

Facing Malpractice, Playbook for the Malpractice-Naïve Physician

Susan B. Orr, Esquire
Dilworth Paxson, LLP

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Disclosures

- I have no financial interests or relationships to disclose.

Learning Objectives

- Know and understand the elements of a malpractice suit an injured patient must demonstrate.
- Recognize common errors that lead to a malpractice suit.
- Know how to avoid a malpractice suit.

What type of Professional Liability Insurance do you have?

- Occurrence: The Best, but more expensive! The policy in place when the event occurs will handle the claim
- Claims-made: The policy in place when a malpractice claim is filed will handle the claim.
- Tail coverage: Must be purchased if the claims made policy is no longer in effect.
 - Occurs when you change jobs
 - Important to negotiate this in your contract

PA Medical Care Availability and Reduction of Error (MCARE) Act– Act 13 (2002)

- Established Patient Safety Authority/Trust Fund
- Informed Consent
- Damages
- Expert Qualifications
- Medical Records – preservation and accuracy

Recent Changes

- The Pa Supreme Court eliminated venue carve outs effective January 1, 2023
 - Prior to 1/1/23, Plaintiff limited to filing a claim only in the county where the event occurred
 - After 1/1/23, Plaintiff can file in any county where:
 - Medical care in question occurred
 - The defendant could be subject to service of process
 - The transaction or occurrence that gave rise to the action took place

So what is malpractice?

- A form of Negligence
 - Conduct that falls below the standard of care
 - Liability occurs regardless of whether the actions were intentional or unintentional



Elements of a Malpractice Case

- In order to prevail, a plaintiff must prove all 4 elements:
 - Duty to the patient
 - Negligence or Breach of that duty
 - Causation/Injury
 - Damages



Duty

- Occurs whenever a physician undertakes the care or treatment of a patient
- The standard of care i.e. what a reasonably prudent physician in the same circumstances would provide
- What is the standard of care?
 - Medical Practice Act
 - National treatment guidelines
 - Institutional protocols/guidelines
 - Expert testimony



Breach of that Duty

- The Locality Rule vs National Standard:
 - Pennsylvania Standard:
 - A physician must have the same knowledge and skill and use the same care normally used in the medical profession. A physician who falls below this standard of care is negligent” (PA Supreme Court)
 - If board certified, national standards are used as the benchmark
 - May use an expert witness to show duty and breach

Injury/Causation

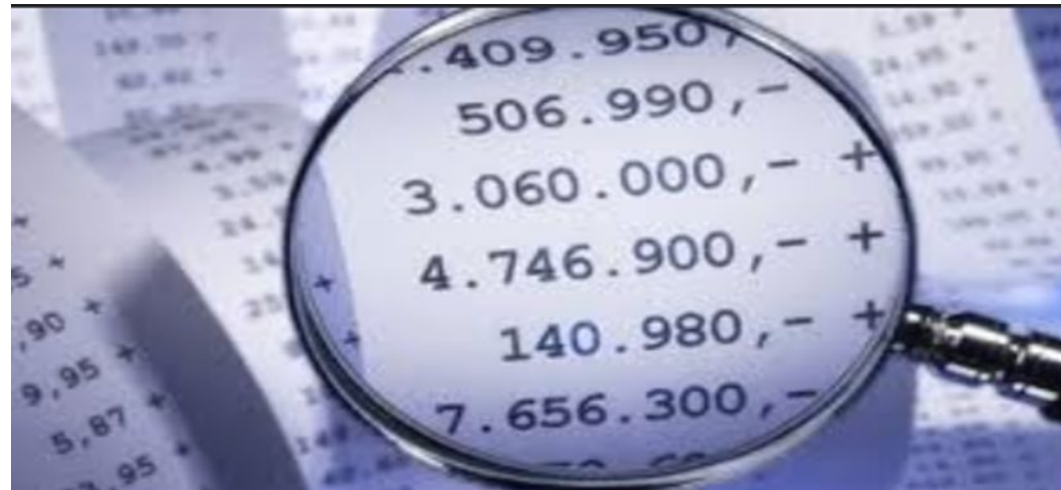
- “But for” test
 - but for the physician’s actions, injury would not have occurred
- Foreseeable – the injury was a result of the physician’s actions and the injury was foreseeable before the injury occurred
- The breach of duty must be the cause of the injury
 - Ex: Physician orders Gabapentin for the wrong patient, patient has an MI. To prevail, must show that the Gabapentin caused the MI
- Some injury must occur, demonstrated by:
 - Medical bills
 - Expert testimony
 - Direct evidence of pain and suffering

Damages

- Without damages (either physical or emotional) – there is no basis for a claim, regardless of whether the physician was negligent
 - Ex: A patient is given another patient's anti-hypertensive medication and experiences a slight drop in blood pressure. No intervention occurred or hospital stay, so no damages.

