Malpractice Makes Perfect; Confessions of a Expert Witness

Robert C Reiser MD MS FACEP
Associate Professor
University of Virginia School of Medicine
Why Do patients Sue Doctors?
APPLETON, WI. (UPI '97) - Nadean Cool, 44, has sued her psychiatrist for malpractice in a suit alleging that Dr. Kenneth Olson convinced her that she had 120 personalities, then billed her insurance company for group therapy.
Patient Complaints and Malpractice Risk
Gerald B. Hickson, MD; Charles F. Federspiel, PhD; James W. Pichert, PhD; Cynthia S. Miller, MSSW; Jean Gauld-Jaeger, MS; Preston Bost, PhD

Hickson, JAMA 2002
Table 2. Cohort Member Physicians With Selected Combinations of Risk Management File (RMF) Openings and Unsolicited Patient Complaints*

<table>
<thead>
<tr>
<th>No. of RMF Openings</th>
<th>Unsolicited Patient Complaints, No. (%)</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0-1</td>
<td>2-6</td>
<td>7-14</td>
<td>15-24</td>
<td>≥25</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>223 (35)</td>
<td>92 (14)</td>
<td>44 (7)</td>
<td>9 (1)</td>
<td>3 (1)</td>
<td>371 (58)</td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>38 (6)</td>
<td>38 (6)</td>
<td>27 (4)</td>
<td>13 (2)</td>
<td>6 (1)</td>
<td>122 (19)</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>9 (1)</td>
<td>17 (3)</td>
<td>13 (2)</td>
<td>14 (2)</td>
<td>11 (2)</td>
<td>64 (10)</td>
<td></td>
</tr>
<tr>
<td>≥3</td>
<td>6 (1)</td>
<td>13 (2)</td>
<td>12 (2)</td>
<td>21 (3)</td>
<td>36 (6)</td>
<td>88 (14)</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>276 (43)</strong></td>
<td><strong>160 (25)</strong></td>
<td><strong>96 (15)</strong></td>
<td><strong>57 (8)</strong></td>
<td><strong>56 (10)</strong></td>
<td><strong>645 (100)</strong></td>
<td></td>
</tr>
</tbody>
</table>

*χ² = 274; P < .001.
Why Do Attorneys Sue Doctors?
$60 Million Dollars !!
Malpractice cases are very expensive

- Expert witnesses
- Virtually all are done on a contingency basis
- If the plaintiff doesn’t win the attorney does not get paid
- Contingency can be north of 40% (after costs subtracted)
$ Contingency fees $
Malpractice Risk According to Physician Specialty

Jena et al. NEJM 2011

- Forty thousand physicians 1991-2005
- Each year during the study period, 7.4% of all physicians had a malpractice claim
- 78% of all claims did not result in payments to claimants
- By the age of 65 years, 75% of physicians in low-risk specialties had faced a malpractice claim, as compared with 99% of physicians in high-risk specialties.
An epidemiologic study of closed emergency department malpractice claims in a national database of physician malpractice insurers.

ACAD EMER MED 2010 Brown et al.

- 1985 - 2007  18 years of age or older
- 11,529 claims  $664 million liability
- Emergency physicians were the primary defendants in 19% of ED claims
- The largest sources of error, as identified by the individual malpractice insurer, included errors in diagnosis (37%), followed by improper performance of a procedure (17%). In 18% of claims, no error could be identified by the insurer.
ED Malpractice

- Acute myocardial infarction (AMI; 5%), fractures (6%), and appendicitis (2%) were the health conditions associated with the highest number of claims.
- Over two-thirds of claims (70%) closed without payment to the claimant.
- Most claims that paid out did so through settlement (29%).
- Only 7% of claims were resolved by verdict, and 85% of those were in favor of the clinician.
High Risk Diagnoses

- Chest Pain
- Wounds
- Fractures
- CNS bleeds
- Pediatric Fever/ Meningitis

FIGURE 6 Percentage of pediatric claims according to adjudication status

- 68% Plaintiff settlements
- 27% Verdict for defendant
- 5% Verdict for plaintiff
- 1% Dropped, withdrawn, or dismissed

Carroll, A. E. et al. Pediatrics 2007;120;10-17
Types of Malpractice Insurance

• 1) Claims made - “tail coverage” (ERP)
• Claims made and reported - (incident or written report)

• 2) Occurrence

• 3) Claims paid (assessable)
Theory of Malpractice- Torts

- Not a pastry

- A negligent or intentional civil wrong not arising out of a contract or statute
4 Elements of Torts

- Duty
- Breach
- Injury
- Causation
Standard of Care

• “Medical malpractice is a legal fault by a physician or surgeon. It arises from the failure of a physician to provide the quality of care required by law. When a physician undertakes to treat a patient, he takes on an obligation enforceable at law to use minimally sound medical judgment and render minimally competent care in the course of services he provides. A physician does not guarantee recovery... A competent physician is not liable per se for a mere error of judgment, mistaken diagnosis or the occurrence of an undesirable result.”
Burden of Proof

- Beyond a reasonable doubt
- Preponderance of the evidence; More likely than not (51%)
Malpractice Makes Perfect,
Anatomy of a Lawsuit
“Rob, do you know what gastroenteritis means to me when I see it on one of my charts?”

“No Tim, what?”
“I’m gonna get sued”

Tim Evans to Rob Reiser, 1990
Lessons?

- Know where your risks are
- Final diagnosis should reflect the chief complaint
- Checking boxes is of little value (except to the billers)
- FOLLOW UP, FOLLOW UP, FOLLOW UP
- Dictation is the way to go
Other Lessons

- Read the nurses notes (or read them in court)
- No Snarky comments
  “says she passed out last night”
- Visual Acuity on all eye complaints
Managing Your Risk

• Stop seeing patients
• Be lucky
• Always be right
• Never be wrong
• Work for TEAMHEALTH
• Enlist
On the other hand, in evaluating your defendants, be on guard for the Marcus Welby type of personality. Some doctors, and even some hospital administrators, have such a forthright and wholesome appearance that jurors will not believe that they can be capable of wrongdoing.
High Risk Diagnoses

- Chest Pain
- Wounds
- Fractures
- CNS bleeds
- Pediatric Fever/ Meningitis
Before signing the death certificate had you taken the man's pulse? -- A: No.

Q: Did you listen for a heart beat? -- A: No.

Q: Did you check for breathing? -- A: No.

Q: So when you signed the death certificate you hadn't taken any steps to make sure the man was dead, had you?
A: Well, let me put it this way. The man's brain was sitting in a jar on my desk, but for all I know he could be out there practicing law somewhere.

Coroner responding to Defense Attny.