

weathering the

MALPRACTICE

Storm

Slammed by lawsuits and increasing awards, physicians are hoping the worst is over. Unfortunately, the forecast is still gloomy.

By Wendy J. Meyeroff

The headline last year in the Louisville, Kentucky, *Courier-Journal* seemed to offer a herald of hope for physicians: “Doctor Strikes Back Against Lawyer Who Sued Him, Wins Jury Award.”

According to the story in the *Courier-Journal*, a Louisville neurosurgeon, Dr. John Guarnaschelli, was accused by a patient of causing meningitis after the physician performed a myelogram to diagnose her back pain. The patient did indeed develop meningitis, but all the evidence indicated that the meningitis had nothing to do with Dr. Guarnaschelli's procedure. Nevertheless, a lawyer (whose mother-in-law had apparently been successfully treated by Dr. Guarnaschelli for a brain tumor) went ahead and sued the neurosurgeon. The lawsuit was summarily dismissed, but unlike most physicians, Dr. Guarnaschelli didn't stop there. He brought the lawyer to court, where a jury found the attorney guilty of malicious prosecution and awarded the surgeon \$72,000 in damages, including \$60,000 in punitive damages.

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ILLUSTRATION BY SUSAN LE VAN

Before the cheering starts...

Sounds great, right? Doctors everywhere are ferociously fighting frivolous malpractice suits, using as their anthem that famous movie line, "I'm mad as hell and I'm not going to take it anymore!"

Unfortunately, that's not what seems to be happening. Malpractice cases have risen dramatically in recent years, and awards handed down by juries are staggering.

Richard Roberts, MD, JD, a professor of family medicine at the University of Wisconsin and the president of the American Academy of Family Practitioners (AAFP), says he

doesn't believe the reason the Louisville story made the press is because it signifies a new "fight back" spirit amongst maliciously sued physicians.

Rather, he says, "It's sort of a 'man bites dog' story. It probably made the news because it's so rare for physicians to sue." That, says Roberts, (who is also a lawyer) is true even when the doctor has been in some way vindicated after the malpractice case is over. B. Page Gravely, Jr., Esq., a partner in the law firm of Crews and Hancock in Richmond, Virginia, says about the Guarnaschelli lawsuit, "It's an isolated case...unfortunately."

How bad is it?

So does that mean malpractice suits are actually getting worse? Roberts points out that first one has to define "getting worse." The frequency of claims, the size of the awards being handed down, and the less tangible and more philosophical question of the public's trust in physicians are different barometers of the state of medical malpractice litigation.

Consider the number of claims. Roberts doesn't feel there's been any extraordinary burgeoning of malpractice suits. "The 'malpractice crisis' is a myth," he says. "There have been ebbs and flows in [the number of such law-

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suits] going back 150 years. It's gone through cycles every three to seven years since the Civil War."

Helen Woodfall, the second vice president in risk management services at the Doctors Reciprocal Group in Richmond, Virginia, doesn't have as benign a viewpoint as Roberts. "In the mid-seventies, we had a medical malpractice crisis, in which we moved from a relatively low incidence of malpractice suits," she explains, "to a much higher frequency into the '80s. Then the number leveled out, but from the '90s on there's been an increase in claims."

The bottom line, says Woodfall, is that when it comes to increased malpractice claims, "There's definitely a blip on the radar." She says that in Virginia, one in nine physicians were sued in 1999. Even Roberts has some depressing numbers from his state, Wisconsin. "A doctor here—in any area of expertise—has about a 1 in 40,000 chance of being sued. That is, one suit for every 40,000 patients encountered." So assume, he says, that the average family practitioner sees about 5,000 patients a year. That FP could expect one lawsuit every eight years, or about four suits over a 30-year career.

Gravely adds that some specialists in fields considered particularly "high risk" (for example, neonatologists), "are sued three to six times in their career." The bottom line, he says, is that "most physicians should expect to be sued at least once."

