Some Practical Thoughts on Medical Malpractice

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Today more malpractice suits are being filed than ever before. Not only are more suits being filed but the amount of settlements and verdicts has significantly increased. Perhaps one of the primary reasons for this phenomenon is the consumerists movements. Obviously, the more consumer groups advocate consumer protection, and the more that juries render favorable verdicts, the better educated and aware of verdicts the consumer becomes. The result of this is that people become more litigation conscious. In Virginia, medical malpractice litigation appears to be just beginning to flourish in relation to other large urban areas in the North and Far West. Notwithstanding this, malpractice litigation in Virginia is increasing rapidly. For example, over the past twenty years the number of medical malpractice claims in Virginia has increased from approximately 47 in 1955[1] to 272 so far in 1975[2], which represents an increase of almost 600%. Concurrently, the average cost of concluding a medical malpractice claim has increased from approximately $4,900 in 1969, to $10,600 in 1974[3], representing over a 100% increase in the past five years.

In order to make this presentation as practical as possible, I am going to assume that none of you have been a defendant in a malpractice claim and that you know nothing about the law of medical malpractice. The problem is real and must be faced. Senator Abraham Ribicoff in 1969 had the Subcommittee on Executive Reorganization investigate the medical malpractice problem.[4] One conclusion reached by the subcommittee in its report is that most claims are justifiable,[5] therefore, I will focus my attention primarily on two questions. First, assuming that there is a bona fide claim, what can a physician do to reduce the insurance company's cost, thereby reducing his insurance premium? Second, what can a doctor do to attempt to avoid a malpractice claim? Before considering these questions, I feel that it would be helpful to briefly discuss the law of medical malpractice, so that a physician will know what the law expects of him.

The Law of Medical Malpractice. The law of medical malpractice is simply another form of what the law classifies as a tort. Very simply, a tort is a private or civil wrong or injury.[6] For a tort to exist, the following three elements must be present.

1. There must be a legal duty owing from the defendant to the plaintiff.
2. The defendant must fail to discharge this duty.
3. As a proximate result of the breach of this duty the plaintiff must suffer some harm.[7]

Adapted from a presentation made by Mr. Harris at the 28th Annual Stoneburner Lecture Series, 10 April, 1975, at the Medical College of Virginia, Richmond.

[1] Shepherd, *The Law of Medical Malpractice in Virginia*, 21 WASH. & LEE L. REV. 212, 213, n.4 (1964).

[2] These statistics were furnished to the writer by the St. Paul Insurance Company which insures 85% to 90% of the practicing physicians in Virginia, and only represents the claims against that company. At the present time, the State Bureau of Insurance is compiling data, but these statistics are not currently available.

[3] These statistics were furnished to the writer by the St. Paul Insurance Company.

[4] SUBCOMMITTEE ON EXECUTIVE REORGANIZATION, 91st CONG., 1st SESS., MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN (Comm. Print 1969).

[5] *Id.* at 1.

[6] BLACK'S LAW DICTIONARY 1660 (Rev. 4th Ed. 1968).

[7] *Id.*

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Therefore, the logical starting point is to examine the legal duty a physician owes to his patient.

> A physician is not required to exercise the highest degree of skill and diligence possible in the treatment of an injury, unless he has by some special contract agreed to do so. In the absence of such special contract, he is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily exercised by the average of the members of the profession in good standing in similar localities and in the same general line of practice with regard being had to the state of medical science at the time.[8]

This standard does not make the doctor an insurer or guarantor of the results,[9] in the absence of promising a certain result such as by saying: "I can take care of that and you will have no problem at all." Obviously, a prudent physician would not do this because sometimes favorable results do not always follow treatment, even without fault on the part of the physician.

