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Medicolegal considerations

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INTRODUCTION

It is important to initially view the professions of medicine and law from the perspective of the roles they serve in a civilized society. In many ways, the professions are quite similar and yet have important differences. We do not rely on the practice of voodoo medicine, nor do we rely on capriciousness in the practice of law. Each profession has a well-developed set of values, norms, and methods taught within a higher educational system. The final practical step is that each professional is granted a license by the state in which they practice based on personal achievement, professionalism, and meeting obligations to the public.

Analogous to the physician–patient relationship is that of the attorney–client. Both share the duty of confidentiality and to place their patients’ or clients’ interest before their own. In most instances, clients or patients are extremely vulnerable and in need of professional assistance. This asymmetric relationship and need for profound levels of duty call for high degrees of professionalism from members of both professions.

Alternatively, there are marked differences. Medicine employs an open, cooperative, yet tightly constrained scientific methodology invested in discovering the truth. By contrast, the American legal system uses a relatively hidden, more creative, adversarial approach in which the courts and jurors unearth the truth to best meet the needs of the justice system. The attorney’s goal is to use the adversarial system to win their case for their client rather than a thorough searching for truth. While scientific studies generally advance a physician’s purpose to care for and remedy his patient’s illness, some of these studies may actually detract from an attorney’s theory on an alleged malpractice case. This occurs because in all circumstances attorneys have the ethical duty to advocate zealously for their client. In medicine, scientific unknowns remain as inconclusive unanswered questions, whereas legal disputes are always conclusively decided upon and finality reached regardless of the quality and quantity of evidence presented. Physicians are trained in the traditional sciences and the scientific method while attorneys are generally schooled in disciplines of advocacy, debate, and political science (1).

There are multiple opportunities for the two professions to interface. Broadly, there are two major meeting grounds: (i) professional liability litigation and (ii) contractual or regulatory aspects of medical practice (2). This chapter will focus on several aspects of professional liability and its litigation.

Most physicians will be called on during their career to provide legal testimony in one context or another. They could be a party to a lawsuit either as plaintiff or defendant. They could be a fact witness providing first-hand knowledge about a patient’s condition, treatment, and records. In this capacity, personal testimony relates to what the physician observed,

heard, or did in the case being litigated. They may also be called upon to provide expert testimony and opine on past events relating to a malpractice lawsuit, in which they often have no first-hand knowledge about the patient’s condition or care. They could also be called upon to predict future medical outcomes, including life expectancy, and in a psychiatric context to discern whether a patient is dangerous enough to be involuntarily committed (homicidal or suicidal) by a judicial decision.

LITIGATION FOR ALLEGED MEDICAL MALPRACTICE

The American legal system is known as the adversarial system having its origin in English law. This method of litigation is the foundation of the American justice system. In theory, it has potential to perform quite well. Accordingly, the logic is as follows (3):

1. *if* two equally matched attorneys (with intelligence, experience, and resources)
2. zealously and competently represent their clients,
3. within the bounds of ethical and legal rules,
4. with neutral judges and juries,
5. *then* the correct results should be reached.

It is noteworthy that judges do not often take active roles; rather, they simply are a neutral referee ruling on admissibility of evidence and other legal issues as they arise. The court will not be interested in reviewing evidence the parties do not present. Jurors are also passive participants usually unable to ask clarifying questions (3).

As a result, attorneys for each side bear an enormous responsibility. Each side is presumed to look after their own interests. They must investigate, prosecute, and defend their clients by collecting, organizing, and presenting the evidence (4). Each party to the litigation will attempt to advance its own favorable evidence (interpretation of historical facts) while attempting to limit the admissibility and credibility of its opponent’s evidence. In contrast to medical practice, there is no obligation to present all the facts, only those favorable to a particular side. Opposing attorneys examine and cross-examine the witnesses and, by using the rules of evidence, attempt to convince a relatively passive court of the correctness of their client’s position.

Each side defines the scope of relevant evidence. Evidence law states that evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” (5). This evidence must be pertinent to the case and help the judge or jury make a final decision based on a “preponderance of the evidence.” The trier of fact (judge or jury) assesses the evidence presented and unearths the “real truth.” Regardless of how close the

pro and con evidence stacks up, ultimately, a conclusion must be reached and one side must win.

To assist the court in making its final decision, attorneys will call upon expert witnesses to help explain to the lay jury the applicable standards of care, whether they were breached, whether the breach caused the injury, and the measure of the past and projected monetary damages based on the nature of the injury (6).

