

FACING AN ALLEGATION OF MEDICAL MALPRACTICE

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ABSTRACT

In recent years, medical malpractice suits have been on the rise both in Singapore and throughout the world. As it is humanly impossible to prevent all medical errors, for the individual physicians, there is no foolproof way of avoiding being sued short of giving up clinical practice altogether. Therefore it is very important for all practicing physicians to not only understand the local legal process but also to have in place a strategy in dealing with a complaint of medical malpractice. This review article aims to provide a step-by-step approach when faced with an allegation of medical malpractice. These are: coping with the initial reaction, be objective and focused, importance of medical records, clinical risk management, seek timely legal assistance, understanding the legal process, preparing for the court hearing, surviving the court hearing, coping with the stress, and moving on.

INTRODUCTION

In the United States, there is more than 50% chance that a physician will be sued for malpractice at least once in his career¹. In the 1998 American Academy of Family Physicians' Professional Liability Survey Report, 45% of the respondents reported having had a malpractice claim filed against them².

In recent years, there has also been an alarming trend in the rising incidence of medical malpractice suits and the value of subsequent claims in Singapore³. A Singapore Medical Association (SMA) report on the changing face of medical litigation in July 2001 reported the Medical Protection Society saying that the average size of a medical malpractice claim had almost doubled over the last 3 years and the number of active claim increased threefold.

Locally several recent cases have reached or exceeded the \$100,000 mark with the largest award being \$2.55 million (reversed on appeal)⁴. Possible contributing factors include a better educated and increasing assertive public with increased awareness of the medical and legal systems as well as rising expectations and costs of medical care.

Although in the United States and throughout the world, clinical standards of care continue to improve, it is still humanly impossible to completely eradicate all medical errors⁵. Therefore, it is important to develop an understanding of the local legal process and a strategy in dealing with a complaint of medical malpractice which maybe encountered personally or by a fellow colleague.

DATA SOURCES & METHOD OF SEARCH

This review is based on a selection of web-based literature on medical malpractice using both the Yahoo and Google search engines. Additional information is obtained from several textbooks on Medical Law and Malpractice as well as the SMA website where articles were written by authors familiar with Singapore medical law.

A Medline search was also conducted for relevant review articles from 1995 to 2005 by combining the key words of "malpractice" and "litigation". This resulted in 322 citations which on inspection yielded 4 relevant papers. These were studied and incorporated into this review article.

WHAT IS MEDICAL MALPRACTICE?

It is an act (or omission) by a healthcare professional that departs from the standard of healthcare (accepted by a credible body of responsible medical opinion), resulting in an injury or harm to the patient. The legal elements include the existence of the physician's duty of care, a breach of the applicable standard of care as well as a casual connection between the violation of this standard of care and the resulting damage or injury to the patient⁶.

WHY DO PATIENTS SUE DOCTORS?

Some of the reasons that motivate patients to pursue medical litigation include anger at perceived betrayal of trust, suspicion of cover-up, breakdown in doctor-patient or hospital-patient relationships as well as desire for doctors to acknowledge and account for their medical errors⁷. Some patients may use the litigation process as a means of finding out what really happened and also to make sure that similar events would not happen to other patients in future⁸.

STEP-BY-STEP APPROACH IN FACING AN ALLEGATION OF MEDICAL MALPRACTICE

The ten steps to consider are:

1. Coping with the initial reaction
2. Be objective and focused
3. Importance of medical records
4. Clinical risk management
5. Seek timely legal assistance
6. Understanding the legal process
7. Preparing for the court hearing
8. Surviving the court hearing
9. Coping with the stress
10. Moving on.

STEP 1: COPING WITH THE INITIAL REACTION

Very often, an indication of a potential medical malpractice suit will come from the adverse event itself, the internal investigation by the hospital's quality assurance committee or a coroner's inquiry where death ensued. However, the receipt of a legal summons is the definitive notice that legal action has been commenced, although this may be preceded or followed by negotiations or mediation for a settlement.

The first step in coping with the stress of litigation is to understand that it happens, regardless of whether there is any element of negligence on your part and that it can be a potentially traumatic experience¹. Next, you will need to deal with and be in control of your feelings. The initial reactions of shock, disbelief or denial may be followed by feelings of distress, depression and even anger.

STEP 2: BE OBJECTIVE

If you work in an organization, inform your immediate superior and your institution's legal advisor as soon as possible. You will also need to inform the legal advisor from your medical insurance agency promptly as insurance companies can legally decline to cover the claim if they have not been notified of the negligence claim in a timely fashion^{9,10}. Early legal advice may assist in either damage control or prevention of a legal suit against the doctor⁹.

At the same time, the doctor must remember that no matter how sympathetic he is towards the patient, he must not under any circumstances make any admission of liability even verbally. This is because any admission of guilt made without prior consent of the insurers will result in the doctor losing his insurance coverage⁹.

