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Lawyers try new tacks in malpractice suits

In the Courts

By Tanya Albert

JUST AS QUICKLY AS MEDICAL knowledge and disease treatment options increase, so too do advances in the strategies lawyers use to bring medical malpractice lawsuits.

Last year, an Ohio jury awarded $3.5 million to the family of a man who died of a heart attack.

His family claimed that the physician didn't do enough to help the man lose weight and stop smoking, given that physicians now know how smoking and excess weight contribute to heart disease and given the significant advances in treatment.

It is still rare for a plaintiff to prove that type of medical malpractice, and that case is now on appeal. But even as it winds its way through the system, other new plaintiff strategies are being tested.

And medical advances are not the only contributor to changing courtroom climates.

New laws, including tort reforms passed in Texas and Florida, are influencing what cases lawyers choose to file, as are realizations that torts used in other areas, such as product liability, could apply to how health care is delivered.

"I'm seeing more creative approaches, and I don't mean it in a pejorative sense," said Tampa lawyer Kevin Napper, a shareholder at Carlton Fields law firm and a 20-year veteran who represents physicians, nurses and hospitals.

Low volume vs. high volume?

FLORIDA RESIDENT MIRIAM KAMIN, along with her husband and son, filed a medical malpractice claim against Baptist Hospital of Miami and several of its physicians in 2002. Instead of claiming the standard of care wasn't met, the woman argues that she should have been referred to a hospital down the street to have a low-grade pancreatic tumor removed.

Why? Her lawsuit claims that the other hospital performs pancreatic surgeries much more frequently than Baptist Hospital of Miami. Consequently, she said, the physicians and hospital had a responsibility to refer her to that facility.

She bases her legal argument on studies by organizations such as The Leapfrog Group, which have concluded that patients have less of a chance of something going wrong at a hospital at which physicians perform high volumes of a certain procedure than they would at a hospital where physicians perform lower volumes.

After the July 1998 surgery, Kamin needed four organ transplants — stomach, liver, pancreas and intestine — and had several follow-up surgeries, according to court records.

"The surgeon and hospital faced increased exposure when they could refer the patient down the road to a facility that does this surgery more often," said Miami attorney Stuart Ratzan, who is representing the Kamins.

The case, filed in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County Florida, is scheduled to go to trial this month.

If the argument is successful, Ratzan thinks the theory could apply to other procedures as well.

"It's common sense that a facility that does something often may be better able to handle a case," he said.

The right to know

IN OHIO, THE BASIS OF A CASE against a Dayton physician practice is that a medical test was not performed according to the standard of care. But the facts leading up to the claim offer a different twist on the law.

The patient, John Dobran, is suing because he says he is being denied the best information possible on whether his melanoma could return. The Ohio Supreme Court is poised to decide whether he has a claim.

When doctors discovered that a mole on Dobran's arm was malignant melanoma, Dobran decided that he wanted a sentinel lymph node biopsy. By harvesting the lymph nodes first encountered when melanoma metastasizes, doctors can determine the chances of the cancer coming back.

The tissue had to be sent to a lab in California. But it thawed before it arrived, making it untestable, and Dobran now wants to be compensated for the emotional pain and suffering of not having those results.

"The whole reason for the test was because it was the best way to know if the disease would return," said Sam G. Caras, the Dayton, Ohio, attorney representing Dobran. "Now that opportunity is gone."

The Dayton physicians being sued argue that Ohio law doesn't recognize a legal remedy when there is not a "cognizance of real danger."

"There is simply no reason to carve out an exception to the law of this state to create a basis for relief for those ... who fear that a pre-existing condition has reoccurred," Franciscan Medical Center and the other respondents argue in their brief filed with the Ohio Supreme Court.

"To do so would create, in essence, a new medical tort which would subject health care providers to potential liability for not performing diagnostic testing regardless of whether the failure to do so bears any relation to actual physical harm to the patient," the brief states.

Tort reform's impact

WHILE MEDICAL DISCOVERIES influence what physicians are sued for, changes in the law are altering the way lawyers handle cases. The most notable example in the past year is tort reform.

In Ohio, Stephen Griffin, chair of the medical malpractice group at the law firm Buckingham, Doolittle & Burroughs, LLC in Canton, said he had seen a slowdown in cases filed against physicians since Ohio adopted a $350,000 noneconomic damages cap in late 2002.

But he has seen an increase in cases directed toward hospitals — in particular negligent credentialing cases, where plaintiffs claim that a hospital should not have allowed a certain physician to perform a certain surgery.

"Even if the physician is the primary target, by including the negligent credentialing claims, it allows them to get more records," Griffin said.

In Texas, the new trend is to try to avoid the $250,000 cap on noneconomic damages, established in September 2003, by trying to make corporate negligence claims in which patients assert that they were harmed because the corporation was motivated to make money and let safety slip.

Plaintiffs are trying to hold physicians liable as the ultimate owners of ambulatory surgery centers and other specialty hospitals, said Monte F. James, a partner at Jackson Walker LLP in Austin.

"It remains to be seen whether or not it will be successful," he said. ◆

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