James Lee Valentine, DO, a partner in Primary Care Associates in Meridian, Mississippi, agrees. While the statistics vary depending on locale, specialty, and other factors, he says, "I've heard estimates saying that in the last 20 years a doctor's developed a 1 in 5 chance of being sued. It's no longer if you're going to be sued, but when."

Evidence-Based Medicine: A New Trend

Rather than preparing for a trial, some experts suggest another strategy with the goal of preventing a lawsuit: Sift through cases and develop recommended standards of care based on what consistently has proven to optimize outcomes. This process is called "evidence-based medicine" (EBM) and like most things, it has pros and cons.

Paul H. Keckley, PhD, the CEO of WebEBM, Inc. in Nashville explains that his group might say, "This is the guideline for treating congestive heart failure, but that guideline is based on sifting through 1500 references." That's a process most doctors obviously don't have time for. Keckley also notes, "The problem for doctors is getting guidelines into a format that they can use."

In 1999, WebEBM established a Web site that allows doctors access to such guidelines, and also gives patients access to information and even chat rooms, posting questions for doctors who agree to participate. (The doctor doesn't have to answer each individual question, says Keckley. Since many are repetitious, it's only necessary to answer it once.) "It's hard for the patient to allege malfeasance if the doctor has followed the evidence-based guidelines and provided access to that guideline to the patient."

Keckley admits that a) Most doctors aren't fond of using the Web and b) the cost is still prohibitive (the minimum amount Keckley mentioned was \$10,000) for a small practice. (On the other hand, a hospital which paid \$45,000 for the system essentially has a minimal cost, considering that 330 staff doctors have access to the site.)

Obviously, some experts are more than a little leery of what sounds like formulaic standards of treatment. Still, it could be argued that doctors have to follow some standards. Besides, says Keckley, a guideline "does not take the place of the doctor getting information from other sources." ■

Show me the money

While the lawsuit itself is painful enough, many doctors are truly shocked at the size of the claims being sought. Tom Kirchmeier, vice president of Physician's Insurance in Seattle, uses this example: "A certain obstetrician may not be sued often, but when he is," says Kirchmeier, "it's often for an

incredible amount of money."

John Jessee, a partner in the law firm of Flippin, Densmore, Morse, Rutherford and Jessee in Roanoke, Virginia, agrees. "What's really important is that the severity of the cases [the amount paid out] is increasing." Gravely concurs. "The 1997-1999 period was a gruesome one, by all accounts, in terms of malpractice ver-

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dicts. Some of the estimates I've seen say we saw a 40 percent increase in jury verdicts in medical malpractice claims during that period."

What causes such large awards? Two things. First, the breakdown in the respect patients have for their doctors. Gravely says that breakdown occurred in the 1970s thanks to the rise in managed care and other pressures on physician practices.

The second factor was an increase in Americans' "get rich quick" mentality. Between the Reagan "spend even if you don't have it" years and then the dot-com millionaires of the '90s, such a change in mindset was perhaps almost inevitable. Kirchmeier says, "When you hear of ball players signing \$25 million contracts, it starts to sound like Monopoly money."

Valentine agrees. "We've lost our concept of what money really means. When people see \$1 million handed out on a game show several nights a week, \$1 million doesn't seem like much any more. So jurors figure if they're going to give an award, why not make it \$50 million?"

Why not fight back?

Ironically, Woodfall says that about 75 percent of the claims that she reviews "are non-meritorious or frivolous. There's no malpractice." That being the case, why wouldn't doctors who are in the right seek redress against such frivolous lawsuits?

Part of it is simply the amount of time it takes. According to Roberts, "The average claim, even one that never comes to trial, consumes one full week of a physician's schedule." Besides the effect that has on one's income, Gravely points to something far more basic: "Doctors just want to practice medicine."