Within this standard are various duties which a physician must discharge. A physician is not under a legal obligation to exercise the highest degree of care. All that is required is that he exercise that degree of care, skill, or knowledge offered by the *average* reputable physician.[10] This standard is also relative to several other considerations. The law does not test a physician by the standard of other physicians who are not in the same practice or specialty. Therefore, a general practitioner is not held to the same standard as a specialist. A specialist is required to have and exercise that degree of skill and knowledge which is ordinarily possessed by other physicians in that specialty.[11] Also, in certain areas of medicine there may be two theories or schools for the treatment of a particular injury or disease. If the physician aspires to one particular school, he must measure up to the proper standard of practice for that school.[12] The physician's standard of care is also relative to the locality in which he practices. For example, a physician in a logging camp in western Virginia would not be expected to exercise the same professional knowledge and skill as a professor at the Medical College of Virginia. What might be malpractice at the Medical College of Virginia might be acceptable medical care at the logging camp.[13] Finally, the law imposes on the physician a duty to keep reasonably abreast of the state of medical science at any given time.[14] Procedures and techniques used three years ago, today might constitute medical malpractice if used.

The final element in establishing a prima facie case of medical malpractice is causation. The injury or harm which the patient complains of must have been proximately caused by the physician's breach of one of the above duties. This requires the patient/plaintiff to prove a causal connection between the alleged negligence of the physician and the resulting injury. The test actually encompasses two elements. First, the "but for" test is used which establishes a logical causal connection. But for what the physician did, the injury would not have occurred. In addition, the law requires in order to establish proximate or legal causation, that the resulting harm must have been reasonably foreseeable.

From what has been said, it is easy to understand why the law as a general rule requires another physician to testify. This is really the only way that a Court can determine what standard to apply. There is, however, a major exception to this general rule. This is the doctrine of *res ipsa loquitur*. *Res ipsa loquitur* means very simply that "the thing speaks for itself."[15] For this doctrine to be applicable it must be shown that the means or instrumentality which caused the injury was in the exclusive possession and control of the physician charged with negligence; that the physician has or should have had exclusive knowledge of the manner in which the instrumentality was used; and that the injury would not ordinarily occur in the absence of the means or instrumentality being used improperly.[16] The traditional case in which this doctrine has been applied is one in which the physician inadvertently leaves a laparotomy sponge, forceps, or surgical pad in the patient.[17]

Assuming that all of the elements exist for a medical malpractice claim, the Statute of Limitations in Virginia for maintaining a claim is two years,[18]

[8] Alexander v. Hill, 174 Va. 248, 252, 6 S.E.2d 661, 663 (1940).
[9] Ropp v. Stevens, 155 Va. 304, 308, 154 S.E. 553, 554 (1930).
[10] *Id.*
[11] Fox v. Mason, 139 Va. 667, 670, 124 S.E. 405, 406 (1924).
[12] Reed v. Church, 175 Va. 284, 8 S.E.2d 285 (1940).
[13] Fox v. Mason, 139 Va. 667, 671, 124 S.E. 405, 406 (1924).
[14] Reed v. Church, 175 Va. 284, 293, 8 S.E.2d 285, 288 (1940).
[15] BLACK'S LAW DICTIONARY 1470 (Rev. 4th Ed. 1968).
[16] Easterling v. Walton, 208 Va. 214, 216-17, 156 S.E.2d 787, 789-80 (1967).
[17] *See, e.g.* Easterling v. Walton, 208 Va. 214, 156 S.E.2d 787 (1967).
[18] VA. CODE ANN. §8-24 (Cum. Supp. 1975).

if there has been no fraud or concealment on the part of the physician to prevent the patient from discovering the injury.[19] In certain cases the injury may not manifest itself until some time after the operation or treatment, which raises the question of when the Statute of Limitations begins to run: From the time of the treatment or operation, or from the time that the injury is discovered? Some states have taken the position that the Statute of Limitations does not begin to run until the injury is discovered,[20] but Virginia holds that it begins at the time of the wrong and not upon discovery of the injury.[21]

One final consideration before leaving this brief discussion of the law of medical malpractice is the so-called "Good Samaritan Rule." Virginia has passed the following statute which protects a doctor who renders assistance in an emergency situation.

