

Legal Medicine: Avoidance of Lawsuits

Ben Taylor, PhD,
PA-C, DFAAPA



Disclosures

No relevant commercial relationships to disclose



Objectives

- Restate tips that help you avoid malpractice cases
- Recognize tips that help win or guarantee losing the case
- Review documentation “Do’s and Don’ts”
- Coping with post-litigation emotional scars



Mr. X

- On a late Friday afternoon, Mr. X, presented to an urgent care facility for care. He was seen by the PA who took the following history:
 - He had been having abdominal pain for the preceding 4–5 days, with diarrhea and vomiting for three days. He was thirsty, supplementing his diet with milkshakes and smoothies only. The night prior to presentation, he awoke somewhat disoriented and diaphoretic, which his spouse assumed was a bad dream. On the day of presentation, the patient admits to becoming progressively weak and sleepy.
 - Review of systems was notable for mild polydipsia, some nocturia over the past few nights, no fevers, and no myalgia.



Mr. X - Conti

Vital signs were as follows: heart rate 159 bpm, respiratory rate of 20 breaths per minute, and temperature of 99.4°F (40.2°C). Blood pressure was 102/67mm Hg. Weight was 165 kg, and BMI was 60.5.

Pupils were equal and responsive to light. Mucus membranes were dry. The neck was supple with no jugular venous distension. There were no decreased breath sounds and cardiac examination was consistent with sinus tachycardia and no murmurs. Pedal pulses were minimally palpable. Abdomen was obese, soft and non-distended, with no hepatosplenomegaly. Striae were present on the flanks.



Mr. X - Conti.

- The PA ordered an EKG, urine, and bloodwork, but since it would cost extra for this work-up, Mr. X declined the EKG and wanted to have the blood drawn at a local lab that was covered under his healthcare plan (it was not covered at the urgent care center). The PA explained to him that he should at least have a fingerstick performed but again, Mr. X declined as there was no history of Diabetes in his family. Mr. X did consent to a urinalysis.



Urinalysis Results

Test	Results	Flag	Reference Range
Color	Dark Amber		Yellow
Appearance	Turbid		Clear
Spec. Gravity	1.035		1.005-1.030
Ph	7.3		5.0-8.0
Protein	Negative		Negative
Glucose	4+	H	Negative
Blood	3+	H	Negative
Ketones	Negative	*	Negative
Nitrite	Positive	*	Negative
Bilirubin	Negative		Negative
Leuk Esterase	2+	*	Negative
Bacteria	25-50 WBC's	H	None



Mr. X - Conti

- The PA informed Mr. X of the results and informed him that he needed to go to the ER since he could have something more serious and their labwork would be available right away. Mr. X refused and stated that he has had UTI's in the past and just needed abx. Again, the PA tried to convince him to have more labwork in the office or go to the ER. He refused again and just wanted the slips to get the labwork done. The PA acquiesced and gave Mr. X a lab request that he was to take to his lab. He left angry and the PA left for the day.



Lab Results

Test	Patient's Results	Flag	Reference Interval
Na+	107	C**	134–144 mEq/L
K+	.1	L	3.5–5.1 mEq/L
CL	68	L	96–108 mEq/L
TCO2	13	L	22–30 mEq/L
Anion Gap	26	H	4–14
BUN	32	H	7–18 mg/dL
Creatinine	3.2	H	0.8–1.2 mg/dL
Glucose	>2100	C**	65–110 mg/dL
C-Peptide	1.1		0.9–7.1 ng/mL
Ionized Ca2	0.72		1.12–1.32 mmol/L
Hbg A1C	12.4	H	4.4–6.4%
Lactic Acid	9	C**	0.2–2.0 mmol/L
Lipase	1485	H	8–57 units/L
Amylase	809	H	25–115 units/L



Mr. X - Conti

The lab results were faxed back to the clinic the next day (Saturday) but the clinic was closed. The lab was later quoted as saying they attempted to contact the clinic about the results. They did not attempt to contact the patient.

Over the weekend, Mr. X's son continued to bring him milkshakes and smoothies as he stayed nauseated, but no vomiting. On Monday morning, Mrs. X stated Mr. X got up to go to the bathroom and passed out. She immediately called 911 and Mr. X was taken to a local ER where he was pronounced DOA. His glucose level upon labs drawn in the ER was 3122.

Mrs. X consulted an attorney, and a lawsuit was filed.



What Should the PA have Done?

- Monday morning quarterbacking
- Think about what you would have done
- How many can honestly say they have acquiesced to patient's demands?
 - What if those demands resulted in a lawsuit such as this?



How would you Feel?