Experts also agree that there are quite



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a number of criteria that must be met before a doctor can seek the kind of repayment won by Dr. Guarnaschelli. Jessee notes, "Here in Virginia, for example, it's hard to sue the lawyer. The doctor must prove almost malice on the lawyer's part; that is, that the lawyer knew he or she didn't have a case." Jessee also adds that it's not enough for the doctor to have won against a malpractice suit. "Just because the physician won, doesn't mean there was no basis for the suit." Perhaps one of the strongest reasons that doctors fail to fight back against malpractice cases is that no matter how frivolous, such cases often have devastating emotional and psychological effects on them. Woodfall

says, "There's an absolute parallel between stages of grief and being sued. Doctors first are shocked, then usually embarrassed. Then they either become angry or go into complete denial."

Some doctors who choose a high-risk specialty accept early that malpractice suits may be a price of doing the work they love. For most physicians, though, a malpractice suit of any kind strikes at the heart of their self-esteem. Gravely pointed to one of his clients who was so upset, "She didn't even want to talk to me—and I was her lawyer."

Jessee agrees. "It's very difficult for physicians when they face this. I've never known a doctor who didn't see this as an attack on his or her skill." He continues,

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"I had a wonderful young doctor in here the other day, totally heartbroken, even though he'd gone above and beyond to deliver the best care to his patient."

In such cases, says Jessee, "My job is to help them understand that this is what happens in their profession. If there are four doctors involved in a case, it's more than likely the plaintiff's attorney will say, 'Let's sue them all.'" That's true even if three of the doctors were only marginally involved in the case.

The tactics used at trial don't help, says Jessee. "The plaintiff's lawyer will do almost anything to get the doctors to lose their temper. I've seen some vicious cross-examinations."

A case history

Gary Janko, MD, a vascular surgeon now with the Department of Veterans Affairs in Bay Pine, Florida, remembers the stress and anxiety well. Janko had a solo practice in Atlanta in the '80s. In 1986 he was one of three defendants in a product liability lawsuit (the hospital and the product's manufacturer were the other two). The case involved a device designed to prevent blood clots from going to the lungs. "The patient had gone to a plastic surgeon for liposuction and was ultimately at risk for a pulmonary embolism. She was in her 40s and had clots already up to the vena cava and so we felt the best thing to do was to insert this device to trap the clots." He adds, "It was a well-marketed device and had been around for many years. I had no reason to suspect it had problems."

Janko says the patient involved suffered a major hemorrhage from the device. Although the problem occurred in 1986, the trial didn't take place until 1990. The manufacturer had already settled with the plaintiff, but the lawyer, hoping for bigger bucks, kept on with the prosecution

of Janko and the hospital.

The jury was smart enough to recognize that Janko had no way to know this then-commonly used device was defective, and thus he "won," but he emphasizes that there was no real triumph in the decision. Since his patient still suffered, despite his best efforts, he calls this "somewhat of a Pyrrhic victory for me." It's a sentiment often echoed by doctors cleared of malpractice.

Besides feeling for his patient, Janko himself suffered. "You play a waiting game," he says. "There's a sword of Damocles over your head." Jessee, the Roanoke attorney, says this wait is not unusual. "In the legal business, 'stat' means in the next couple of months." What about the Sixth Amendment's promise of a speedy trial? "That applies only to criminal trials," explains Jessee. Malpractice cases, however, are civil trials.

It doesn't help that the media tend to run major headlines when a malpractice case ends, and to say little if the physician wins. "The Atlanta Journal-Constitution has a local section and when the suit was brought, it was all over page one of that section," Janko says. "But when the verdict in my favor came in, it was buried in a tiny paragraph." He adds, "It wasn't enough to prevail. The damage wasn't rectified. The stain wasn't erased."

While Janko insists he just did the best he could and continued on as usual throughout this tense situation, it's evident that the lawsuit had a tremendous impact on him. For example, he deliberately moved to the Florida VA when everything was over, because he felt it was a safe haven. "I was sick at heart working in the private sector. I'm somewhat divorced from it now."

There is help

Additionally, when his case was finally re-

solved, Janko suffered a massive heart attack. The odds are, say the experts, it was caused by bottling up all the stresses and strains. Yet, while experts agree that such repression is the wrong strategy, they admit Janko's actions mirror the way most physicians react.