> **§ 54-276.9 Persons rendering emergency care exempt from liability.**
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> (a) Any person who, in good faith, renders emergency care or assistance, without compensation, to any injured person at the scene of an accident, fire, or any life-threatening emergency, or en route therefrom to any hospital, medical clinic or doctor's office, shall not be liable for any civil damages for acts or omissions resulting from the rendering of such care or assistance.
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> (b) Any emergency medical care attendant or technician possessing a valid certificate issued by authority of the State Board of Health who in good faith renders emergency care or assistance, without compensation, to any injured or ill person, whether at the scene of an accident, fire or any other place, or while transporting such injured or ill person to, from or between any hospital, medical facility, medical clinic, doctor's office or other similar or related medical facility, shall not be liable for any civil damages for acts or omissions resulting from the rendering of such emergency care, treatment or assistance.
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> (c) Any person having attended and successfully completed a course in cardiopulmonary resuscitation, which has been approved by the Board of Health, who in good faith and without compensation renders or administers emergency cardiopulmonary resuscitation, cardiac defibrillation or other emergency life-sustaining or resuscitative treatments or procedures which have been approved by the State Board of Health to any sick or injured person, whether at the scene of a fire, an accident or any other place, or while transporting such person to or from any hospital, clinic, doctor's office or other medical facility, shall be deemed qualified to administer such emergency treatments and procedures; and such individual shall not be liable for acts or omissions resulting from the rendering of such emergency resuscitative treatments or procedures.
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> (d) Nothing contained in this section shall be construed to provide immunity from liability arising out of the operation of a motor vehicle.[22]

With a basic understanding of the law of medical malpractice in mind, I will offer suggestions which a physician may follow in order to prevent a malpractice claim, or if suit is filed or a claim made, how the physician can reduce the cost to the insurance company, and thereby reduce insurance premiums.

Preventing a Medical Malpractice Claim. Various authors and surveys recognize that a decline in the personal physician-patient relationship, lack of rapport, and lack of sympathy are significant contributing factors in explaining the increase in medical malpractice cases.[23] While the obvious cause is the fact that today's society has an abundance of patients and a shortage of physicians, the number of suits filed increases, notwithstanding fault. Crawford Morris, a Cleveland attorney who has defended physicians and hospitals in medical malpractice litigation for many years, wrote the following to the Subcommittee on Executive Reorganization.

> It is common knowledge today that almost all doctors are making enormous amounts of money, refuse to make house calls, play golf on Wednesdays, drive expensive cars, own yachts, hunting lodges and apartment houses.
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> The doctor's image is sadly tarnished.
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> Once thought of as "the old country doctor driving through the rain all night to sit beside a sick patient," they are now thought of as "supersuccessful businessmen." This, perhaps subconscious, attitude makes patients more willing to sue their doctors and makes patients on juries more willing to return a verdict and one of considerable size against doctors.[24]

My parents never would have considered suing their doctor, because he was a friend who they saw at

[19] VA. CODE ANN. §8-33 (Rep. Vol. 1957).

[20] *See, e.g.* Morgan v. Grace Hospital, Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965).

[21] Hawks v. DeHart, Adm'x, 206 Va. 810, 146 S.E.2d 187 (1966).

[22] VA. CODE ANN. §54-276.9 (Cum Supp. 1975).

[23] SUBCOMMITTEE ON EXECUTIVE REORGANIZATION 91st CONG., 1st SESS., MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN 3-4 (Comm. Print 1969); U. S. News & World Report, Jan. 20, 1975, p.54; U. S. News & World Report, June 16, 1975, p.50-51.

[24] SUBCOMMITTEE ON EXECUTIVE REORGANIZATION, 91st CONG., 1st SESS., MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN 3 (Comm. Print. 1969).

church, at the movies, or at a picnic. Today, we live in an urban society and doctors are simply too busy to spend the time with patients to become their "friends." If a physician will recognize this situation and accept it from the outset, I believe certain steps can be taken which will perhaps help remedy it.

