

Medical Malpractice Litigation

Perspective From a (Gasp!) Lawyer

BEFORE I JOINED THE ACADEMY STAFF, I was a litigation attorney with experience in a wide variety of cases, including a number of medical malpractice suits. In a few short years, I was lucky to have had the opportunity to work on both sides, representing doctors, hospitals, insurance companies, and patients.

In the best of circumstances, doctors and lawyers remain happily oblivious of each other, applying their own standards in their own professions. When doctors are accused of professional malpractice, however, they're subjected to the legal measure of negligence, a different standard from the one used by the medical profession. For a doctor to be found negligent by a judge or jury, four elements must be present:

► *The doctor must have a duty to the patient.* This duty is established with the formation of the doctor-patient relationship and is usually undisputed. The doctor's duty amounts to an obligation to provide a certain minimal level of care to the patient. The doctor owes the patient the level of care that a "reasonable" doctor would provide under similar circumstances. (The specific level of care that applies to an individual patient depends on other factors.)

► *The doctor must have breached his duty to the patient.* As stated above, the level of care to which the doctor's treatment is compared is the "reasonable man" standard, which, in professional negligence cases, is viewed as the "reasonable professional" standard. In other words, the doctor must take whatever action a reasonable doctor in a similar position would take.

In the D.C. metropolitan area, where I practiced, the plaintiff's case is required to include testimony by a witness, certified by the court as a medical expert, describing the standard of care that applied to that plaintiff's condition. The establishment of the standard of care is a hallmark in any medical malpractice case. Both sides will most likely be relying on medical textbooks, journals, or other academic sources to support their experts' testimony. One of the many tasks of an expert witness is to discredit the opposing expert and, if possible, the source material from which that expert's testimony derives.

In one case, the expert testified about numerous ways in which his treatment of the mother would have been different from the treatment provided by the defendant. The expert also testified that the doctor's treatment choices didn't comport with the standard of care as set forth in

medical journals and other reputable publications. The expert doesn't have to treat this plaintiff; she merely has to explain what she would have done if she had been in the defendant's position.

In all likelihood, the plaintiff's attorney will present expert testimony indicating that the standard of care required treatment different from the treatment the defendant rendered to the plaintiff. The defendant's attorney will present expert testimony indicating that the standard of care requires substantially the same care as the defendant provided.

In many cases, the care of several doctors, each with a different specialty, is under scrutiny. Occasionally, the plaintiff challenges the treatment provided by a hospital, nursing home, or ambulance service. The plaintiff's attorney has to elicit expert testimony about the standard of care for each alleged breach by each defendant.

► *The patient has suffered an injury.* This element is often easy to establish, because most patients or their families don't litigate against their doctors unless they've experienced an objectively negative outcome, such as death or permanent disfigurement. Whether the patient's injury renders the doctor negligent, though, depends wholly on the final element.

► *The patient's injury must have been caused by the doctor's breach.* In my experience, this element is by far the hardest to prove in court. In many cases, the medical experts hired by the plaintiff are hard-pressed to link the adverse outcome (death, disfigurement, brain damage) to the doctor's care, even if that care didn't meet the applicable standard.

For example, I worked on a case in which an obstetrician was being sued for waiting to order a cesarean section for a woman who was giving birth to a baby boy. The baby was born with severe brain damage. In preparing for the trial, I learned that the standard of care probably required the doctor to have made better treatment choices.

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LAUREN PACHMAN is policy analyst, casualty, for the American Academy of Actuaries in Washington.

However, the mother was in her 40s, which automatically increased her risk of complications. Additionally, her prenatal care records reflected abnormalities throughout the pregnancy, especially in the final days leading up to labor and delivery. Based on those records, even if the doctor had followed the applicable standard, the boy probably would still have suffered from the same significant level of injury. The jury concluded that there was not a sufficient causal connection between the doctor's mistake and the boy's injury, and the doctor was found not liable.



costly post-injury care.

Medical malpractice lawsuits are also motivated by a desire for “corrective justice.” Plaintiffs can’t be restored to their pre-injury state, but the justice system provides them with a channel through which they can be economically restored, to the extent possible. Some hope to evoke feelings of guilt and remorse in the defendants in the process. Some seek to ensure that future patients avoid the adverse outcome they suffered.

A significant problem arises when a plaintiff hires an attorney to sue a doctor because the patient was the victim of an adverse outcome, and the attorney, intentionally or not, takes a case that is causally weak to trial. This happens often in cancer cases, in which the defendants can be oncologists, but they can also be radiologists or general practitioners—anyone who, with the benefit of hindsight, can be viewed as negligently failing to identify an irregularity that might have been treatable had it been noticed earlier.

Once those medical records are under the microscope, errors are easy to find. And when those errors are brought to the attention of a jury, in many jurisdictions, the case is over. A jury is likely to find a defendant liable if the medical records are replete with errors, even if the errors are completely unrelated to the standard of care at issue.

The justice system is largely the only resource for people injured by their doctors’ treatment. Medical malpractice litigation may become less prevalent eventually if a uniform system of error disclosure and evaluation is developed and utilized, with an accompanying rule prohibiting the use of such information in litigation or settlement. But until the medical community can effectively elicit honest disclosure from its practitioners, injured plaintiffs will continue to use the adversary system to achieve, to the degree possible, justice.

Without malpractice litigation, medical

Academy Awards

The medical community has, over time, developed a highly cynical attitude about the process of litigating medical malpractice lawsuits. Cases? Fraudulent. Lawyers? Ambulance chasers. Plaintiffs? Deserving of Academy Awards, not jury awards.

The goal of medical malpractice liability has never been to drive good doctors out of practice. The culture of medical malpractice litigation has developed, over time, as a means of addressing a number of shortcomings inherent in the American medical system as it currently exists.

Although doctors occasionally make mistakes, the medical community has historically remained conspicuously silent on its own fallibility. That silence was well chronicled in the Institute of Medicine’s 1999 report *To Err Is Human*. The vast majority of the medical community quietly endorses the abiding belief that medical errors should not be disclosed for fear that disclosure will be met with lawsuits. The unintended result of this secrecy is that, to bring medical errors to light, victims must sue the perpetrators. Medical malpractice litigation forces careless doctors to acknowledge publicly their mistakes and the effects thereof.

mistakes are likely to be unreported and subsequently repeated. When doctors don’t discuss errors, the errors never become part of an institutional conversation about quality assurance or improvement. Patient safety can’t take precedence as long as quality of care is sacrificed to individual doctors’ reputations and/or egos. Nurses at a hospital, for example, may repeatedly make the same prescription-dispensing mistake because of a systemic deficiency in the pharmaceutical dispensation method used at the hospital. Without an institutional means of error disclosure and examination, however, the common causes of errors can’t be discovered and corrected, and new patients will become victims of avoidable errors.

Medical malpractice litigation also supplants health insurance coverage for medical care. The more severe the injury, the less likely it is that the entire cost of care will be borne by health insurance companies. Naturally, plaintiffs and their kin seek additional funds to offset the high cost of care. Plaintiffs who suffer severe injuries can require round-the-clock care, which can be prohibitively expensive. Plaintiffs and their families often are motivated to sue by fear that they’ll run out of money to fund continuing and