions (direct examination), including of expert witnesses, attempting to establish the standard of care which can be opposed by defense attorney (cross examination).

After plaintiff's evidence, if plaintiff has not demonstrated all negligence factors, regardless of defendant's lack of evidence presentation, defendant/physician is entitled to judgment. Here, defendant may move the court to direct the jury to render a defense judgment, that is, a directed verdict. If not granted, the defense presents its case using direct examination, subject to cross examination by the plaintiff. After completion, each side's attorneys make closing arguments outlining, from their perspective, what has/has not been shown and the proper verdict.

The judge then instructs the jury on the specific law—that is, the rule of negligence (below). The jury then

privately deliberates, reaches a verdict, returns to the court, and informs the judge. The judge then renders judgment based on the verdict

The losing party may then move for a judgment notwithstanding the verdict (also known as judgment as a matter of law) or a new trial. Judgment notwithstanding the verdict uses a similar standard to directed verdict, requiring no reasonable jury to find otherwise based on the facts. If neither the new trial or judgment withstanding the verdict are granted, the judgment is final for that court. The losing party may then appeal.

Appeals

A party may generally appeal once as a matter of right. The appellate court review considers the trial record, summaries, and attorney oral arguments, focusing on legal errors/issues. Trial court fact determinations are not generally reviewed. The appellate court decision is then issued. Further appeals may occur; for example, to the state Supreme Court and US Supreme Court. However, court acceptance is discretionary and rarely granted.

NATIONAL PRACTITIONER DATA BANK

National Practitioner Data Bank (NPDB) is a repository detailing US malpractice payments. If a physician is found negligent or a payment is made on a physician's behalf in malpractice settlement, this must be reported to NPDB and the relevant state licensing board within 30 days by the payor (eg, insurer, hospital, and other health care entities).[16] Alterations of the scope of a physician's license or penalties associated with clinical care must also be reported.

Physicians receive notice when they are reported to the NPDB. They may file factual challenges with the reporter; if uncorrected after 60 days, physicians may appeal to the secretary of the Department of Health and Human Services, challenging the report submission (eg, not in accordance with reporting requirements) and/or the report inaccurately states its basis and action taken. The underlying reasons and merits of a malpractice claim cannot be reviewed.

NPDB must be used by hospitals to evaluate privilege applications and biennially for current staff. NPDB files are confidential with limited public access.

CONCLUSIONS

As stated, it is a near certainty that physicians practicing stroke care will at some point in their career face a malpractice claim.[3] This is due to a variety of factors, including the difficulty and urgency in making correct diagnoses.[1] Indeed, the 2021 Medscape Malpractice Report found failure to diagnose (eg, stroke) was a leading cause of underlying malpractice lawsuits.[17]

Although only 5% of malpractice suits reach a judge or jury verdict and physicians are likely to prevail in cases that do go to a verdict, the process of preparing for litigation can still lead to significant distress, loss of confidence and diminished capability, regardless of outcome.[18] Hence, understanding and preparation for the possibility of a medical malpractice claim is an essential element of practicing modern medicine, particularly in high-risk specialties treating potential stroke. As a proactive measure, physicians should understand the legal process and, if sued, develop an open, honest, and collaborative relationship with their attorney. Taking such steps will not only improve patient safety but also assist physicians in their personal and professional well-being.

ARTICLE INFORMATION

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