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Medical Malpractice Suits: A Physician's Primer for Defendants

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THIS PAPER IS A PRIMER for physicians and their counsel, outlining ways of avoiding a malpractice suit and what to expect in court. My first county medical society appointment in 1912 was as chairman of the legislative committee, and in the years intervening I have had wide experience advising doctors, helping defense attorneys, appearing in court many times as an expert witness, and as a defendant. So I speak from experience. The suggestions as to technique are, in the main, from the records of three cases (containing photostatic copies of all office and hospital records, pyelograms, detective reports, etc.), loaned by a malpractice insurance company.

Malpractice suits are not new. The world renowned Dr. Samuel Gross of Philadelphia (whose widow married Sir William Osler) wrote in 1870, "These suits have, unfortunately, been exceedingly common in this country during the last twenty-five years, and there is reason to believe that they are generally instigated by dishonest and designing medical men, intent upon the ruin of the defendant, who is thus often subjected to great trouble, vexation, expense, and even loss of character. What is worse than all, no physician or surgeon, however exalted his character or position, is exempt from them." Times have not changed. My observation has been that every malpractice suit, without any exception, is instigated either directly or indirectly by a doctor. They must be very common since the legal department of the American Medical Association reports that 14% of all A. M. A. members in the United States, and one out of four doctors in California, have had a medical professional claim or suit brought against them. A total of 18,500 living members of the A. M. A. had been sued, as of mid-1958.

The malpractice committee is probably the most important one in the medical society. It will be the hardest working one if it polices the testimony of the plaintiffs' experts and makes its reports promptly. It should be composed of mature, level headed

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men who can see both sides of a medicolegal question; are well informed as to medicine's progress as evidenced by regular attendance at the scientific sessions of national conventions; and have had court experience either as an expert witness or defendant. Merely being a good doctor, an enthusiastic medical politician, a "lagniappe professor," or an "egg head," is not sufficient.

From the members of this committee the local bar association should be able to select a panel to advise plaintiffs' attorneys and testify as experts for them. Doctors' opinions might vary, but they must agree on medical facts. All a good lawyer wants is an honest doctor who will testify as to orthodox medical teaching and not slant his testimony. Such a panel will make unnecessary the use of "universal specialists" who now testify for an "adequate fee" or on a percentage basis.

We all know that the purpose of malpractice insurance is twofold; one, to compensate the patient who has been injured by unscientific medical care (and this does not refer to the many suits that are instigated for results that although they are not satisfactory to the patient are excellent from a medical viewpoint and for the problem presented); second, to protect the doctor from bizarre charges that verge on libel and are in reality mere legalized blackmail. Hence, a number of county medical societies have committees whose purpose is to investigate allegations of malpractice and recommend either settlement out of court, where there has really been malpractice, or that the case be defended. Settlement demands are in many cases for a greater amount than a jury would award. A man should follow the advice of his malpractice committee. It is not a disgrace to be sued, but most certainly it is to settle a case that has no merit and condones the practice of legalized blackmail. True, you are saved from annoyance, but suit-conscious persons are encouraged to gamble again and to file a suit against one of your friends, or perhaps a repeat performance against you. When other attorneys or disgruntled patients find that you are a "soft touch" you may be a real target for future claims and suits. Furthermore, annual malpractice premiums are based on the costs of the preceding year.

Recently a plaintiff's lawyer was sued for malpractice for not trying a medical malpractice suit, as he claimed he could not get a reputable doctor to testify as to medical facts. After several trial postponements and failure of the attorney to appear at trial the court dismissed the case. His insurance carrier settled the case out of court for $15,000.

Many insurance policies are too small. In such cases all assets, including real estate, can be attached and liquidated to satisfy a judgment. The insurance policy should be in a reputable United States company subject to the laws of the state in which you practice, and one that will be in business 21 years hence. Dealing with an unlicensed foreign company through a broker is dangerous, as demonstrated by the San Francisco fire, where many who had insurance in foreign companies were not compensated. The company and broker may not be around when you need them, or the company without any warning may cancel your policy at an inopportune time. Also they might settle without your permission. A settlement suggests an admission of guilt and will not only be a mark against your record for future insurance, but will encourage more claims and suits.

