The Myths of Medical Malpractice
Faculty

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Learning Objectives

1) Understand the elements of a malpractice case

2) Understand the limitations of clinicians’ beliefs regarding the malpractice process (ie, the myths)

3) Understand the reason that patients tend to sue, and how to avoid these pitfalls

4) Recognize the symptoms of medical malpractice stress syndrome and the strategies to combat these symptoms
What Is Medical Malpractice?

- Negligence committed by a medical professional

- Elements necessary to prove actionable negligence in a malpractice case
  - Duty to care (standard of care?)
  - Breach of that duty
  - Damages occurred which are proximately caused by the breach of duty
• Likelihood of lawsuit varies somewhat based upon specialty, ranging from 2.5%-19% annually
  
  – A recent study demonstrated that 1 in 14 physicians will be sued annually

• Approximately 75%-85% will have a suit filed during their practice lifetime

• Despite the volume of lawsuits filed, aggrieved patients only win ~22% of the time

1. Medical malpractice lawsuits are extremely stressful.
2. The allegation of medical malpractice may be extremely traumatic to the accused physician.
3. The primary manifestations of medical malpractice stress syndrome are psychological symptoms (e.g., acute or chronic anxiety and depression), and the secondary manifestations are physical symptoms.
4. The accused physician must acknowledge that he or she may be suffering from a medical malpractice stress syndrome.
5. The distressed physician should seek support, understanding, and comfort from immediate family members, close friends, defense counsel, and professional colleagues.
6. The physician needs help to acknowledge and address the fears of medical malpractice stress.
7. The accused physician must continually be reminded that being sued for medical negligence is a predictable hazard of medical practice in our times.
8. Education of the sued physician about medical malpractice stress is the key to dealing with the fear of litigation.

Why Do Patients File?

- *Communication*, or lack thereof, is at the core of most suits
- Angry patients and families are the ones who sue
- Patients who have received excellent communication about their conditions, and the risks and benefits of treatments vs non-treatment (opting out), are seldom if ever disappointed with their medical care

Even when a bad outcome occurs, patients and families are grateful for the efforts on their behalf, and for honest and open communication.

When errors occur, acknowledge and apologize:
- There's a growing body of knowledge about hospitals adopting a culture of apology, assuming less defensive postures.
- Early experience indicates there is greater satisfaction on both sides with this practice.

So What Happens?

- Author Malcolm Gladwell helps to explain the reasons in his book, *Blink*:

  “The overwhelming number of people who suffer an injury due to the negligence of a doctor never file a malpractice suit at all. Patients don’t file lawsuits because they’ve been harmed by shoddy medical care. **Patients file lawsuits because they’ve been harmed by shoddy medical care – and something else happens to them.**”

So, let’s dig deeper into the necessary elements for a successful malpractice claim...
Duty to Care

• The patient-clinician relationship
  – When does it begin?
  – What does it mean to you?

• A strong relationship between the doctor and patient will lead to frequent, quality information about the patient's disease. Enhancing the accuracy of the diagnosis and increasing the patient's knowledge about the disease all come with a good relationship.

• Where such a relationship is poor, the physician's ability to make a full assessment is compromised and the patient is more likely to distrust the diagnosis and proposed treatment, causing decreased compliance to actually follow the medical advice.
Breach of Duty

• Failure to perform to the level of the standard of care for that geographic area

• How is that standard determined? Is it open to interpretation?
Damages

- Injury (physical, emotional, or both) as a consequence of a breach of the standard of care
- Residual disability
- Lost wages
- Direct and indirect healthcare costs
Proximate Cause?

- Defined as: “Damages or injuries that are caused by the alleged negligence that would not have been suffered but for the breach of duty.”

- *If* the injury still would have potentially occurred despite the alleged malpractice, no valid claim exists… except…

Who Determines Proximate Cause?

- Proximate cause is often determined by clinicians who are contracted for case review.

- **Perfect World** vs **Real World**
Are There Safeguards?