PROVING PROFESSIONAL NEGLIGENCE

The burden of proof rests with the plaintiff in the American judicial system; the degree to which this must be demonstrated, however, is variable. In criminal cases in which a defendant's life or liberty is at stake, the burden is to provide evidence that is "beyond a reasonable doubt," which typically translates to a 95% likelihood. However, in professional negligence cases where the compensation for injury secondary to negligence is money, the courts apply a *mere* "preponderance of the evidence" standard (6). This often equates to proving only 51% likelihood or as common parlance as "more likely than not."

There are four elements that must be demonstrated in a professional negligence lawsuit. These are duty, breach, causation, and injury. Each element must be proved by the preponderance of evidence standard (2).

The first of these elements, a legal duty, is created by the physician-patient relationship. The obligation arising out of this relationship is the duty to provide the standard of medical care that would be exercised by other similarly situated physicians under similar circumstances with comparable resources (6). These standards of care refer to appropriate conduct (behavior), that is, actions or inactions by the defendant. It does not refer to a mind-set (character) to harm or help the plaintiff.

It is imperative to understand the contrast of legal duty from ethical duty. A legal duty is what *must or must not* be done that a court of law may or will enforce. An ethical duty is what someone *should or should not* do and a court may not or will not find it enforceable. Consider a physician who happens to be shopping at a mall and the person standing in front of him collapses and stops breathing. The physician ethically should assist that person. However, in the absence of a preexisting physician-patient relationship, he has no legal duty, no legal requirement, to help and cannot be haled into a court for failing to provide medical care. However, once this physician takes action to help, he must do so nonnegligently. To encourage these selfless acts, almost all states have enacted "Good Samaritan" statutes to protect these good people from lawsuits (7).

The second element that has to be proved by the plaintiff is the defendant's breach of the standard of care (the legal duty). Here the physician's conduct is at issue. The alleged negligent (breached) conduct is either an omission of an owed duty or commission of a negligent act. To prove this element, expert witness testimony is generally required (2) to provide admissible evidence for the benefit of the court by answering two questions:

1. what is or should of been the standard of medical care and

2. whether the duty to provide that standard was breached by the defendant physician.

The legal principle of *Res Ipsa Loquitur* is an exception to the plaintiff's requirement for expert witness testimony (2). This legal doctrine addresses the adverse outcome that could only have come about by the defendant's negligence. It is a rule of circumstantial proof (6). A prime example is the unintentional leaving of a sponge in a patient's abdomen after a surgical procedure. Here the lay person may use their common sense and reason that this was clearly negligence.

The third element to prove is legal causation. There must be a reasonably close and causal connection between the breach of the standard care and the alleged injury. The legal question asked of and answered by the expert witness is "but for" the defendant's breach, would the plaintiff suffered the claimed injury (6). In other words, the breach must be a necessary condition that leads to the injury. Furthermore, the attorney will often be required to ask the expert witness that "within a reasonable degree of medical certainty" whether the alleged breach resulted in the alleged injury (2).

In medicine, causation is complex and depends on multiple factors. To establish scientific proof using "evidenced-based" medicine, physicians often rely on controlled clinical trials with mathematical probabilities. Scientific studies minimize the occurrence of happenstance or chance by quantifying a probability of error to <5%. Causation is further strengthened if these results are independently reproducible.

In law, however, the notion of legal cause is generally quite different than medical causation. The focus is not scientific truth. The heart of the legal matter is the attribution of responsibility (8). Therefore, by necessity, the law commences a retrospective investigation of particular conduct of particular persons and uses the somewhat complex rules of legal evidence to help the jury make a final decision. In these situations, the probability of error in malpractice litigation (<50%) can be much higher than that in science (<5%). Thus, the 51% standard proof (i.e., preponderance of the evidence) is invoked to persuade the jury.

The final element that requires legal proof is the development of an injury. The purpose of awarding monetary damages is to make the victim "whole" from a legal standpoint. If there is no injury, there is no recovery on which damages can be based. Compensatory damages are usually of two types: economic (measurable) and non-economic (nonmeasurable). Economic damages include case-related past, present, and future medical expenses and related loss of past, present, and future wages. An economic expert known as a "life planner" will testify as to the amount of economic damages. Noneconomic damages include those related to "pain and suffering," loss of consortium, and mental anguish. Unfortunately, these cannot be accurately quantified and thus are subject to sizable degrees of variation among juries. Many state legislatures, through tort law reforms, have enacted or are attempting to enact a hard cap on noneconomic damages to protect against runaway jury awards, to improve the predictability of judgment amounts, and to stabilize insurance premiums and maintain access to medical care (9).