On numerous occasions I have had the following stereotype of doctors presented to me by clients and acquaintances. Most of the following comments are not based on my own experience and obviously are not applicable to every doctor. First, when the patient goes to a doctor, he or she finds a receptionist who is extremely busy and has no time to give the patient her personal attention. The patient waits sometimes an hour or more past the appointment time and is then ushered into a small examining room where an assistant comes in and takes the patient's temperature and blood pressure. These people do not really see the patient as a person. Finally, the doctor comes in. The doctor may have twenty patients scheduled for that hour and can afford to spend only from three to five minutes with the patient. How can one expect such a patient to feel that he or she should refrain from suing that doctor if an unexpected injury results from the treatment. This is often the patients' view, and much of this feeling is caused by the tremendous demand placed on that physician's time. I submit, however, that if the physician would pat the patient on the hand and take just a few minutes to explain the situation in language that can be understood, perhaps 50% or more of the medical malpractice claims would not be filed. Patients do not sue doctors for whom they have a warm feeling, unless of course, it is an obvious case of negligence.

Another thing a physician should always do is keep detailed, legible, and dated notes. These are more helpful to the insurance company than anything else, and this is particularly true in cases involving informed consent. Informed consent means more than just telling the patient that there is a possibility of complications. The physician is under a legal duty to disclose to the patient risks incident to medical diagnosis and treatment. A physician who fails to make such disclosure may be legally liable for adverse consequences even though the physician was not negligent in his treatment.[25] The rationale behind this rule is that every adult of sound mind has the legal choice to determine what shall be done with his or her own body. This requires that the patient consent to an operation or treatment, and for the consent to be meaningful, it must be intelligent in the sense that the patient is aware of all pertinent facts.

A good example of an informed consent case is the Texas case of *Wilson* v. *Scott*.[26] In this case, the patient had diminished hearing in one ear and the doctor decided that a stapedectomy would probably improve his hearing. According to the doctor's testimony, the patient was informed that there was a 90% chance for hearing improvement and a 10% chance that hearing would not improve. However, the doctor failed to inform the patient that there was a 1% chance of hearing loss. As a result of the operation, the patient lost all hearing, experienced vertigo, instability, and tinnitus. On the basis of expert testimony, the Court found that it was standard practice to inform the patient that there was a 1% chance of hearing loss and accordingly rendered a verdict in favor of the patient. Even though there was no evidence that the doctor was negligent in the performance of the stapedectomy, the patient, if he had been advised of this possibility, might have decided that he would prefer to have diminished hearing rather than take a chance on an operation which could result in a complete loss of hearing.

This appears to be the type of case which is presenting itself more frequently today than any other. In order to prevent this, the physician should not only inform the patient of possible adverse consequences, but also note in the medical records that the patient has been so informed. If the physician does not put this in the medical records, then it becomes the physician's word against the patient's. Many physicians say that they informed the patient in a particular case because they always inform their patients. It is submitted that doctors are extremely busy and it is not impossible for them to forget to inform the patient in such a case, because at the time they were perhaps interrupted or thought they had told the patient the last time they saw him or her.

For the above reasons, it is submitted that if the doctor would prepare a written form advising the patient about the operation or treatment and have the patient read and sign it, three goals would be accomplished. First, if the patient says that he or she was not informed of this, or that, the doctor can go back to the records, pull the consent form, and see exactly what the patient was informed of. Second, such a procedure will require the doctor to think

[25] Dietze v. King, 184 F. Supp 944 (E.D. Va. 1960).

[26] 412 S.W.2d 299 (Tex. 1967).

about what the adverse consequences of an operation are rather than inform the patient somewhat rotely. Finally, if a form is used prior to every operation, it will prevent the doctor from forgetting for some reason or another to inform the patient.

Below are some of the basic facts that should be included in the consent form and presented to the patient prior to an operation. This list is not intended to be exhaustive and additional information may be deemed necessary under certain circumstances.