STEP 3: IMPORTANCE OF MEDICAL RECORDS

The medical record is the most important tool of defense a physician has in a medical malpractice suit². You will be required by your legal advisor to write a preliminary account of the events leading to the incident. This will be based on the facts documented in all the medical records that you have gathered.

First of all, make sure your medical record is complete and up-to-date². Take time to gather all records together and slowly review them to refresh your memory⁹. Besides being completely familiar with every aspect of your documentation, you may also want to review records of other doctors who had treated the patient for the same injury or other relevant records that predated the injury¹¹. Remember not to alter, hide or add anything to the original medical records or else your case will fall¹².

At the same time, you must be ready to explain what you said and did to the patient, the rationale behind the treatment provided and any other counseling given to the patient². Carefully study all the information gathered and construct a reasonable account of what happened but do not over-elaborate your story. Your account should be factual, accurate and relevant¹³.

You should make copies of your medical records to your legal advisors and other professionals from your medical defense union. Keep the originals in a safe place but make sure you know where to retrieve them at a later date⁹. At times, you may need to contact other members of your healthcare team who are also involved in the case and who may be potential witnesses should the case proceed to trial.

STEP 4: CLINICAL RISK MANAGEMENT

Inevitably in clinical practice, patients' outcomes may not be as expected originally⁵. In fact, adverse events and medical errors are not uncommon¹⁴. When things go wrong, there is a need to be open and investigate the facts. Subsequently, all patients are entitled to a full explanation of what has happened, why it happened as well as an apology of the adverse event where appropriate¹⁴.

An honest and forthright risk management policy that puts patients' interests first and alleviates their concerns may lessen rather than increase the risk of medico-liability of the healthcare professionals^{7,14}. Besides, ethics, professional policy, and relevant empirical literature all suggest that timely and candid disclosure of medical errors to the patients should be the standard practice for all physicians in the near future¹⁴.

STEP 5: SEEKING TIMELY LEGAL ASSISTANCE

You would most likely need advice from the legal professionals from both your organization and your medical defense union. Make use of this opportunity to learn as much as possible about the entire litigation process¹. Ask your lawyer or legal advisor to explain clearly the actual steps involved in the medical malpractice process in detail.

Stay actively involved in your case by working closely with your lawyer⁹. Expert witnesses will most likely be needed to help anticipate the other side's approach and prepare the defendant on the standard of care as well as review the authoritative and relevant literature.

STEP 6: UNDERSTANDING THE LEGAL PROCESS

The first step taken by the aggrieved party in the commencement of civil proceedings is the issuing of a "Writ of Summons"⁴. This is essentially a notice to the court and the defendant that the plaintiff is initiating a lawsuit against the defendant. If the defendant chooses to contest the suit, he would then enter an appearance. After this, there will be an exchange of pleadings (written statements of the cases) between both parties.

Most likely, you are required to respond in writing to questions from the plaintiff's attorney and disclose relevant documents to the other party. If information is clearly in your favor, the plaintiff may decide to drop the case immediately. This phase is unpredictable and could last for months or longer, after which your case could be dropped, settled or proceed to full trial.

Usually before the case proceeds to trial, there would be a pre-trial conference where both parties will be urged to explore the possibility of an out-of-court settlement, or to be mediated by a neutral third party. If this fails, both parties would proceed to trial. Understand that an out of court settlement does not imply that you are at fault. Whether a case is settled out of court depends on several factors e.g. how well your case can be defended in terms of the quality of medical records, the credibility of the witnesses or the physician defendants, etc.

Once the trial proceeding begins, both parties would submit their evidence (witnesses & documentary evidence) to the court and there would be an opportunity to cross-examine each other's witnesses. After hearing all the evidence, both parties would have an opportunity to make closing arguments before the judge makes a decision in the case.

Legal proceedings are commonly subject to postponements and last-minute changes¹. So you need to anticipate that there will be disruptions to your schedule during this time to reduce your frustration. The entire litigation process could stretch for as long as 2 years or even longer; this represents additional effort and expenses for all participants⁷. Also understand that you may experience a series of emotional swings throughout the entire process.

STEP 7: PREPARING FOR THE COURT HEARING

Adequate practice with your defense attorney can maximize your chance of presenting the facts of your case in the most beneficial manner and promote the impression of your competence and confidence². You should set aside dedicated time with your defense attorney to go through a simulated rehearsal of the actual court proceeding where you may be faced with tough questions from the plaintiff's lawyer. Remember to participate actively in the preparation and provide your defense counsel with complete details as promptly as possible¹⁵.

Before the court hearing, you need to be familiar with all the facts and other important issues relevant to your case, what are the contentious issues as well as the strengths and weaknesses of your case². Besides getting help from a reliable and dependable lawyer, you may get advice from colleagues who have similar experiences.

