Pennsylvania Academy of Family Physicians Foundation

Pittsburgh CME Conference

November 7 - 9, 2014

Medical Malpractice – A Family Physicians Perspective ***Patient Safety***

Richard Bruehlman, MD, Renaissance Family Practice, Pittsburgh, PA

Disclosures:

Speaker disclosures that he has an immediate family member with a financial relationship or interest with a commercial entity. The speaker also provides reviews for medical malpractice files and trial testimony for defense teams in PA, WV, and Ohio. There are no conflicts of interest.

The speaker has attested that their presentation will be free of all commercial bias toward a specific company and its products.

The speaker indicated that the content of the presentation will not include discussion of unapproved or investigational uses of products or devices.

Medical Malpractice for the Family Physician

Richard Bruehlman, M.D.
Directory of Community Preceptors
UPMC St Margaret Family Medicine Residency

Disclosure

- Dr. Bruehlman discloses that he or an immediate family member has a financial relationship or interest with a commercial entity that may have a direct interest in the subject matter of this session. No conflict of interest exists in relation to his presentation today.

Objectives

- Discuss the lifetime claims risk for a family doctor
- Explore the effects of tort reform on the number of malpractice filings in Pennsylvania
- Use the results of a classic observational study to reduce our risk of being sued
- Employ the concept of “cognitive dissonance” to help decide whether to settle or go to trial

My qualifications (and disclosure)

- Medical legal reviews since 1993
- Pennsylvania, West Virginia, and Ohio
- About 200 cases reviewed
- Trial testimony on behalf of defendant family physicians and general internists
- Perhaps 1% of my professional time is devoted to medical legal work
- Disclosure: I get paid for this work

Our legal system

- The medical legal system runs in parallel to the health care system
- The right to seek redress in our court system is fundamental
- Though aggravating, inefficient and painfully slow, our legal system helps us settle disputes in a nonviolent manner

Why do family doctors get sued?

What diagnostic categories show up on claims most frequently?

"Big Five" for family docs

- Coronary artery disease (atypical presentations)
- Breast cancer (overreliance on mammography)
- Lung cancer (who follows up on abnormal CXR?)
- Colon cancer (screening, w/u of rectal bleeding)
- Appendicitis (masquerading as gastroenteritis)

PE belongs in the "Big Five"

- Failure to diagnose fatal pulmonary embolism
- "High index of suspicion"
- Classic presentations are easy: pleuritic chest discomfort, SOB, tachycardia, hemoptysis, etc
- Subtle presentations are hard: chronic DOE in morbidly obese woman with mild ankle edema
- Use Well's score to guide decision making

Weird stuff: alleged ….

- Failure to diagnose upper extremity DVT resulting in amputation
- Delay in diagnosis of islet cell tumor of the pancreas
- Failure to diagnose thrombotic thrombocytopenic purpura
- Delay in diagnosis retroperitoneal recurrence of endometrial stromal cell sarcoma years following TAH/BSO
- Pseudotumor cerebri

"Clerical malpractice"

- Hypothetical case: man treated for pneumonia, calls complaining of persistent cough and dyspnea
- You are up to your ears with patients and phone calls
- Your staff feels they need to protect you, or it's Friday afternoon and they want to get a little early
- An MA or worse a front desk receptionist tells him that he needs to finish the antibiotic before any improvement, you never find out until the ER calls ….

What's our risk of being sued?

- "Malpractice Risk According to Physician Specialty" NEngJMed August 18, 2011
- 15 years of data from a single physician-owned insurer
- Calculated claims risk per year for every specialty
- A claim was defined as an action that resulted in defense costs

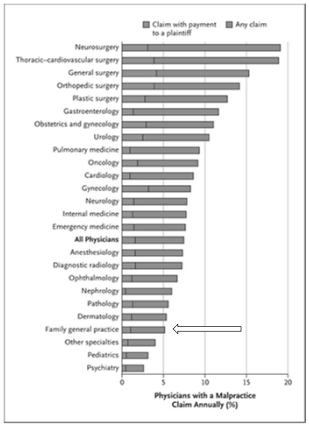
What's our risk?

- All specialties combined: 7.4% per year had a claim
- Neurosurgery and CT surgery doctors had nearly 20% per year claims risk
- Psychiatry was lowest at 2.6% per year

What's our risk?

- Family medicine had a claims risk of 5.1% per year
- So, about 1 in 20 family doctors experience a claim each year

Proportion of Physicians Facing a Malpractice Claim Annually, According to Specialty.



The NEW ENGLAND JOURNAL of MEDICINE

Jena AB et al. N Engl J Med 2011;365:629-636.

What's our lifetime risk?