Let's look at some numbers

- In 2021, there were 1,460 malpractice filings
- Reduction of 46.6 % from the average 2000-2002



What Specialties are Most at Risk?

<u>Specialty</u>	<u>% Sued During Career</u>
■ OB/GYNs	62.4
■ General surgeons	59.3
■ Orthopedic surgeons	47.2
■ Emergency physicians	46.8
■ Radiologists	40.2
■ Otolaryngologists	39.3
■ Urologists	38.3
■ Cardiologists	32.1
■ Family Practitioners	32.0
■ General Internal Medicine	30.0

Most Common Errors

- Surgical
- Medication
- Medical



Malpractice Claims

Surgical Errors

- 200 million surgical procedures performed each year, with over 4000 errors occurring
 - Administering wrong medication or dosage
 - Anesthesia
 - Surgical site infections – failure to follow hygiene/disinfection
 - Performing the wrong procedure or a procedure on the wrong patient
 - Equipment failure – not properly trained, failed to use necessary equipment, equipment failure
 - Foreign object left in patient
 - Poor communication leading to a mistake
 - Causing nerve damage, hemorrhage or excessive bleeding

Medical Errors

- 21% of people have experienced medical errors
 - Poor aftercare
 - Inappropriate treatment
 - Misdiagnosis (cancer, vascular events, infections)
 - Delayed Diagnosis
 - Premature discharge from hospitals
 - Failure to order proper tests
 - Failure to respond to test results
 - Faulty interpretation of test results

Medication Errors

- 7,000-9,000 individuals die due to medication errors each year
- 8th leading cause of death
 - Dispensing an incorrect medication
 - Dosage strength or dosage form
 - Miscalculating a dose
 - Failing to identify drug interactions or contraindications
 - Drugs with similar looking names
 - Patient misuse due to poor understanding of directions for use

Ways to avoid a Malpractice Claim

- Patient Care and Diagnosis
- Referring patients
- Communication
- Documentation



Patient care and diagnosis

- Practice good medicine
- See the patient
- Respond quickly to medical emergencies
- Know the community standards
- Review and interpret test results on a timely basis
- Always think of the worst case scenario
- Never skip monitoring vital signs
- Follow treatment guidelines

Referring Patients

- Involve consultants when needed
- Explain what you want from the consultant and document the exchange
- Midlevel providers work under a physician's license. If you supervise MLP, you are responsible for their treatment of a patient.



Communications

- Talk to your patient and their families
- Explain what you are doing and why
- Follow-up with consultants – know what consultants are doing
- Obtain patient records from prior physician, consultant, hospital stays



Documentation

- Timely charting
- Do not cut and paste
- Record all patient interactions by you and staff, including phone calls
- Review all templates and make sure they detail what you did for a patient
- Correctly document the encounter
- Pay attention to medication alerts

What should I do if I am sued?

- Inform your malpractice carrier immediately
- Research your attorney options
- Be open and honest with your attorney and follow their advice
- DO NOT CHANGE ANY INFORMATION IN THE PATIENT RECORDS
- Don't panic!



Statute of Limitations/Statute of Repose

■ Statute of Limitations

- Claim must be filed within 2 years from the date of discovery
- “Discovery”- when cause of injury actually discovered or should have been discovered (reasonable person standard)
- Exceptions:
 - Minors – must file within 2 years after 18th birthday
 - Fraudulent concealment – patient notices a problem and physician assures the patient there is no problem

■ Statute of Repose

- Claim must be filed within 7 years from the date the event occurred
- Not applicable for claims involving foreign object left in patient by surgeon

Final Statistics

- Doctors won 77% of the medical malpractice cases that went to a jury trial.
- Only 7% of medical malpractice lawsuits are decided by a jury
- An estimated 93% of malpractice cases are resolved outside of court before trials occur.

Certificate of Merit

- All medical malpractice claims must be supported by a certificate of merit
- Signed by a “qualified expert” who has reviewed the plaintiff’s case and provided a written opinion indicating that the defendant’s conduct did not meet the accepted medical standard of care
- Must be filed by plaintiff’s attorney within 60 days of initial filing or claim is dismissed

Q&A
Thank you!