1. Have the patient authorize the performance of the operation.
2. Inform the patient of the nature of the procedure necessary to treat him.
3. Inform the patient of the risks associated with the particular operation.
4. Inform the patient of the consequences which are normal in the procedure.
5. Inform the patient of the risks inherent in the performance of any surgery.
6. Inform the patient of reasonable alternative treatment, if it exists.

One obvious question a physician will ask is, do I have to tell the patient of every conceivable adverse consequence? The answer is no, because in order for the doctor to be liable, he must have fallen below the standard of the reasonably prudent physician. One author has suggested the following four factors for the physician to consider in determining what risks he should inform the patient of:[27]

1. The nature or degree of the risks, harm, or adverse result;
2. The frequency or percentage of cases that such risk, harm, or adverse result occurs;
3. The probable effect of the procedure or treatment on the patient's health or well being;
4. The probable effect of disclosure of the risks on the patient's mental health or well being.

The Anatomy of a Medical Malpractice Case. If the foregoing preventive measures fail, there are still certain others which can be taken. Therefore, I am going through the anatomy of a medical malpractice claim, step by step, and explain what you as doctors can do for self-protection and also save the insurance premium dollar. To better understand how some of these suggestions can save the insurance premium dollar, it would be helpful to see where your premium dollar goes. For every dollar spent for insurance, approximately 30% goes to the injured patient; approximately 15% goes to the plaintiff's attorney; and the balance, approximately 55%, goes to the defense attorney and defense investigation costs.[28] It is obvious that if a claim is concluded at an early date, much of the defense costs can be eliminated.

If the physician has an idea that a claim is going to be made, he should notify his insurance carrier as soon as possible. Upon notification an adjuster can go out and talk to the claimant right away and perhaps conclude the matter promptly, and prior to an attorney becoming involved. This would avoid much of the defense and litigation expense, consequently lowering the insurance premium. I know that most professionals, myself included, are very reluctant to admit error, but by the same token "stone walling" is not the answer. If a patient has a legitimate claim, it is to the physician's advantage, monetarily as well as emotionally, to conclude the matter as expeditiously as possible. If the claim is not valid, it still cannot be ignored. It is the insurance company's responsibility to investigate and dispose of the claim. They are trained in these areas and are not going to settle a claim that is not valid, or pay any more than the claim is worth.

If the claim cannot be settled initially, let me explain what an experienced, competent attorney will do when a client comes in. One article analyzed what it cost for an attorney to handle a medical malpractice case.[29] This article used metropolitan New York as its setting. The result was that for an attorney to *net* $30,000 per year, he must produce $62 per billable hour at a minimum. Further analysis revealed that the average malpractice case required the attorney to spend 67 hours prior to trial. If this is computed, it amounts to over $4,000 of the attorney's time. It should, therefore, be obvious that it would be economic suicide for an attorney to take a meritless malpractice case. If, however, the case has merit and the injury is considerable, the lawyer has an ethical and moral responsibility to prosecute the claim, just as a doctor has to treat the patient who is sick or injured.

Finally, there is the case with marginal liability, and the harm is not great. A lawyer will evaluate the

[27] 11 HOUSTON L. REV. 1075, 1076, (1974).

[28] These statistics were furnished the writer by St. Paul Insurance Company. *See also* SUBCOMMITTEE ON EXECUTIVE REORGANIZATION, 91st CONG., 1st SESS., MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN 10 (Comm. Print 1969). While it is true that most medical malpractice cases are handled on a 33⅓% contingent basis, attorneys do not become involved in all claims.

