A Primer to Understanding the Elements of Medical Malpractice

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Semin Intervent Radiol 2019;36:117–119

Abstract

Keywords

- medical malpractice
- medical error
- medical complications
- litigation
- interventional radiology

According to a 2017 survey of 4,000 physicians across 25 different specialties in the United States, 55% of respondents report having been sued at least once, with nearly half of them having been sued multiple times. In addition, procedural specialists are far more likely to be sued. As a procedural-driven specialty, interventional radiology (IR) practitioners are subject to these statistics. While the focus of all IR practices is providing the highest quality care safely and efficiently, medical errors and complications are unavoidable. Understanding the process of medical malpractice litigation is necessary to develop strategies on how best to avoid and mitigate the hardships of the process.

According to a 2017 survey of 4,000 physicians across 25 different specialties in the United States, 55% of respondents report having been sued at least once, with nearly half of them having been sued multiple times. Procedural specialists are far more likely to be sued, and nearly 40% of physicians who were sued took 3 to 5 years to litigate the case.¹ As a procedural-driven specialty, interventional radiology (IR) practitioners are subject to these frankly depressing statistics. While the focus of all IR practices is providing the highest quality care safely and efficiently, medical errors and complications are unavoidable. Understanding the process of medical malpractice litigation is necessary to develop strategies on how best to avoid and mitigate the hardships of the process.

It is difficult to imagine being the target of a former patient by which a claim of malpractice is alleged. Potential side effects as a result of being named a malpractice defendant include anxiety, helplessness, and humiliation to name a view. A deeply emotional response is common and understandable, given the recriminations and cognitive dissonance that is often associated with malpractice litigation: I tried my best to help someone, and now they want to harm me? It is hard to relate to these feelings without having firsthand knowledge.

The Standard of Care

It is important to adhere to the standard of care. It is also important to understand how the standard of care is defined in legal terms for any given patient, with any particular stage of disease, in any hospital setting. The standard of care is generally defined as the level of care that a qualified, careful physician would do under the same or similar circumstances. Several years ago, the standard of care included consideration of geographic location; for example, creation of a transjugular intrahepatic portosystemic shunt (TIPS) in a high-volume academic liver transplant center or an 80-bed rural community hospital mattered in legal terms. However, now the standard of care definition is a nationwide standard: it makes no difference who created the TIPS, or which type of facility, or where. Standards of care are not determined by evidenced-based medicine, or published phase 1 clinical trials, or key opinion leaders. Rather, the standard of care is largely defined by your own peers who are comparable in training and education and who are faced with the same or similar clinical scenario. In a malpractice case, the standard of care will be defined for the jury by the expert witnesses who will testify for the defendant and plaintiff, respectively.

Issue Theme Management of
Complications in IR; Guest Editor, Robert
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Publishers, Inc., 333 Seventh Avenue,
New York, NY 10001, USA.
Tel: +1(212) 584-4662.

DOI <https://doi.org/10.1055/s-0039-1688425>.
ISSN 0739-9529.

Medicolegal “Nuts and Bolts”

The vast majority of medical malpractice lawsuits are filed in state court, as opposed to federal court. If the defendant physician is an employee of the federal government, other avenues to resolve the dispute exist outside of state court. Having established the legal venue, this review aims to identify the common elements that must be alleged and proven to succeed against an interventional radiologist.

There are generally two classifications of parties to a medical malpractice suit. First, the patient who seeks compensatory damages from an IR is known as a plaintiff. The IR from whom the plaintiff seeks damages is the defendant. In some instances, multiple defendant medical providers are named where the plaintiff uses the “shotgun” approach, where the plaintiff will name any and all potential individuals, institutions, or business entities who may or may not have played a direct or indirect role in the care of the patient during the time the alleged injury occurred. As information about the incident is uncovered (during a phase of the process called “Discovery”), certain individuals, institutions, or entities may be removed from the legal complaint. This often prompts a deep sigh of relief from the IR who is removed from a malpractice case. Unfortunately, this process can take months to years, during which time the IR is subject to the intense anxiety that comes with being party to a malpractice case.

All malpractice cases are composed of four elements that must be alleged and proved: (1) the IR owed a duty to the patient, (2) a breach of the duty occurs, (3) the breach is a cause of an injury that is compensable, and (4) the patient actually suffers an injury.

In order for an IR to owe a duty to a patient, it first requires that the IR possess and use the knowledge, skill, and care ordinarily used by a reasonably careful IR under the same or similar circumstance. For example, where an IR agrees to place a tunneled dialysis catheter in a patient with renal failure, the IR owes a duty to the patient to place the tunneled catheter as a reasonably careful interventional radiologist.

It is important to understand how “duty” is defined and how published documents can impact the legal interpretation. Clinical guidelines or practice parameters that are published by medical associations or societies may be viewed as an authority for the method of how the procedure is performed or upon which patients the procedure is efficacious. The substantive content of any particular society’s guidelines may serve as additional evidence of a duty.