- Individuals confronting the litigation process should expect to feel:
 - angry
 - hurt
 - disappointed
 - disillusioned
 - isolated, frustrated, vulnerable, and unjustly singled out.
 - depressed



Questions

- Who is at fault in this case (e.g., the lab, the PA, the collaborating doctor, the clinic, etc.)?
- How much blame does the family shoulder in this incident?
- What actions if any should be taken against the party at fault in this case?
- What could be done to prevent this type of medical error from happening in the future?
- If you were a member of the jury how would you vote in assigning blame for the error?



The Verdict

The jury returned with a verdict for the defense.



Anatomy of a Lawsuit

- We live in a litigious society
 - Assume each chart you touch is going to end up in a lawsuit
 - **YOUR** documentation is the **ONE** thing you can control



Definition

- **Medical malpractice** is an act or omission by a health care provider which deviates from accepted standards of practice in the medical community and which causes injury to the patient.
 - Simply put, medical malpractice is professional negligence (by a healthcare provider) that causes an injury.



**Is a bad outcome always
malpractice?**

Answer:

Not Always



Is an unintentional mistake malpractice?

Answer:

YES



The Good News/Bad News: Filing of Malpractice Cases are Rare

- 1 in 8 who suffer from an adverse event due to negligence file a medical malpractice claim and only 1 in 15 received compensation
- Most adverse events resulted in only minimal and transient disability and most of the patients' medical care expenses were paid for by health insurance.



Why Do Some Patients Sue While Other Do Not?

- How you view things counts but how the patient views it is what ultimately matters.



Legal Reasons Used for Lawsuits

Failure to diagnose/delayed diagnosis	33%	Abnormal injury	11%
Complications from Treatment/surgery	29%	Poor documentation of patient instructions/education	4%
Poor outcome/disease progression	26%	Errors in medication administration	3%
Failure to treat/delayed treatment	18%	Failure to follow safety procedures	2%
Wrongful death	16%	Improperly obtaining/lack of informed consent	1%
		Other	11%



A little Background about Lawsuits

- Diseases Associated With Medical Malpractice
- The top five diseases that receive monetary awards for malpractice, in terms of dollar value, are:
 - **Breast cancer**
 - **Lung cancer**
 - **Colonrectal cancer**
 - **MI**
 - **Appendicitis**



The 5 Most Common Types of Medical Malpractice Lawsuits

1. **Misdiagnosis**. Failure to diagnose an illness is a common medical mistake. The most commonly misdiagnosed conditions are heart attack and cancer.
2. **Surgical errors**. left tools or sponges inside the body during surgery, operating on the wrong side or site or even performed on the wrong patient.
3. **Failure to treat**. This error occurs when a provider correctly diagnoses a condition, but then fails to treat it in accordance with the acceptable standard of care for that condition. Discharging a patient too soon (ER), or the lack of follow up care.
4. **Birth injuries**. A large portion of medical malpractice claims are against OBGYNs for childbirth-related medical mistakes. Shoulder dystocia or other nerve damage, spinal cord injuries, cerebral palsy and cephalohematoma are common birth injuries that have been caused by medical errors.
5. **Prescription drug errors**. Providers make errors in prescribing the wrong medication, incorrect dosing and administration of prescription drugs. Other errors include prescribing drugs that can cause drug interactions in the patient



A plaintiff must establish all four of the following elements, for a successful medical malpractice claim.



1. A Duty was Owed

- A legal duty exists whenever a hospital or health care provider undertakes care or treatment of a patient.
- A duty is simply a legal obligation



2. A Duty was Breached

- The provider failed to conform to the relevant standard of care. The standard of care is proved by expert testimony or by obvious errors (the doctrine of *res ipsa loquitor*).



3. The Breach Caused an Injury

- The breach of duty was a proximate cause of the injury.



4. Damages

Without damages (losses which may be pecuniary or emotional), there is no basis for a claim, regardless of whether the medical provider was negligent.



For the plaintiff to win a case, the jury must find the deviation from the standard of care is the proximate cause of the patient's injuries.

Proximate cause=directly causing injury

No Harm—No Foul



What Should You Do if Sued?

- Talk to risk [management]
- Get professional help
- Talk with Attending MD
- Participate actively in your defense
- Prepare for either outcome
- Learn from the experience
- Educate your patients
- Take care of yourself!



Documentation Problems, Do's and Don'ts



If Involved in a Bad Outcome or Incident: DO NOT

- Rewrite medical record (spoliation)
- Admit mistake or error - instead, state facts objectively
- Lie or distort
- Discuss with colleagues or friends
- Write personal notes or diary



If Involved in a Bad Outcome or Incident—DO:

- Report to supervising physician
- Be objective and careful in preparing documentation—charting or occurrence report



The Hospital Chart is the most important evidence in a medical malpractice lawsuit.



Why?

Because the medical record is the clearest, strongest and most persuasive evidence which will reflect what you saw, knew, heard, thought and did.



Why is it Important?