Ultimately, all four elements must be linked together for the plaintiff to prevail by proving each element by a

preponderance of the evidence (2). If a physician defendant has no legal duty to the patient, that suit will automatically fail. If the defendant can show that the standard of care was met despite an adverse outcome (maloccurrence), the defendant should prevail. Even if the defendant did breach a standard of medical care owed to the plaintiff, but the breach did not cause or was unrelated to the injury, the plaintiff should not recover any damages.

Legal *duty* is hardly ever litigated because in most cases there is usually a well-defined physician–patient relationship. On the other hand, evidence pertaining to the other three elements is inevitably controversial, often litigated, and most often introduced into court through the testimony of experts.

GUIDELINES FOR EXPERT WITNESS TESTIMONY

An expert witness is defined as a person who, by reason of education, special training, and/or experience possesses knowledge of a particular subject area at greater depth than the judge or lay jury. The judge will often decide on the admissibility of this evidence (expert’s testimony) by assessing the proffered expert’s qualifications and opposing counsel’s objections. Once allowed to testify in the courtroom, the jury will weigh the expert’s testimony about their interpretation (opinions) of the facts of the case (6).

Multiple experts may be used to prove each element independently. In contrast to fact witnesses, expert witnesses are permitted to reflect, opine, and pontificate in court. Initially, experts on standard of care through testimony educate the jury on what the appropriate medical practice is or should be, and whether or not the defendant’s conduct falls within the standard of care. Causation experts may be used to establish whether the alleged breach “within a reasonable degree of medical certainty” caused the alleged injury. A single expert witness can provide testimony on both standard of care and causation, or alternatively and more likely, multiple experts will be utilized. Economic experts are separate individuals who make claims regarding the degree of damages, life expectancy, and projected future costs.

Expert witnesses are employed by opposing parties of a malpractice claim. Physicians who accept both plaintiff and defense cases are thought to be less biased. Depending on individualized State Tort Law, an expert may render appropriate opinions by virtue of similar practice and does not need to practice an identical discipline of medicine. Nonetheless, the expert must have knowledge of the standard of care and be familiar with the locality of the case setting. A favorable expert is one who is active clinically. While it helps to be familiar with current literature, it is very important that they have an understanding of the standards of care during the time period that the case actually took place. Oftentimes, years, and even decades, have passed before a case is filed. Also it is important that experts understand the setting by region and facility and how these factors can impact the evidence of a case.

Obstetric cases stemming from alleged neurologic birth injuries attract a relatively small group of physician experts who testify in a large portion of cases. Many witnesses tend to establish themselves as plaintiff or defendant “friendly” (10). Although specific qualifications can vary from state to state, the American College of Obstetricians and Gynecologists has

Table 1 American College of Obstetricians and Gynecologists Qualifications for the Expert (11)

1	The physician expert witness must have a current, valid, and unrestricted license to practice medicine in the state in which he or she practices
2	The physician expert witness should be currently certified by a board recognized by the American Board of Medical Specialties, as well as by experience or demonstrated competence in the subject of the case
3	The specialty, training, and experience of the physician expert witness should be appropriate to the subject matter in the case
4	The physician expert witness should be familiar with the standard of care provided at the time of the alleged occurrence. In addition, the physician expert witness should have been actively involved in the clinical practice of the specialty or the subject matter of the case within 5 years from the time the expert was retained to provide an expert opinion in the matter
5	The physician expert witness should be able to demonstrate evidence of continuing medical education relevant to the specialty or the subject matter of the case
6	The physician expert should be prepared to document the percentage of time that is involved in serving as an expert witness. In addition, the physician expert should be willing to disclose the amount of fees or compensation obtained for such activities and the total number of times the physician expert has testified for the plaintiff or defendant

offered a guide in an attempt to promote the integrity of the individual expert witness and his professional organization (11). Their recommendations are found in Table 1.

As stated previously, the expert witness who testifies on behalf of both plaintiff and defendant is considered less ethically biased (12). The expert should distinguish maloccurrence from malpractice. Maloccurrence is an adverse outcome unrelated to the quality of care provided, whereas malpractice is substandard care causing harm. It is unethical for a physician expert to accept compensation that is contingent on the outcome of litigation (13).

