

## **MEDICAL MALPRACTICE SUMMARY HANDOUT**

### **History**

The concept of legal responsibility for medical malpractice dates back thousands of years, as far back as the Babylonian Code of Hammurabi and medical malpractice was recognized in Roman law. Medical malpractice in the United States is based on English common law and grounded in the legal concept of tort law. A tort is defined as a legal wrong committed upon the person or property independent of contract<sup>1</sup>. While the first medical malpractice claim in the US was reportedly in 1794, they have only recently become more common. In the 1960s, multiple factors, including increasingly complex patients and treatments with increased risk of harm as well as the removal of barriers to filing lawsuits and protections to charitable institutions led to the increase in medical malpractice lawsuits<sup>1</sup>. The goals of malpractice litigation include: deterrence of unsafe practices, compensation of persons injured through negligence, and to exact corrective justice<sup>2</sup>.

### **Legal system**

Based on premise of trial advocacy, where there is a judge (the decider of questions of law), a jury (the decider of facts, i.e. was the physician negligent, did the physician commit malpractice, was there injury related to the malpractice and does the injury warrant monetary reward) and 2 opposing parties. The lawyer's job is to represent a client; winning does not necessarily equal justice or truth and are paid on contingency collecting only after settlement or award.

### **Tort law**

Combination of legislative enactments and common-law principles. As they are often based on precedents from previous rulings, they can vary substantially from state to state. Tort law is not dependent on a previous contact or agreement between the parties. Individuals, as opposed to criminal law where the government serves as the plaintiff, bring tort actions<sup>3</sup>. Medical malpractice lawsuits begin when the patient, or their estate, believes the patient was a victim of medical negligence and consults with an attorney. The attorney obtains medical records and has a medical provider review them. If the reviewer believes there may have been medical negligence, the attorney will often have an expert in the field related to the alleged malpractice review the case to determine if there was negligence and if that negligence led to harm. The attorney then decides whether to take the case, issuing an allegation of malpractice if they do decide to proceed with the case. The formal claim, which includes details of the case and the rationale for the claim, is made directly to the physician, group, hospital, or health care institution and may be communicated in writing, in person, or by phone. Once received the claim is investigated with the health care providers' insurance carrier. After the investigation, the decision to defend or negotiate a settlement is made<sup>3</sup>.

## **Proof**

In civil court the burden of proof is initially on the plaintiff and they need a preponderance of the evidence to win.

## **Punishment/Damages**

A losing defendant in civil litigation reimburses the plaintiff for losses caused by the defendant's behavior. The tortfeasor or defendant is not subject to incarceration or fines in civil court<sup>3</sup>.

## **Statute of limitations**

There is a time limit on filing a malpractice lawsuit, referred to as the statute of limitations. Generally this is concerned to begin when the plaintiff became aware, or should have become aware of the alleged act of malpractice. Pediatric and birth injury cases, typically have statute of limitations that last 2 years after the patient becomes an adult. Due to the concept of statute of limitations the plaintiff attorney will often name any medical provider who may have had a role in the alleged malpractice to make sure the correct provider is named in time.

## **Medical Malpractice definition**

### **Elements of medical malpractice**

- 1) There must be a duty to care for the patient (plaintiff)
  - a. For the Emergency Physician this includes providing service in the first instance for any patient coming through the door
- 2) The defendant breached the duty to treat by deviating from the expected standard of care
- 3) This deviation led to the plaintiff's injury
- 4) This injury led to damages

### **Standard of care**

"The quality of care that would be expected of a reasonable practitioner in similar circumstances. Custom is determined primarily through the testimony of experts in the same field as the defendant, although some encapsulations of expert opinion, such as practice guidelines, may also be used"<sup>2</sup>.

### **Medical malpractice data/emergency medicine information**

A large database review, published in the NEJM in 2011 reviewed 25 specialties covered by a nationwide large professional liability insurer and found that on average, each year during the study period, 7.4% of all physicians had a malpractice claim, with 1.6% having a claim leading to a payment and 78% of all claims did not result in payments to claimants<sup>4</sup>. Emergency medicine physicians were in the middle of the pack in this study with about 7.5% annual malpractice claim, of which about 2% were paid, with a median payment of just less than \$100,000 and a mean of a bit less than \$200,000 (Jena). A study looking at emergency medicine physicians specifically

over a 4-year period, there were malpractice claims against 9% of physicians. The only factors associated with being named in a malpractice claims were increasing total number of years in practice and higher visit volume<sup>5</sup>.

### **Wrap up**

Emergency medicine is a high-risk specialty due to multiple issues, including temporal factors, shift work, shift changes, language barriers, and informed consent<sup>6</sup>.

~ 2/3 of all malpractice incidents occur between the hours of 6 pm and 1 am on weekends and holidays, next highest time is MN to 7 AM on weekdays (consider staffing issues, less nurse, moonlighting physicians, fatigue, less availability of ancillary testing). Change of shift – oncoming physician may be less vigilant as patient has previously been evaluated and the exact point where one physician's responsibility ceased and the others began is difficult to determine and there is often a lack of documentation.

Repeat visits should be viewed as a second chance to make a diagnosis, not viewing the patient as someone who is abusing or misusing the ED.

Always obtain informed consent for performing procedures that carry some risk to the patient.

Remember – the lawyer's job is to represent client, winning does not necessarily equal justice or truth and lawyers are paid on contingency collecting only after settlement or award.

### **References:**

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