SURVIVING A MALPRACTICE SUIT

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THE UNHAPPY REALITY

- You will not “enjoy” this talk
- This presentation may prepare you better for a very difficult future (or current) situation you are dealing with.
- If you have previously dealt with a claim against you, I hope you will find some comfort in what I discuss here.

MY SISTER

- In June of 1994 my sister had surgery on her left wrist to relieve “trigger thumb”
- The surgery was done with a local anesthetic.
- This was injected by a resident, supposedly under supervision of the hand surgeon.
- She experienced severe pain upon the injection, and subsequently experienced months to years of numbness in her fingers and sensitivity in her left wrist.

- The surgeon claimed on post operative exams that this was a normal postoperative occurrence.
- My sister, who was a lawyer, sued for malpractice, claiming that the injection was done incompetently, and that anesthetic was injected into the median nerve causing permanent damage.

- She served as her own attorney (pro se) and filed suit in 1996.
- By 2003, there had been no further action taken by her to our understanding.
- My sister died in 2009.

- In 2010, the surviving siblings were contacted with a request to dismiss the suit. My sisters refused to consent (I agreed, but was outnumbered).
- The hospital system went into bankruptcy proceedings.
- As part of the bankruptcy proceedings, legal settlement agreements were arranged to handling outstanding lawsuits including my sister's.
- Apparently at some point I agreed with my other siblings to be part of the settlement.

LAST WEEK

- Last week, I received a request from the attorney handling the settlement informing me that I had to re-file my notarized document, and that to expedite things (!), I was to send the new document by Fedex.
- I sent it by regular mail.
- The final settlement is supposed to be approximately $10,000. Apparently I will receive a portion of that. I don't know whether the attorneys get a portion of it, since it is a settlement for bankruptcy.

THE MALPRACTICE SYSTEM

- It is not based on logic.
- It can be incredibly slow to the point of absurdity.
- It can require fast responses despite the otherwise snail like processes.
- It is conducted in a way that is completely contradictory to the analytical, practical, and fairness concepts inherent to the mind of the typical physician.

ER VISIT

- Reimbursement to examine a patient to rule out post operative endophthalmitis:

Level 4 ER evaluation 99284 (data for SC)

BCBS $126.29, Medicare $122.00, Medicaid $59.20 (Medicaid is $93.26 in NC !!)

Extended ophthalmoscopy 92225

BCBS $51.51, Medicare $22.56, Medicaid $12.00

(no payment if during the post op period of your own patient)

OMIC INFORMATION

- Indemnity payment for a missed endophthalmitis and failure to treat:
- $375,000.00
- Payment on behalf of a 32 year old ophthalmologist sued for this.

- To the lawyers it is all about the money.
- To us, it is personal, painful, and soul wrenching. (p 33)

RETINAL DETACHMENT

- OMIC data as of April, 2018
- Out of 1613 ophthalmic practice claims
  - 14% were allegations of diagnostic error
  - Of these, 29% involved RD
  - It is the most common missed diagnosis claim

WHAT INCREASES YOUR RISK?

- The emergency work in
- ER calls
- Failure of staff protocols for handling calls
- When you have diverted attention – are you being distracted during evaluations?
- How I missed an RD

ISSUE OF SCLERAL DEPRESSION

- According to George A. Williams of the Academy's PPP (preferred practice patttern):

  "As it states, the standard of care for any at risk patient requires a dilated examination of the entire fundus with indirect ophthalmoscopy and scleral depression – period, end of discussion."

So how many of you do scleral depression on patients with new floaters?

What about optometrists? What about optometrists employed by you ????

DATA ON MALPRACTICE SUITS AMONG OPHTHALMOLOGISTS

- According to OMIC data, 95% of all ophthalmologists will have a claim filed against them during their career.
- There is currently approximately an equal number of claims in OMIC's database compared to the number of covered OMIC ophthalmologists in this state. (The distribution is protected info).

DO YOU CARE ABOUT THAT DATA?