- Yes, technically (but realistically, no)

- Many states have adopted laws that require plaintiffs to obtain, prior to filing a malpractice suit, a “certificate of merit” from a physician with knowledge of the standard of care in that area stating that the defendants were likely negligent in treating the plaintiff

- The gray area: Who makes that choice?
So, What Do We Believe about Malpractice?

- It requires a legitimate error or complaint of negligence to come to fruition
  - “My patients love me…”

- Document! Document!! Document!!!
  - Documentation protects you…
  - But is that true?
Myths of Practice and Malpractice

• Documentation
  – Does not always protect you and can indeed hurt you

• Value of tort reform
  – Do lawsuits truly increase the cost of care?

• Physicians are one malpractice verdict away from bankruptcy
  – Realistic consequences?
Realistic Tort Reform?

• Much of the reasoning behind tort reform derives from the notion that medical malpractice lawsuits are one of the biggest drivers of high medical costs.

• However, a study published by the Congressional Budget Office in 2009 concluded that limiting malpractice liability would limit healthcare spending in the US by just half of 1 percent.

• Still, fear of being sued has led many doctors to practice what is called "defensive medicine," the act of ordering extra tests and using expensive imaging devices in order to provide a defense for any possible lawsuit by the patient.

Can both help you and hurt you
  - The danger of EMR!!!
  - You have to change your expectation

A malpractice case is not about “absolute truth”
  - Rather, it is whose truth is more likely

EMR = Electronic Medical Records
“And, while there’s no reason yet to panic, I think it only prudent that we make preparations to panic.”
• 18 months later she presented to an outside facility with a draining wound

• She was diagnosed with osteomyelitis and was told it was likely from my surgery

• Her case was “certified” as legitimate by the treating physician who indicated that my care had been negligent

• The medical record did not support any of these findings – the presence of osteomyelitis, the allegation of a chronic wound, nor any allegations of negligence
So, We Go to Trial...
DOES ANYONE KNOW WHERE WE KEEP THE UNWRITTEN RULES?
• Expert vs expert
  - Which “interpretation” of the record was most accurate and believable to the jury?
    - Pathology reports that say one thing being used to say something else
    - “Depends on what the definition of ‘is’ is”

• Standard of Care?
  - What IS the standard of care? Custom orthotics?
  - Depends on who’s paying you, it would seem...

• Resolution?
  - A Pyrrhic victory
So, What Can We Do?

• DOCUMENT! DOCUMENT!! DOCUMENT!!!
  – It may not save you, but it can absolutely harm you if your documentation is poor

• Consider how you interact with the patients
  – Especially how that interaction will be perceived by them
  – Their version of reality is all that will matter prior to the lawsuit
• In a landmark 1997 study, researchers recorded hundreds of conversations between a group of physicians and their patients.

• Half of the doctors had never been sued, and the other half had been sued at least twice.

• The study authors found that, just on the basis of those recorded conversations alone, they could find clear differences between the two groups.
The doctors who had never been sued spent more than three minutes longer with each patient than those who had been sued did (18.3 minutes vs 15 minutes).

They were more likely to make “orienting” comments, such as “First I’ll examine you, and then we will talk the problem over,” or “I will leave time for your questions.”

They were more likely to engage in active listening, saying things such as “Go on, tell me more about that.”

They were far more likely to laugh and be funny during the visit.

Levinson reported **no difference in the amount or quality of information** doctors gave their patients; the never-sued doctors didn’t provide more details about medication or the patient’s condition.

*The difference was entirely in how they talked to their patients*
In Conclusion

• The threat of legal action is a reality that we will all likely face

• It is demoralizing, embarrassing, and frustrating
  – It is not fair
  – It never will be - it is not designed to be
  – You must overcome the process
In Conclusion

• You can overcome but it requires effort
  – Be mindful of medical malpractice stress syndrome (MMSS)
    • Significant social support mechanisms
  – Seek help
  – You are not alone
  – What you are feeling is completely normal

• Never give up
  – A suit does not define you
  – A loss does not define you
Sources