Additional ethical principles for expert testimony (12) include the following:

1. The physician’s review of medical facts must be thorough, fair, and impartial and must not exclude any relevant information. It must not be biased to create a view favoring the plaintiff, the government, or the defendant. The goal of a physician testifying in any judicial proceeding should be to provide testimony that is complete, objective, and helpful to a just resolution of the proceeding.
2. The physician’s testimony must reflect an evaluation of performance in light of generally accepted standards, neither condemning performance that falls within generally accepted practice standards nor endorsing or condoning performance that falls below these standards. Medical decisions often must be made in the absence of diagnostic and prognostic certainty.
3. The physician must make every effort to assess the relationship of the alleged substandard practice to

the outcome, because deviation from a practice standard is not always substandard care or causally related to a bad outcome.

4. Finally, the physician must be prepared to have testimony given in any judicial proceeding subjected to peer review by an institution or professional organization to which he or she belongs.

When called upon to testify, most physicians bring a high degree of professionalism to the legal process and play a very important role in the administration of justice (13). Unequivocally, a patient injured by genuine medical malpractice deserves due compensation. When true malpractice has occurred, the individual (patient) and society (all of us) will benefit by professional testimony that assists a court in reaching that conclusion (9).

Most physicians desire the best for their patients. More often than not, unfortunate maloccurrence is the nature of an adverse outcome rather than true medical malpractice. Physicians can benefit and avoid litigation by application of the principles of risk management.

SELECTED ASPECTS OF RISK MANAGEMENT

Maloccurrence is defined as a bad or undesirable outcome that is unrelated to the quality of care provided. In some cases, these outcomes are anticipated and unavoidable. In other cases, they are unanticipated yet unavoidable. Fully informed consent goes a long way to preventing litigation in these situations. Malpractice, on the other hand, is essentially the provision of substandard medical care that causes significant harm (12).

Basic risk management principles include listening carefully to patients, documenting their complaints, comments, and responses, as well as timely documentation of how physicians respond both verbally and physically. While this communication and documentation will confer some degree of protection from claims, it remains a basic tenet that errors must be avoided.

Practicing the principles of patient safety minimizes medical errors. Open and extensive communication among caregivers is paramount to this process. It builds trust and respect through such endeavors as team training, structured sign outs, team huddles that anticipate problems, mock drills, and clinical simulations. Significant improvements in the management and outcomes of obstetric emergencies such as shoulder dystocia and hemorrhage have been reported. The concept of full disclosure to patients following adverse outcomes has also been shown to reduce the risk of malpractice claims. Physicians who demonstrate compassion by being available to discuss, answer questions, and importantly apologize as appropriate are less apt to be the target of claims. Still some physicians appear to be prone to lawsuits.

Frequently sued obstetricians demonstrate a pattern of behavior that is fairly predictable. They are often rushed and unavailable. When present, they often are poor communicators and do not take the time to listen or offer pertinent information. They seem unconcerned and show disrespect to their patients. Despite these shortcomings, the outcomes of lawsuits in the setting of these contextual risk factors still seem to favor the lawsuit-prone physicians (14). Although there may be unprofessional behavior, the alleged acts of negligence acts are often not as claimed. They may turn out not breaches

of the standards of care; furthermore, the untoward outcome may be a temporary injury that resolves with minimal effects or no injury at all.

In contrast to cases that result in no payment, the greatest predictor of a professional liability payment to a patient is the severity of outcome, namely an unanticipated death or permanent disability. Being a great communicator, being personable, and being well liked by your patient is very important but does not provide complete immunity from a lawsuit. If there is a significantly bad outcome due to substandard care, and there are appropriate expert plaintiff attorneys and expert witnesses, there is a high likelihood that when litigation does happen, it will rightfully result in favor of the plaintiff.

What can institutions do? Current initiatives to reduce liability via vigorous quality improvement (QI) programs are being developed. QI endeavors can be implemented in solo locations or system-wide entities. A series of "triggers" are identified that when encountered, set off an automatic review by select representatives on the committee. Examples from the field of obstetrics include postpartum hemorrhage, a return to the operating room, and maternal readmission. These reviews are done to identify variables that contribute to adverse outcomes or near misses. Events are deemed avoidable or unavoidable and action items are created. Responsible parties are then tasked with addressing deficiencies and propagating progressive change.

CONCLUSION

In conclusion, we reviewed the four elements of medical malpractice case, the importance of expert witness testimony, the guidelines for integrity and ethical physician expert witness testimony, and some practical aspects of risk management and litigation avoidance.

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