Preserve your old policies. The statute of limitations in many states begins to run one year from the time the plaintiff claims he discovered the cause of action or the negligent act that produced the injury. Time out of the state must be added. In the case of a child the time begins when the child reaches the age of twenty-one. Your current policy will not protect you for previous alleged malpractice in a suit filed 21 years later by a child.

Recently the directors of a Children's Hospital belatedly woke up to the fact that they were probably going to be subjected to numerous malpractice suits in 18 or 20 years. The pediatricians and surgeons had been by-passing the urologists; all enlarged kidneys were being didactically diagnosed as Wilm's tumors and exposed transperitoneally. Many were hydronephroses, and those that survived were left with abdominal urinary fistulae.

Now as regards histories, they should be written in the third person; otherwise, the court and jury assume that the doctor is vouching for the accuracy of all statements. They should include a record of all previous illnesses, names of previous doctors, and hospitals (along with dates).

Never permit any erasures in either your hospital or office records. In case of an error delete by scratching out and interline, including the date if the change was made subsequent to the time the report was written. The corrected records are liable to face you in court blown up to five feet by five feet, with an intimation to the jury that your explanations are fantastic. You must never forget that the plaintiff on subpoena has access to all records.

Make sure that all your orders are written on the hospital

chart. If you feel that bed rails are essential for a person using hypnotics or narcotics, note your order on the chart, for if the patient falls out of bed you will have a good defense.

A judge has almost unlimited discretion as to the qualifications of a malpractice medical expert, the law not especially recognizing specialists, but merely requiring that the doctor have a medical license. Even an osteopath *may testify.*

A not uncommon allegation is that the doctor operated while under the influence of alcohol. If you are called for an emergency from a banquet table, or from your own home after dinner where you have had a cocktail and wine, use chlorophyll, or some similar preparation, so that there will be no odor of alcohol on your breath. Your patient's family may be "witch burners" or fanatical prohibitionists.

A high class plaintiff's attorney never indulges in personalities, but the inept lawyer often attempts to win a weak case by concentration on character assassination.

When notified that you have been sued, immediately turn your file over to your insurance carrier without removing any extraneous material. They will photostat it, and you will be protected from the usual allegation of altering your record. Also, notify the superintendent of the hospital to have his records locked up.

In the beginning you will be subpoenaed by the plaintiff's attorney to give a deposition in his office and to bring with you all your records. Your own attorney may give you no advice except to tell the truth. The opposing lawyer will take your records to file with the deposition; hence, the importance of the photostatic copy. He will be very friendly, but he is sizing you up as a prospective "easy mark." He will ask you to explain every entry over and over. He may be merely on a "fishing expedition," hoping to get into the records statements that might differ in some degree with your testimony at the trial that may not take place for several years. Answer his questions but give him no information that is not in your record, and make no detailed explanations. The best answer is usually "Yes" or "No." He is probably well informed on the subject, having been thoroughly coached by his "house physician." His purpose is to discredit your testimony. Do not try to educate him.

Frequently Superior Court juries bring in verdicts for the defendants, but the upper courts may reverse the case in favor of the plaintiff. In a recent case of a pathological fracture of the

pelvis, they reversed a defendant's verdict and granted a new trial. The doctor had examined the man about a year before, the only complaint being a bruised knee from a fall. The Superior Court judge charged the jury to evaluate the testimony of the various orthopedic specialists as to the cause of the fracture. The upper court ruled that in case of broken bones a layman's opinion was acceptable, as it was common knowledge that one with a fracture should be completely x-rayed. The second jury brought in a verdict of $230,000. The policy was only for $50,000. The doctor's personal attorney advised settlement, the judge reduced the verdict to $83,000 for cash and the case was settled.

No lawyer is qualified to defend a malpractice suit alone. He should have the defendant sitting by his side in order to call his attention to unscientific and untruthful evidence that is being introduced. The defendant is supposed to remain in the court room throughout the trial, the average duration of which is about two weeks.

