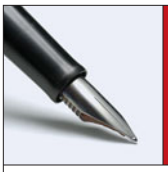

LETTER FROM THE EDITOR-IN-CHIEF

I'm Not a Lawyer, But I Play One...

LEE A. RESNICK, MD, FAAFP

Like many of you, the fear of a medical malpractice claim casts a wide shadow over everything I do. Like most of you, my intent is always to do no harm and provide the best care possible for every patient despite significant challenges. And like all of you, I wonder how we got to a place where any level of inaccuracy or misjudgment became a breach of the standard of care. While some reforms have been enacted to reduce the burden and exposure of medical liability, we still practice in an environment that expects near perfection despite the fact that this goal is unachievable. We are still judged and punished on our imperfections regardless of intent or any objective definition of negligence. This is a shame.

So, when is a mistake in judgment, an error of omission, or miscalculation considered to be negligent, and why? How does the law define "negligence" and "standard of care," and when should a mistake be "acceptable" vs punished? Let's start with some legal definitions:

Standard of care: The standard of care is linked to the legal concept of "custom." It is most easily described as a customary way of doing things safely. "Customary" practice has also been defined as "reasonable" or "expected" relative to other providers with similar experience and training.

Negligence: Negligence and liability are a little bit different. Negligence requires four legal elements be met: duty, breach of duty, harm, and causation. Duty is aligned with the standard of care; breach is falling below that standard; harm is "injury" or consequence; and causation relates to the connection between the breach and the harm.

While these definitions may all seem reasonable, there are many inherent problems. First, there is little agreement and even less consistent application of the term of "customary." Is this a "minimal" standard, a reasonable standard, or a usual standard? Who decides? If two experts disagree about the standard (which, in the course of litigation, they always do), who breaks the tie? Well, in practical terms, it's the jury that decides (or in the case of settlement negotiations, the *threat* of a jury decision). And how do juries decide you may ask? Well, based on which expert they believe and what they think the standard *should* be. Of course, all this is a very flawed, and profoundly unfair way to confer negligence and apply punishment.

"The system should focus more on cases of alleged misconduct than trying to adjudicate standards of care."

Consider this example: Most physicians would agree that a patient with a chief complaint of chest pain should have an EKG. And most would agree an EKG is standard when the chief complaint is shortness of breath and chest pain is identified in the review of systems.

But what if the chief complaint is cough and chest pain is associated? This example is less clear. If the provider diagnosed pneumonia and the patient died of a myocardial infarction, does the failure to order an EKG breach the standard of care? The jury will hear this from plaintiff's counsel: *An EKG is such a simple and inexpensive test and would have more likely than not identified the patient's heart attack. And since the patient presented with chest pain, why not rule out the most threatening cause?* The defense expert can only counter with lectures on *pretest probability* and the risk of *false positives* that lead to unnecessary testing and complications. Of course, the jury already knows the outcome, and the emotional plea is always more compelling than statistics.

It seems to me that the system should focus more on cases of alleged misconduct (eg, practicing while impaired) than trying to adjudicate standards of care. An insurance pool could exist to compensate patients for mistakes and misjudgments and these cases should be heard by a panel of unconflicted experts rather than juries. We should limit the trauma of jury trial and punitive damages to more obvious neglect of duty. This would reflect true reform and remove an unfair burden from the thousands of dedicated, well-ntentioned and "imperfect" providers. ■

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