- Not when you are the one named?
- But there is a very high and almost guaranteed likelihood that you will have to deal with a claim during your career.
- According to OMIC – “A malpractice suit can be emotionally traumatic, but physicians eventually see their cases through and often emerge stronger and even more committed to their chosen profession.”

FROM AN OMIC DOCTOR

"I was able to get through this horrific ordeal relatively unscathed, but a bit stronger from my scars. The phone call I received informing me that my case had been dismissed ranks, in terms of emotional impact, just below that of my children being born"

My case was not dismissed.

I did not get through my experience unscathed or stronger.

FROM "MEDICAL MALPRACTICE"

- Book by Thom Loebe, MD, JD
- Sections on p.2 and p. 33

2001

- A 50 yo smoker presented with a complaint of very intermittent visual disturbance. Able to elicit that she was having intermittent diplopia. No pain.
- Exam was mostly unremarkable, except for trace impairment of elevation OD and a slightly smaller pupil on that side.

CONTINUED

- Patient brought back for orthoptic evaluation.
- During that evaluation, patient experienced the symptom. Orthoptist noted a significant esotropia during the symptom. Lasted a few minutes or less.
- Discussion of ocular motility findings. Diagnosis of oculomotor neuromyotonia. NO history of prior brain tumor or irradiation.

NEUROIMAGING

- MRI ordered. Order specified to rule out cavernous sinus aneurysm or mass because of possible coexistence of slight third with ? Of Horners.
- Reading of MRI said no aneursym seen, but further testing could be done with CTA (not yet locally available) or catheter arteriography. MRA not mentioned as option in report. No phone call from radiologist.

3 WEEKS LATER

- Patient goes to local ER because of sudden onset of severe headache. ER doc told of oculomotor neuromyotonia dx. No head scan done and patient sent home.
- I get a call from patient's husband with the current symptom. Patient told to go immediately to radiology at hospital to have urgent scan, which was done.

IN RADIOLOGY

- I see the patient while in radiology. Still neurologically intact except for headache.
- Scan shows subarachnoid heme. Patient admitted and undergoes neurosurgery. Neurosurgeon (near retirement age) does surgery. Patient suffers post op stroke and permanently impaired after surgery.

SUBSEQUENT COURSE

- Lawsuit against me and ER doc. NOT neurosurgeon, not radiologist.
- Every miniscule detail of every written item in every location gone through with fine tooth comb. I am criticized for not listing pain since patient took Tylenol.

WHY WERE THE NEUROSURGEON AND RADIOLOGIST NOT SUED?

- Hospital employment protects them?
- No explanation ever given to me that seemed satisfactory.

MALPRACTICE SUIT

- I am cited for missing diagnosis despite raising the question on MRI order. MRA not mentioned by radiology as option, which was confusing. CTA mentioned but not locally available. Angiography mentioned.
- Review of scans by outside neurosurgeon notable for missed suggestion of aneurysm.

OTHER REVIEWS

- My expert , Steve Newman, agreed that this was not outside standard of care.
- Another expert said that initially he would have ordered angiographic study, but not after the second exam when oculomotor neuromyotonia diagnosed.
- Plaintiff expert, not nationally known, denies knowledge of oculomotor neuromyotonia as an entity. Said it was aberrant regeneration.

WHY NOT ABERRANT REGENERATION?

- No fixed deficit of eye movement or lid.
- Intermittent disorder.
- Pupil size not varying on gaze, but smaller on that side. VERY atypical pupil finding for third!

NANOSNET INQUIRY

- Case described as presented.
- NOT one suggestion to do angiography. Only suggestions on treatment.
- Case presented at regional neuro Oph conference with 11 neuroophthalmologists. Not one doctor recommended angiographic study. All shocked at diagnosis of aneurysm.

MONTHS LATER

- After many months of record review , expert review, depositions, etc. , case goes to a mediation session. I am told by my lawyer after about 3 hours that there was no point in me staying at session since they were so far apart in a settlement agreement.
- SC JUA in fear of another huge lawsuit against them

END OF DAY

- A huge concession made by JUA and case settled. (Joint underwriting association for SC)
- Goes on my record.
- My emotional status further ruined.