- Deposition – where you are questioned about care, may not happen until **2-3 years or more** after the care
- If it's charted – It happened
- If it's not charted – **It DIDN'T HAPPEN**



Do's & Don'ts of Documentation



Do:

- Make only objective statements
- Document all supervisor notifications/interactions
- Follow up negative findings with positive action
- Write legibly (if paper-charting)
- Be complete
- Be specific



Do:

- Be Complete
 - Significant information
 - When dealing with a high-risk area's, be especially careful to document a full history and exam, the thought processes behind your diagnosis and a clear plan.
 - Atypical Treatments
 - Unusual Occurrences
- Chart a differential diagnosis
- Chart a medical rationale for difficult presentations



Do NOT:

- Obliterate or erase entries (spoliation)
 - **Tampering can be fatal to a case**
 - Could cover up evidence that might have helped
 - Expert witnesses detect this easily
 - Destroys credibility



Do Not:

- Never, under any circumstances, succumb to the temptation to make additions to the chart after a suit is threatened or filed against you in an attempt to make your alterations appear to have been made at the time of the original note. Such alterations are dishonest and unethical.



Do Not:

- **Avoid editorial comments about patients.**
 - Unless they are medically necessary to improve care, don't make editorial comments. Writing in a chart "loud and obnoxious 43-year-old male" does nothing to improve the patient's care. It may be used to portray you as an intolerant provider who shortchanged a patient due to a personality conflict.



Do NOT:

- Make extraneous remarks and/or joust



Do NOT:

- Explain away mistakes
- Refer to patient's insurance status
- Cut and paste from previous notes



Know your Case

- You should be an expert about your case and the associated medical literature by the time of your trial.
 - You may have to educate your attorney
 - You will need to be a knowledgeable witness for the jury in your defense
 - Remember that **NO** medical literature is authoritative or even totally reliable. It is merely a reference.



Know the Medical Record

- You need to be the most knowledgeable person in the case regarding the record
- Jury equates your knowledge and concern with the details with your care and concern for the patient



Discovery

- Once the complaint has been filed and all involved parties notified of the lawsuit, both sides will begin the process of discovery. During discovery, both sides will request information, evidence and related documentation from the other in an attempt to gather the facts and build their respective cases.
- This is the period where the defense and plaintiffs will hire expert medical witness to consult on the case and to advise on the merits of the medical negligence complaint.



Negotiating a Settlement

- If it is established, through the discovery period and medical expert opinion, that the case has merit, then the defense will likely begin their attempts to settle the case out of court.
- Defense attorneys represent the medical malpractice insurance provider and will do their best to minimize the amount of money that their client will have to pay out for the lawsuit. Additionally, they will try to avoid having to go to trial due to the cost of doing so.
- The plaintiff's medical malpractice lawyer will consider the strength of the case when determining an appropriate settlement amount. If the defense attorneys do not offer a reasonable settlement, then a good medical malpractice attorney would take the case to trial.



Why Settle?

- Over 90% of medical malpractice cases settle out of court.
 - Neither side wants to go to court, because it is expensive and time-consuming.



The Deposition

- Plaintiff lawyer is not your friend
- Never volunteer answers
- Understand the question
- Listen to your lawyer's objections
- Never guess
- **NEVER** place blame on someone else
- Arguing with opposing counsel
- Stay consistent with your answers



The Trial

- Jurors will hear testimony from experts on the standard of care and whether that standard was violated.
- Very often, blow-ups of the medical record and anatomical renderings are used to help the jury understand what happened and why.
- You will be called to testify. Both lawyers will ask questions of you
 - Goal of the plaintiff lawyer is to get you to say something that you did not say or changed during your deposition.



Coping with Post-Litigation Emotional Scars

- The most widely published expert on the topic, Sara Charles, MD, has found that more than 95% of sued physicians acknowledge some physical and/or emotional reaction.



Will this impact me Professionally?

- Being named in a medical malpractice suit can have other professional consequences. Since 1986, any entity making payments in settlement of a malpractice claim (unless the payment is made by the physician on his own behalf) must report the provider and case details to the National Practitioner Data Bank (NPDB).



Take Home Points

- Elderly patients will present with unusual, atypical, or abnormal symptoms—That is the rule, not the exception!
 - 70-year-old male with back pain is not always arthritis
- Don't relying so heavily on tests!
 - 50 y/o male in ED c/o atypical chest pain. You get an EKG and cardiac markers which are normal.
 - What do you rely on: your H & P or the tests?



Other Points

- Avoid 'hanging hat' on unreliable diagnostic maneuvers or those with poor sensitivity!
 - GI cocktails, reproducible chest pain
 - Kernig's, Brudzinski, nuchal rigidity



References

For more information:

1. <https://aapalm.org>
2. <https://www.forthpeople.com/blog/medical-malpractice-dos-and-donts-proving-your-case/>