The Society of Interventional Radiology and other specialty medical organizations attempt to protect its members with the preamble contained within its *Practice Parameter*²:

This document is an educational tool designed to assist practitioners in providing appropriate radiologic care for patients. Practice Parameters and Technical Standards are not inflexible rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care.

Some courts have held that published standards or guidelines of specialty organizations are useful in determining the

duty owed or the standard of care applicable in a given situation.

A breach of duty occurs when the defendant fails to do something a reasonably well-qualified interventional radiologist would do, or does something that a reasonably well-qualified defendant would refrain from doing. Expert testimony presented by the plaintiff is essential to prove both a duty to the patient and that a breach has occurred. In the example earlier, a breach of the applicable duty may occur if there was inadvertent perforation of the superior vena cava during placement of the tunneled dialysis catheter.

Once the plaintiff proves the first two elements, a duty to the patient and a breach of that duty, the plaintiff must establish that the negligent act caused an actual injury. This element is the most troubling and legally challenging as the defendant’s counsel may have knowledge of multiple other potential causes for the patient’s injury or death. In the example above, is it possible that a vascular injury could have happened previously, or was not actually related to the dialysis catheter placement? Were there existing conditions that predisposed the patient to the injury may or may not have occurred as a result of the procedure?

The Aftermath

If it is determined that the plaintiff did suffer an injury due to a breach in duty owed, the plaintiff is entitled to damages, usually defined as a sum of money. To calculate the total amount of damages, the jury receives instructions to estimate how much the plaintiff is entitled to for (1) pain and suffering and (2) disfigurement. The plaintiff is also entitled to reimbursement for medical expenses incurred after the injury, as well as lost wages (including consideration of a 3% cost of living adjustment per annual year).

The damages become substantially higher in cases where the plaintiff dies as a result of the injury. Damages would be calculated by accountant retained by the plaintiff who estimates the wages lost over the plaintiff’s expected lifetime, up to retirement at the age. The calculated damages amount will include a value for loss of consortium, related to the deceased plaintiff’s spouse and children under the age of 18 years.

Some states have a \$250,000 cap on the amount of damages for pain and suffering as well as disfigurement. For example, the state of Illinois no longer has a cap on pain and suffering damages. It is important to know whether your state has caps or not since that will specifically dictate how much malpractice insurance coverage you should carry.

Mitigating Risk

To mitigate the medical malpractice risk, an IR should obtain an appropriate level of insurance. Consideration of the jurisdiction in which the physician practices should provide some guidance as to the amount of insurance coverage. If that jurisdiction lacks a cap on noneconomic damages (such as pain and suffering or disfigurement), one should consider greater than \$2,000,000.00 in coverage per occurrence. If the

damages exceed the amount of malpractice insurance coverage, the IR physician is personally responsible for any excess sum owed to the plaintiff. All assets that are not contained within certain trusts, with the exception of some retirement or pension accounts, are subject to seizure. However, this process is state dependent. Consultation with an experienced attorney who specializes in trusts is recommended.

Direct and transparent communication with the patient and family about complications and medical errors has been shown to decrease the incidence of malpractice litigation. "Apology" laws exist in 36 U.S. states, which mandate that when a physician states "I'm sorry," it is not admissible as a statement of guilt or culpability in a court of law. A sincere apology after a physician mistake decreases the likelihood of subsequent legal action.³

It goes without saying that careful, contemporaneous documentation of conversations, consultations, procedures, and follow-up visits is required. In the age of the electronic health record (EHR), remember that all of your documentation is available in perpetuity. It is also possible to track when medical records or images are accessed. If you are named in a legal action, do not access relevant medical records until you've had a chance to discuss it with your legal counsel. Any relevant notes or documentation outside of the EHR is discoverable, meaning that they must be made available to the plaintiff's attorney.

Conclusions

Understanding the elements of a medical malpractice cause of action and a means to mitigate the risk through careful planning, documentation, and the purchase of appropriate malpractice insurance is important information for the IR practitioner. Understanding the length and breadth of medicolegal actions is the necessary first step to successfully navigating the legal, financial, and emotional challenges.

Take-Home Points

1. Malpractice requires four elements: duty owed, duty breached, an injury caused by the breach, and that the patient actually suffered the injury.
2. Malpractice cases routinely take years to litigate; it is a marathon, not a sprint. Prepare yourself mentally for a prolonged, slow-moving process.
3. The standard of care is usually defined by the testifying expert witnesses: what is the level of care provided by a qualified, careful physician in the same or similar circumstances?
4. Find out whether your state has caps on pain/suffering/disfigurement; if not, you'll need to carry more malpractice insurance to avoid losing unprotected personal assets.
5. A sincere apology after a patient injury decreases the likelihood of subsequent litigation. Apologies are not considered an admission of guilt in the 36 U.S. states that have passed "Apology" laws.

Disclosure

The authors have no relevant financial disclosures.

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