ISSUES

- To the lawyers, it is “just about the money”
- To us, it is personal and highly damaging to our ego.
- In the professional world, I was permanently branded as a tainted physician because of report to data bank.
- I was then told by my insurer that they were possibly not going to renew my insurance because of presentation to regional meeting.

ISSUE OF TIMING

- I had been told I could not discuss case in any forum.
- My presentation was prior to that, and eventually I was able to prove that, but I went for about 2 months with uncertainty about my professional future of insurability.

DAMAGES TO ME

- Deep and long lasting depression
- Distracted thinking , resulting in another error (but not a lawsuit)
- Damage to family relationships
- Permanent change in attitude towards patients – all are potential lawsuits
- Permanent change in test ordering. Attitude of OMIC is rule out worst case scenario. This is an extremely expensive way to practice medicine.

WORST CASE SCENARIO APPROACH

- Results in massive amount of test ordering
- Negates the benefit of clinical judgment
- Massive extra expense for system

FAILURES OF SYSTEM

- Fear of jury trial and complexity of medical issues made JUA fearful of bringing case to court.
- Occurrence of **case** of possibly one in 10 million IRRELEVANT in regards to malpractice trial risk
- Inequality of expert witnesses IRRELEVANT. It is who puts on the best show.

DATA BANK

- I was limited in how much of an explanation of my own interpretation of case that I was allowed to submit.
- I learned from a subsequent case how to avoid another entry to data bank
- Payment made on behalf of you to third party is reported. Not payment you directly make!

FAILURES OF SYSTEM

- Early and active counseling not actively made available to me.
- No adequate preparation to me for the psychological damage.
- Ongoing damage to my professional reputation and ability to apply to jobs elsewhere.
- Permanent record of malpractice.
- Inability to adequately be allowed to “rebut” the record in the data bank.

RECOMMENDATIONS

- You must not deal with this in isolation (pages 232-233 of Nasca et al)
- Seek early counseling and seek out support systems
- To the lawyers it is only about the money (on BOTH sides).
- To you it is deeply personal and extremely damaging to your self esteem.
- Protect your family from this effect.

RESOURCES/CONSEQUENCES

- You must ask for help – it does not automatically get offered.
- You must realize that you will take this far more personally than anyone else cares. That especially includes your own attorney.
- You will suffer long term emotional consequences.
- You will change your behavior towards future patients.
- Your family, your office staff, and your patients will all suffer directly or indirectly.

CAN YOU AVOID LAWSUITS?

- Only to some degree.
- Bad things happen to good doctors
- Decisions are made based on the “best show” and uncontrolled factors, not the right science.
- Worse things happen to doctors willing to do the difficult work
- Juries are stupid and unfair
- The system is broken and will remain broken
- We need a peer system
- We need a non fault system

WHAT IS A NON FAULT SYSTEM?

- Mandatory reporting of errors
- Systemic managing of errors to prevent future errors.
- Examples of errors:
  - Switched MRI scans (what if I had not reviewed the scans personally?)
  - Missed patient info about lymphoma diagnosis because of patient failure to inform me of this in her history
  - Missed history of brain tumor by patient with vision loss

WHAT ARE FINANCIAL PROTECTIONS?

- Keep assets in protected structures.
- Some states protect primary residence from suits.
- Other strategies.

WHAT ARE EMOTIONAL PROTECTIONS?

- Knowing you did adhered to standard of care does help, but only partially.
- Guilt is an overriding feeling that is hard to suppress.

OMIC RESOURCES

- Go to www.omic.com
- I don't believe there is a crisis number to call, in case you were wondering.

CONCLUSION

- As a physician, you will receive little to no training during medical school, internship, residency, or fellowship on how to handle the emotional aspects of a malpractice suit.
- As a physician being sued, you will have to figure out how to manage the emotional aspects of a malpractice suit.
- If you do not accept the reality of this paradox, you will suffer greatly. If you are sued, actively seek emotional assistance. If not for you, then for your family.

I AM AVAILABLE AS A RESOURCE

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