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It has been said that the only things that are certain in life are death and taxes. O. William Brown, MD, JD, a vascular surgeon and a professor of law, would add a third certainty: If a physician practices medicine long enough in the US, he will be named in a medical malpractice suit.

What are the basic elements to a malpractice lawsuit?

There are four prongs to any medical malpractice suit: duty, breach of duty, proximate cause, and damages. All four of these must be present if a medical malpractice suit is to be successfully filed. *Duty* is most often established by proving that a physician-patient relationship existed. *Breach of duty* most often refers to a breach of the standard of care. *Proximate cause* basically means that the negligence of the physician was the cause of the patient's damages. Finally, the patient must show that he sustained *damages*.

How is a physician-patient relationship established?

A physician-patient relationship may be established in one of several ways. If the patient is seen by the physician in his office, or is seen in the hospital as a consult, clearly, a relationship has been established. Similarly, if a physician is called by his resident or by a nurse regarding a patient in the emergency room, a relationship will most often be deemed to have been established. A relationship may sometimes be assumed to exist by a simple comment made by a physician in a social setting. If a vascular surgeon, after being questioned by a fellow party guest concerning leg swelling, states that the swelling is probably not significant, he may be deemed to have established a physician-patient relationship. Accordingly, if the person in question subsequently develops a pulmonary embolism and dies, the physician may be held liable. It should be stressed that whether the physician has charged or been paid for his services is unimportant in determining if a physician-patient relationship exists.

A physician-patient relationship may be terminated in one of three ways. First, the patient can dismiss the physician. Second, the physician may withdraw from giving care, but only after providing the patient with sufficient notice. Finally, if the patient's medical problem has been resolved, the physician-patient relationship no longer exists.

What defines "standard of care?"

The standard of care may be established in one of five ways. Most often, it is established by an expert witness. The definition of a "medical expert" varies from state to state. In some states, any physician may give "expert" testimony in any type of medical malpractice case. In other states, the qualification of the expert is more narrowly tapered. In Michigan, if the defendant is board certified, the experts must be board certified in the same specialty. The standard of care may also be established by the defendant. This occurs when the defendant admits that he has violated the standard of care. The third method is known by the Latin phrase *res ipsa loquitur*, or *it speaks for itself*. An example of the use of *res ipsa loquitur* to establish the standard of care would be leaving a sponge in the abdomen of a patient after a laparotomy. The fourth method of establishing the standard of care is by the plaintiff if he is a medical expert. The final method is by citing the common knowledge doctrine. An example of this would be performing extensive x-ray evaluations on a woman who is in the first few weeks of her pregnancy. Even a layperson knows that x-ray use early in pregnancy can produce birth defects.

The standard of care applied to physicians is a national standard. That is, a physician from the small city of Munising, Michigan, is held to the same standard of care as a physician in Boston. Location becomes a consideration only when hospital equipment is an issue. A physician cannot be held liable for not obtaining a 128-slice CT scan on a patient if the hospital does not have such a scanner.

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How does a physician obtain "informed consent?"

The statement "risks and benefits discussed with the patient" does not constitute informed consent. Any note attempting to establish informed consent must contain at least five basic components: diagnosis, treatment plan, risks and benefits, treatment alternatives, and prognosis with and without treatment. In addition, the physician must tell the patient anything that could affect his decision whether or not to proceed with the treatment.

Moreover, obtaining informed consent is a nondelegable duty, which means that the informed consent for a procedure must be obtained by the physician performing the procedure and not the resident or physician assistant who is helping the physician with the procedure. Lastly, a signed operative consent form does not constitute informed consent. In truth, the only purpose of the operative consent form is to protect the physician from liability for civil or criminal battery. This is particularly important when one considers that malpractice insurance will not cover monetary verdicts, which result from a civil battery suit.

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What are the defenses to a malpractice lawsuit?

There are several medical malpractice defenses. The first is that the physician acted in a manner consistent with a reasonably prudent physician. A second defense is that the damages were a result of an error in judgment and not negligence. A third defense is "assumption of the risk." An example of this would be if a patient was told not to run after having a hip replacement and then decided to participate in a marathon, whereby the hip became dislocated. Contributory negligence is a fourth defense.

An example of this would be if a patient was told to stop smoking after a femoropopliteal bypass and continued to smoke three packages of cigarettes per day. Let us assume the graft occludes. Even if the interventionist placing the graft were found to be negligent, many states would reduce the award by the percentage that the patient contributed to the graft's occlusion by continuing to smoke cigarettes.

What are Good Samaritan statutes, and how do they work?

In most states, there is a Good Samaritan statute. This statute covers physicians who provide medical care in an emergency situation to patients whom they have no duty to treat. The classic example of a Good Samaritan is a physician who stops at the side of the road to help an accident victim. However, in many states, the Good Samaritan statute has been extended to cover acts that occur within the hospital. For example, if a vascular surgeon is called emergently by an orthopedic surgeon to assist in the repair of a popliteal artery injured during a total knee replacement, the vascular surgeon can refuse to see the patient as long as he is not on call. If the surgeon does choose to help the orthopedic surgeon and treat this patient, the vascular surgeon, under the Good Samaritan statute, cannot be held liable for ordinary negligence. The vascular surgeon can only be held liable for willful or wanton acts, that is, acts that are intentionally negligent. It is therefore important for all vascular physicians to be familiar with the Good Samaritan statute in the state in which they practice. Although statutes of limitation vary from state to state, it is important to remember that there is no statute of limitation for fraudulent concealment. Therefore, it is imperative that the patient and the patient's family be informed of any significant occurrence in the operating room.

What are the different types of medical malpractice insurance, and how does their coverage differ?

There are basically two types of medical malpractice insurance: occurrence and claims made. Occurrence type of insurance covers any lawsuits that arise when the physician was covered by the occurrence policy. For example, assume that a physician purchases an occurrence policy for the year 2008 and then discontinues the policy. Even if the lawsuit is filed in 2010, if the event in question occurred in 2008, the policy is still deemed to be in force. However, if the same physician purchased a claims-made policy for 2008, and the lawsuit is filed in 2010, he is not covered by that policy. He would be covered only for claims filed in 2008, no matter when the event in question occurred.

Although claims-made insurance is less expensive for the first few years, after several years, the price for claims-made insurance closely approaches that for occurrence insurance. Finally, if a physician selects claims-made insurance and then leaves town or stops practicing, he will need to purchase what is referred to as *tail coverage*, which will cover him for all future years even though he no longer has active malpractice insurance. ■