When the doctor goes on the stand in California he becomes an expert witness against himself. The plaintiff's attorney will demand direct answers. Give him a "Yes" or "No," and then you are entitled to explain your answer. If it is "No," qualify with, "I have no recollection; I do not recall; I have no knowledge; I do not remember; or, My assumption is . . ."; but never an unqualified "Yes" or "No." Do not forget that the judge is only the legal moderator of the panel. The plaintiff's attorney merely asks the questions, often "double barrelled," and your attorney is to protect you. After listening to his questions, pay no further attention to him. Talk only to the jury. Never take your eyes off them. Answer each question to a single juror—playing no favorites. It flatters them. Beware of the hypothetical question. It is designed to trap the unwary witness.

Never recognize any doctor or book as an authority—you are the authority. Your opinions are based on your personal experience, what you were taught in school and what you have heard. Do not be trapped into mentioning the name of one of your textbooks, or you will be subjected to an oral quiz on the volume. If you have written a book or pertinent paper, and your testimony of today does not coincide with what you have published, merely state that your views have changed.

Judicial notice is taken of the fact that medicine is neither an exact nor a finished science. The same "standard of practice"

is not required in Milpitas, California as in New York City, as yet.

Any records, papers (even though they may contain personal data not relevant to the case), or instruments taken into the court room, may be put on record as exhibits by the plaintiff's attorney. There is no legal responsibility for their return, and valuable articles are frequently lost.

Forensic medicine is a very lucrative specialty, since the plaintiff's attorneys advocate adequate fees for their "house doctors." Not every man can qualify. He must be money hungry and with little or no private practice, a name dropper (both of individuals and clubs), a graduate of a good medical school, *a member of his county medical society,* have made one or two trips abroad, and hence be able to claim to have taken postgraduate courses in a number of famous foreign universities, all of whose records were destroyed during the war, and hence his claims cannot be nullified. Above all, he must be able to fool the defense attorney as to his medical background.

The National Association of Claimants' Compensation Attorneys (NACCA) has in a few years grown from seven to seven thousand. Their theme song is the "adequate award," and Melvin Belli, designated by Life Magazine as the "King of Torts," is their "high priest." The reading of his "Ready for the Plaintiff"[1] is a "must," for there an outstanding plaintiff's attorney gives you a peep behind the scenes of malpractice suits. Furthermore, it is interesting reading, for he mentions names, not only of his *favorite doctor,* but tells that a leading gubernatorial candidate in California was a malpractice and personal injury lawyer before Jake Ehrlich launched him on his political career.[2]

Do not ever think, "It can't happen to me," for when you are least expecting it, you may find yourself the defendant in a malpractice suit, as did the three defendants whose cases are abstracted here. They were all experienced surgeons, with national and international reputations, and their ability, honesty, veracity and integrity had never been questioned. The cases are all different, and from their records were gleaned the "aphorisms" above.

Case I: The allegation was that a doctor did not cystoscope a man who refused to be cystoscoped. It was instigated by a

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[1] Henry Holt & Co., N. Y., 1957.

[2] Never Plead Guilty (Farrar, Strauss & Cudahy; N. Y., 1955).

doctor harboring a petty grudge. It lasted for seven years, was carried to the Supreme Court twice, and ended in a defense verdict. For all concerned it was very expensive, the plaintiffs' attorney's costs being $25,000, and the price of malpractice insurance to the profession of Northern California increasing during that period from $77.40 to $580.50, for the same coverage. The technique used was based on "impeachment of witness" proceedings.

In the first trial the jury returned a verdict for the plaintiff. The next trial was before a different judge and jury and brought in a prompt defense verdict.

Case II: Complication of a Circumcision: On the day following a herniotomy, an orchipexy, and a circumcision on a 2½ year old child with an electric knife, and a Gomco clamp, there was evidence of a burn of the glans and extending down the raphe to the junction of the proximal and middle third of the two centimeter phallus. Eight days later a diagnosis of third degree burn was made and a retention catheter inserted.

A skin graft was done, and the plastic surgeon stated that as the child developed there would have to be eight or nine more plastic operations, at a cost of $8,000 to $9,000.

Suit was filed for $350,000, alleging that it was malpractice to use an electric knife; that a permanent perineal urethral fistula would inevitably develop; the child would be a "neuter" without phallus or testicles; would have to sit down to urinate, and consequently would be a permanent psychic problem.