[29] Shayne, *Meritless Malpractice Cases: A Fragile Dilemma*, in MEDICAL MALPRACTICE 309 (Practicing Law Institute 1975) (Reprinted with permission from Trial, May—June 1975).

case and the physician involved. If the lawyer knows that the doctor has done everything possible for the patient and has tried to keep a good rapport with the legal profession, he will probably discourage the case. Plaintiff's attorneys who handle automobile liability cases have considerable contact with doctors. Occasionally, when these attorneys try to get medical reports from doctors they have to beg for them. Also, when some doctors write a report, they attempt to minimize the patient's injury for some reason, even when the injury is legitimate. Another situation which arises is where the attorney needs the doctor to testify in an automobile liability case. The attorney calls the physician for a pre-trial interview to explain what questions will be asked from both sides. The appointment may be arranged for 4:00 PM, and the doctor finally may see him at 7:00 PM. If an attorney has experienced this situation with the doctor, he is very unlikely to discourage litigation in a marginal medical malpractice case. I submit that if doctors would treat the attorneys the way they want to be treated, the attorneys would inevitably discourage a marginal medical malpractice case.

Once the attorney determines that the patient's claim is legitimate, he will file a Motion for Judgment.[30] In this the attorney will put every possible basis for a malpractice action he hopes to prove. When the physician is served with this, he will think, "I sound like the worst person in the world." Also, the attorney will sue for the upper limits which he hopes to recover. If you are served with the paper, do not get upset or attempt to ignore it. You should go immediately to the insurance company so that they can start working on the case. Perhaps when they investigate the case, they can bring it to a conclusion even before the responsive pleadings are filed. If they can, it will save a lot of the defense dollars and also save you a lot of mental anguish.

If it cannot be settled at this point, the insurance company's lawyer will file responsive pleadings, and the issues will be joined, and the case matured. The next step is the discovery process. This is where your medical records become invaluable. Often lawyers would not file a lawsuit if they saw the medical records and had a chance to analyze them. If, however, the medical records are not legible or do not exist, these facts can be used against you.

At this stage of the litigation, the plaintiff's attorney will probably subpoena your records, file interrogatories, and take depositions. Interrogatories are written questions which must be answered under oath. Take your time with your attorney and give him complete and accurate answers. Next, depositions, which are oral questions under oath before a court reporter, will probably be taken. I recommend that you take the time to appear, even if you are not going to be questioned. The reason for this is that if a witness is inclined to stretch the truth, he or she will be less likely to do so if you are present. If you are questioned, give complete and accurate answers, because you are bound by these at trial. Obviously, if there are any inconsistencies, the other attorney will capitalize on them.

After discovery is completed by both sides, an experienced attorney is usually able to anticipate what result will be obtained at trial. If the patient's attorney determines at this point that he cannot prove the case, he will usually non-suit or dismiss the case. On the other hand, if the doctor's lawyer thinks that the case can be proved, he owes it to the doctor to approach the plaintiff's attorney with a settlement offer. Again, if the case is settled at this stage, a lot of the premium dollar can be saved.

If no settlement or agreement is made, the next step is the trial. You want to appear to the jury as the nicest fellow in the world and that you could not do anything except serve mankind. You want to appear friendly and have a pleasant expression on your face. If someone gets on the witness stand and begins to stretch the truth, or says something that you do not agree with, do not start grimacing, because the jury might think that you are bitter and perhaps punish you for that. When you testify, the key point is for you to have read the medical records and know exactly what is in them. When answering questions, face the jury. They are the ones you have to convince. Look at the jury and be candid, but whatever you do, do not get mad. Sometimes, the other attorney will use this as a trial tactic so that you cannot think properly and as a result the jury will be unimpressed with your testimony. Therefore, remain calm and think before you answer his questions.

The foregoing is not intended to be a comprehensive examination of the medical malpractice crisis. It is submitted however, that if some of the suggestions herein are followed, many of the potential medical malpractice claims would not be filed, or if filed, terminated at an early date, thereby saving the medical malpractice insurance carriers substantial sums, and consequently reduce the premiums for physicians.

[30] In Virginia a lawsuit is initiated by filing a Motion for Judgment. SUP. CT. OF VA. R. 3:3. In the federal courts and in other state courts it may be called a complaint.