- For "low risk" specialties like family and general medicine, for a doctor practicing until age 65, the estimated lifetime risk for having a claim is 75%
- Authors projected that 36% of physicians in low risk specialties will have a claim by age 45

Expect a claim or two sometime

It's a cost of doing business

Reform efforts are effective

Beginning in 2003, the Pennsylvania Supreme Court mandated for malpractice filings that:

- Cases be brought in the venue in which the cause of action arose
- A medical professional must sign a certificate of merit that there is a "reasonable probability" malpractice occurred

Reforms are effective

- All specialties: average number of malpractice filings statewide from 2000 to 2002 was 2,733 per year (Allegheny 396, Philadelphia 1,204)
- Number of malpractice filings per year fell by 2010 to post-reform low of 1,490
- In 2013, total of 1546 filings (Allegheny 295, Philadelphia 382), a 43% reduction from base years
- Specialty specific statistics are not available
- http://www.pacourts.us/assets/files/setting-2929/file-2300.pdf?cb=e416ad

Reforms can be effective

- Higher up front costs, no venue shopping, medical professional signing a legal document → fewer, but not zero, "frivolous" malpractice suits are filed
- Mediation is becoming more common; cost to defend and settlement amounts are lower than jury trials
- It remains challenging for plaintiffs to have Pennsylvania juries (outside Philadelphia) find against physicians but when they do, awards can be quite high

Needles, Z. "Have malpractice filings stabilized 10 years after tort reform?" Pittsburgh Post-Gazette 7/1/14

Apology reform

- SB 379 "Benevolent Gesture Medical Professional Liability Act" signed into law last year
- No liability for saying "I'm sorry" prior to the start of malpractice, mediation or administrative actions
- Does saying you're sorry reduce liability?
  Probably yes!
- Does not work if your apology is finger-pointing
  "I'm very sorry Dr X caused you such harm …."

Time for a classic study…

"Physician-Patient Communication"

Wendy Levenson M.D. et al
JAMA 1997; 227: 553 - 559

Physician-Patient Communication

- 59 PCPs, 65 general and orthopedic surgeons
- Claims (at least 2 lifetime) doctors vs. no-claims doctors
- 10 videotaped patient encounters per doctor
- 3 reviewers, blinded to claims status, reviewed and rated encounters using a validated rating tool

Levenson et al. JAMA, 1997, 277: 553 -559
http://jama.ama-assn.org/cgi/content/abstract/277/7/553

Physician-Patient Communication

- Did any differences in behaviors reliably identify "claims" vs. "no-claims" physicians?
- For general and orthopedic surgeons, the answer was no, for reasons not clear to study authors

Levenson et al. JAMA, 1997, 277: 553 -559
http://jama.ama-assn.org/cgi/content/abstract/277/7/553

Physician-Patient Communication

For primary care doctors, behaviors observed more often in "no-claims" doctor-patient encounters:

1. More "statements of orientation": goal setting for encounter, patient education
2. More use of "facilitation": checking for understanding, soliciting patients' opinions
3. More laughter and use of humor

Levenson et al. JAMA, 1997, 277: 553 -559
http://jama.ama-assn.org/cgi/content/abstract/277/7/553

Testing whether laughter IS the best medicine

"Whoa! *That* was a good one! Try it, Hobbs — just poke his brain right where my finger is."

Physician-Patient Communication

"No-claims" primary care physicians spent average of 18.3 minutes per encounter vs. 15 minutes for "claims" physicians

Length of visit independently predicted claims status of physician

Limitations of Levenson's study

- Nice guys and gals do get sued
- What about "the daughter from California"?
- Cause and effect: did prior claims change physician behaviors rather than vice versa?
- Hospital liability is a different animal

Cognitive dissonance

- Leon Festinger circa 1957
- Psychic discomfort created by 2 conflicting beliefs or evidence that conflicts with a strongly held belief
- We unconsciously and consciously work to reduce this discomfort
- Conservatives watch Fox, liberals watch CNN
- Might explain some the difficulty we physicians have at times with evidence based medicine

Cognitive dissonance

- Juries do not like to find *against* physicians
- Juries do not like to see:
  - permanently injured young people
  - indifferent care
  - physicians who point fingers at one another or at nurses during trial

Questions to ask yourself

- When faced with deciding on whether to defend or settle a claim, ask yourself: will cognitive dissonance work in the favor of me or the plaintiff?
- Are you truly at peace with the care you provided or are you finding yourself irritable and defensive?

When you are sued, remember …

- You are in excellent company - good docs get sued
- You are human, therefore imperfect
- To seek help from your family, colleagues, friends, religion, physician, therapist; don't go it alone
- In your career, you have relieved much suffering and extended many lives
- Nothing in life really worth having comes without a struggle