A series of experiments were performed to determine the cause of the burn. A thin piece of raw beef was wrapped around the tip of a finger, introduced through the opening in the base of the instrument; the Gomco bell slipped over this, and the thumb screw tightened. The instrument was then connected with a cutting machine, and the operation simulated by cutting away the excess of raw meat with an electric knife. The bell did not heat. Next the meat was "cooked," but still the finger did not feel any heat.

Then an electrical engineer was called into the picture. The hospital would not allow their machine to be investigated. The engineer's explanation was that the vaseline smear on the child's phallus must not have been of equal thickness, and where the flesh was not resting flush against the metal the electric current jumped, causing a severe electrical burn.

The Gomco clamp is nationally used and acceptable to the Journal of the American Medical Association for advertising. Nevertheless, there was a third degree burn down the shaft of the baby's penis. Yet with a different machine meat was cooked on the base, and the finger in the bell did not detect any heat.

The surgeon did not choose to submit to a court crucifixion, so he exercised his privilege of asking that the case be settled. The insurance carrier paid $90,000.

Case III. This suit was predicated on a diagnosis of *"post-cystoscopic infection"* that followed a complete kidney investigation with retrograde pyelograms made to determine the reason for red blood cells in a purulent urine, and caused a Cowper's gland abscess 18 months later, and an urethral fistula—following which there were about a dozen unsuccessful plastic operations by a variety of doctors.

A careful investigation disclosed the fact that the man had for many years suffered from pyuria and had been classified as a "professional litigant," having been paid off several times. There had been no previous urologic investigations, the attention of the various doctors being concentrated on back trauma with alleged sensory disturbances.

The patient then entered an outstanding hospital. The admission histories are all different, the patient giving full vent to his imagination, and no apparent attempt was made to correlate with previous admissions. None of them recorded that he had had four previous perineal operations elsewhere. They only agreed on the use of the unscientific term "post-cystoscopic infection," and even more reprehensible was its use by all the consultants.

The patient eventually went back to the family doctor and his operating associate, who were legally the real culprits, having caused the fistula and the urethral strictures, for advice. According to their office records they both recommended that he file a complaint with the county medical society malpractice committee against the cystoscopist, since all of his trouble stemmed from a hypothetical "post-cystoscopic infection." One even telephoned a complaint to the medical society and backed it up with a written charge.

The accused had a "cast iron" defense, while all the critics were vulnerable. He was protected not only by the statute of limitations, but also by a California Supreme Court decision to the effect that it is impossible to infect a man by the passage of a

sterile cystoscope. In the case cited the plaintiff developed a fever (flu) immediately after cystoscopy[3] while in this case 18 months intervened between cystoscopy for pyuria and the appearance of the Cowper's gland abscess. The patient died 38 months after he started on his "operative debauch," and before suit was filed.

If the malpractice attorney had subpoenaed all of the various office and hospital records, of which the insurance carrier had photostatic copies, a considerable number of doctors would have been forcibly taught to be more careful in the future to see that their records are accurate and include no incriminating or libelous statements.

This case well illustrates what can happen when hurried, careless histories are taken which by inference appear to be a diagnosis rather than a history, and no attempt is made to verify from the record of previous hospitalizations.

There would be fewer malpractice suits against certified specialists if their colleagues would do less loose talking and remember *the suit they save may be their own.*

Malpractice suits are not only impeding the progress of medical science, but the cost of illness is almost prohibitive, because of the numerous laboratory tests, x-ray pictures, and consultations they make necessary for the protection of the doctor.[4] Certainly the use of spinal anesthesia, aortography, antibiotics, vaccines, serums, etc., are all exceedingly valuable, but they all carry a certain amount of risk to some individuals, and we will not be able to call them perfect until they have had a ten year trial.

A form prepared by the legal department of the American Medical Association for the doctor to have signed by every hospital patient before admission, asking him to agree to be responsible for any complications following recognized orthodox procedures might be the answer to this pestilence of malpractice litigations.

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[3] Moore v. Belt, 203 P. 2d 22, 212 P. 2d 509 (Calif. 1950).

[4] See, Silverman, Malpractice: Medicine's Legal Nightmare (series of 3 articles), Saturday Evening Post (Apr. 11, 18, 25, 1959).