Gravely says that too many insurers have pulled back from helping the doctor through these tensions in an effort to minimize cost, but that's the wrong tactic to take. "The insurance company has to get a handle on keeping the doctor sane. Not just for the doctor, but for its (the insurer's) own well-being." After all, he points out, "If the doctor isn't stable, you can't defend him or her. You'll lose—and lose big."

That's one of the reasons Woodfall's group has established a formalized Physician Support Program, designed to help the doctor deal with the stress through the whole legal problem and beyond. "Dr. Janko's story is not unusual. Most of the physicians I speak to—and remember they're high achievers—take being sued very hard, very personally." The only physicians who Woodfall doesn't tend to see are those doctors who are prepared for the lawsuit. "They read articles on litigation, they talk to people, and they don't overly personalize." These are the doctors who understand the medical/legal environment.

Survival tips

There are other steps (some established, others gaining momentum) for at least minimizing malpractice suits. Among the current recommendations:

- ✓ Be realistic about the amount of insurance you're likely to need. Kirchmeier notes that in Washington state a doctor is required to carry insurance that annually covers both a \$1 million claim and anywhere from \$3 to 5 million in awards. In non-legalese, that means the doctor could figuratively be sued eight times in a year and as long as no one claim was over \$1

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million, or the total of all eight claims was less than say \$3 million, he'd be covered. That doesn't mean a Washington state physician, especially in a high-risk specialty, should have only this minimal coverage. Instead, talk to colleagues, and experts like Kirchmeier.

- ✓ Look for an insurer with support programs. The latter should include risk management and, if possible, emotional support and help finding a lawyer.
- ✓ Listen to the risk management experts. Woodfall recommends adding adequate policies and procedures for a host of situations, like scheduling appointments, releasing records, tracking records, solid documentation, and follow-up.
- ✓ Do a better job of record-keeping. Among Roberts's suggestions: making your notes while the case is fresh in your mind, and making sure records are typed, not hand-written.
- ✓ Find personal support. Roberts says it's relatively easy to find others in your specialty who've been through similar situations. "Just make sure you talk about your feelings, NOT the merit of the case."
- ✓ Don't go around discussing the case. Remember, things get back to the prosecution and even your friends can be called against you.
- ✓ Be sympathetic to your patient, within limits. Don't lead them to believe you're responsible for a problem, especially if you're not.
- ✓ See if your insurer tracks procedural changes and offers advice on making changes. Kirchmeier says, "One procedure that's become 'higher risk' is VBAC, vaginal birth after Cesarean." So Kirchmeier's people will tell their doctors in which patients this might not be the best procedure to choose.

- ✓ Know your limitations. Says Valentine: "Recognize when you should refer your patient. Be honest and don't try to do more than you can do."
- ✓ If the problem occurred in a hospital with which you're affiliated, don't assume the administration will help. Says Roberts, "The administration is usually either feeling they've got to cover themselves or angry, like 'How dare he do that in MY hospital?'"
- ✓ Find a good lawyer. Says Jessee, "Most insurers generally try to find the best lawyer for you, because it ultimately saves them money." If you're not satisfied with your insurer's choice, many professional associations, like the AMA, have legal referral services.
- ✓ Don't cover up. "They'll find it," Jessee says.

Closing the doctor/patient gap

Over and over, the experts emphasized one survival tip above all: establishing a solid relationship with one's patients. Whether it's done through on-line chats (see "Evidence-Based Medicine: A New Trend), or face-to-face, experts agree that a strong doctor/patient relationship plays a major role in lessening the odds of a malpractice suit. As Kirchmeier puts it, "A lot of the things [that lead to lawsuits] are perceptual," that is, a perceived slight or disregard for the patient's care.

Valentine notes he's been practicing 20 years and he hasn't been sued yet. "And I plan to keep it that way," he says. Being personable and honest are two of the greatest factors he feels contribute to his success, and which can help his fellow physicians. Jessee backs him up, noting, "Nobody sues Marcus Welby' is not exactly true—but it's close." ■

Wendy Meyeroff is a regular contributor to Unique Opportunities.