Go through the important and relevant issues with your lawyer and discuss with your expert witnesses all the possible issues that may be raised in the court. You should make an effort to obtain all the necessary information that is supportive of your case. It is necessary to go through your affidavit with your lawyer several times. You may want to ask your counsel about the opposition's affidavits of evidence and trial tactics and even seek individual coaching to better understand the malpractice process and prepare for the trials¹⁵.

STEP 8: SURVIVING THE COURT HEARING

First of all, remember to look, act and talk in a caring manner. Dress neatly and conservatively. Be professional, caring and respectful¹².

Remember that your role as a defendant is to provide a factual and accurate testimony for your expert witness to defend your case². Be confident that you are well prepared and can withstand the challenges of cross examination. Do not be intimidated or agitated by the plaintiff's solicitors¹⁶. Be mentally prepared for the constant attacks from the other side. There is no need to feel compelled to argue in your own defense; that is the role of your attorney and expert witness.

You need to keep your cool and calmness during the stress of cross examination². Do not be argumentative, defensive, or evasive as all these indicate a lack of professionalism. Learn to deal with feelings of doubt, fear, anger and frustration that will invariably surface during the court proceeding. Remember to be consistent: no matter how many times the same question is asked, the answer should remain the same.

Next you should be alert and think about your answers carefully before making any reply. Your responses should be clear, concise and directed to the specific questions asked. Keep your answers simple and avoid medical jargon¹². If the question is not clear, clarify with the attorney. If a question requires some thought, it should be done mentally.

Admit when you are unsure of the answer; do not speculate or guess at an answer¹³. Do not answer poor questions or seek to volunteer any information more than what is asked of you. Try to remember what you say and do not contradict yourself. Try to speak slowly and carefully.

You should be prepared to explain the circumstances concerning the case and offer an explanation for the adverse medical outcome (how the patient's claimed injury was not the result of your actions). Be sincere and consistent². You should adequately discuss this issue with your attorney prior to the court proceeding to identify and address your areas of vulnerability.

Finally be considerate: while maintaining your belief in the appropriate quality of care provided, show empathy and sympathy for the patient's adverse outcome.

STEP 9: COPING WITH THE STRESS

Going through the entire process of medical malpractice suit can be very emotionally draining and traumatic due to the often protracted course of litigation¹⁷. Very often, the doctor will start to doubt his own professional competence or be plagued by feelings of guilt or accusation.

Although your attorney may have advised you against discussing the legal aspects of the case with anyone, it maybe therapeutic to talk to someone (perhaps your spouse, family member or close friend) about how you feel about the entire litigation process. Talking and ventilating helps to counteract the shame and isolation that you may feel.

At times, you may want to speak to a professional counselor if you find the stress overwhelming¹⁷. Your medical insurance company may offer other forms of support services e.g. some other colleague who has gone through the litigation process may be able to provide both practical advice and support during the period of trial.

On the other hand, be aware that the accusation of your substandard care may push you to make harder and longer hours¹. To counteract this, continue to pursue your usual personal interests or hobbies. You will need to explore various ways of coping with the stress and seeking relaxation elsewhere. Besides striving to strike a balance between your professional and personal lives, social support especially from your loved ones is very important to sustain you during this trying moment.

STEP 10: MOVING ON

In life, you may need to adopt the attitude that no matter what happens to you, there is always a potential to learn something out of the experience even if it is a traumatic one¹⁵. Similarly regardless of the outcome of the litigation, when it is over, there should be time for self reflection and personal learning and growth.

The first issue is whether you actually did make a medical error¹. If indeed there was, you should go back to the medical records to perform a significant event analysis to find out what, why and how the mistake was made. Thereafter, explore ways to prevent it from happening in future and implement the corrective actions; this may involve making changes to the existing system or workflow in the clinic or hospital. The bottom-line is you must learn something valuable out of the experience.

At the same time, we must face the reality that, as physicians, we are also human and may sometimes make mistakes in the course of our work. Of course, we should strive to minimize medical errors as far as possible. But we should not allow feelings of guilt, embarrassment and humiliation to hinder us in our subsequent professional career.

At times, there maybe a tendency to practice defensive medicine or even to stop seeing patients as a result of previous medical litigation. It is important to deal with all such negative feelings as they may persist for months or even years. You may want to talk to some trusted colleague or closed friend. What is crucial is that you must be able to move on with your life after the traumatic episode that you will most likely remember for the rest of your life.

CONCLUSIONS

The incidence of medical malpractice suits in Singapore will no doubt continue to rise in the coming years. For the individual doctor, there is no foolproof way of avoiding being sued short of giving up clinical practice altogether. Indeed going through the entire process is both physically and mentally draining.

Thus it is important that every physician has at least a basic knowledge of the local legal process as well as to be aware of the necessary steps to take when faced with a medical malpractice suit. Although being prepared for a medical malpractice suit does not necessarily ensure a favorable outcome, at least, it could help to reduce the stress, intimidation and uncertainty that one may experience.

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