Frivolous Lawsuits: Still a Big a Threat to Doctors?

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Dr G, a New York surgeon, was only a couple years into practice when he faced his first lawsuit.

After undergoing liposuction surgery on the area of her calf and ankle, a patient claimed she had developed a severe allergic reaction, characterized by small areas of necrosis on the lower extremities, said Dr G, who asked to remain anonymous. However, the alleged injury seemed suspicious, said Dr G, considering that 3 weeks after the surgery, the area had shown a successful result with minimal swelling.

Six months into the suit, Dr G received a shocking phone call. It was the patient's estranged husband, who revealed that his wife was having an affair with another man, a physician. In recorded phone calls, the patient and her paramour had discussed causing an injury near the patient's calf in an attempt to sue and get rich, the husband relayed. Dr G immediately contacted his insurance carrier with the news, but his attorney said the information would not be admissible in court. Instead, the insurer settled with the patient, who received about $125,000.

At the time, Dr G did not have a consent-to-settle clause in his contract, so the insurer was able to settle without his approval.

In legal practice, a frivolous claim is defined as one that lacks a supporting legal argument or any factual basis. A claim issued with the intent of disturbing, annoying, or harassing the opposing party can also be described as legally frivolous, said Michael Stinson, vice president of government relations and public policy for the Medical Professional Liability Association (MPL Association), a trade association for medical liability insurers.

However, when most physicians refer to "frivolous claims," they often mean a claim in which there is no attributable negligence. Such suits represent a second category of claims — nonmeritorious lawsuits.

"I think people intermix nonmeritorious and frivolous all the time," Stinson said. "In the vast majority of nonmeritorious claims, the patient has suffered an adverse outcome, it's just that it wasn't the result of negligence, whereas with a frivolous lawsuit, they really haven't suffered any damage, so they've got no business filing a lawsuit on any level."

A third type of so-called frivolous suit is that of a fraudulent or fake claim, in which, as Dr G experienced, a patient causes a self-injury or lies about a condition to craft a false claim against a physician.

If a patient files a claim that the patient knows is false, the patient commits fraud and may be subject to counterclaims for malicious prosecution or abuse of process, said Jeffrey Segal, MD, JD, a neurosurgeon and health law attorney. Further, the patient would be testifying under oath, and such testimony can be considered perjury, a criminal offense with criminal penalties.

Sadly, Dr G was the target of another frivolous lawsuit years later. In that suit, a patient claimed the surgeon had left a piece of sponge in her breast cavity during surgery. The case was dismissed when medical records proved the patient knew that the foreign body resulted from an unrelated procedure she had undergone years earlier.

"There is so much abuse in the court system," Dr G said. "You really don't think stuff like that will happen to you, especially if you honor the profession. It's unfortunate. It's left a very bitter taste in my mouth."

Frivolous claims have long been a subject of debate. Tort reform advocates often contend that such claims are pervasive. They cite them as key reasons for high healthcare costs and say that they have led to the rise of defensive medicine. Plaintiffs' attorneys counter that the rate of frivolous claims is widely exaggerated and argue that the pursuit of frivolous claims would be "bad business" for legal firms. The debate begs the question: Do frivolous cases still exist, and if so, how common are they?

"I have never seen a frivolous malpractice claim," says Malcolm P. McConnell III, JD, a Richmond, Virginia, medical malpractice attorney and chair of the Medical Malpractice Legislative Subcommittee for the Virginia Trial Lawyers Association. "I cannot say that such things never happen, but any lawyer bringing such a thing is foolish, because there is no reward for it."

Are Shotgun Lawsuits Frivolous?

To many physicians, being dragged into a lawsuit over a complaint or medical outcome in which they were not involved is frivolous, said Stanislaw Stawicki, MD, a trauma surgeon and researcher based in Bethlehem, Pennsylvania. Stawicki was named in a lawsuit along with a long list of medical staff who interacted in some way with the plaintiff. Stawicki himself saw the

patient once and made a note in the chart but had nothing to do with the patient's surgery or with any critical decisions regarding his care, he said.

"Nothing really prepares you for seeing your name on a legal complaint," Stawicki said. "It's traumatic. I had to block out entire days to give depositions, which were really kind of pointless. Questions like, 'Is this really your name? Where did you train? Were you there that morning?' Stuff that was really not consequential to the fact that someone had surgery a month earlier and had some sort of complication."

Stawicki was eventually dropped from the claim, but not before a nearly year-long ordeal of legal proceedings, meetings, and paperwork.

It is common practice for plaintiffs' attorneys to add codefendants in the early stages of a claim, said David M. Studdert, ScD, a leading health law researcher and a professor of law at Stanford Law School. Defendants are gradually dismissed as the case moves forward and details of the incident become clearer, he said.

"Plaintiffs' attorneys have strong incentives to try and choose claims that will be successful," Studdert said. "However, in the early point in the process, neither the patient nor the attorney may have a good idea what has actually happened with care. So sometimes, filing a lawsuit may be the only way to begin the process of opening up that information."

A study by Studdert in which medical malpractice claims, errors, and compensation payments were analyzed found that of 1452 claims, about one third (37%) did not involve errors.

"Many physicians might call those frivolous lawsuits, but in fact, most of those don't go on to receive compensation," he said. "We suspect that in many instances, those claims are simply dropped once it becomes apparent that there wasn't error involved.

"They can still be burdensome, anxiety-provoking, and time consuming for physicians who are named in those suits, so I don't want to suggest that claims that don't involve errors are not a problem," said Studdert. "However, I think it's wrong to assume, as many people do when they use the term 'frivolous lawsuit,' that this is really an extortionary effort by a plaintiffs' attorney to try to get money out of a hospital or a physician for care that was really unproblematic."

Certain "Frivolous" Cases More Common Than Others

Nonmeritorious claims still occur relatively frequently today, according to data from the Medical Professional Liability Association's Data Sharing Project. Of about 18,000 liability claims reported from 2016 to 2018, 65% were dropped, withdrawn, or dismissed. Of the 6% of claims that went before a jury, more than 85% resulted in a verdict for the defendant, the researchers found.

"Basically, any claim that does not result in a payment because the underlying claim of negligence on the part of a health professional had been demonstrated, proven, or adjudicated false is one we would describe as nonmeritorious," Stinson said.

The MPL Association does not track cases that meet the legal definition of frivolous, said Stinson, and they "don't see truly frivolous lawsuits very often."

Malpractice claims are risky, expensive, and aggressively defended, says McConnell, the plaintiffs' attorney. McConnell, who has been practicing for 30 years, said his own claim selection process is very rigorous and that he cannot afford to pursue claims that aren't well supported by science and medicine.

"Pursuing frivolous cases would bankrupt me and ruin my reputation," he said. "A lawyer I know once said he would write a check for $10,000 to anyone who could show him a lawyer who makes a living pursuing frivolous medical malpractice cases. It's a fair challenge. The economics and the practices of liability carriers and defense lawyers make frivolous cases a dead end for plaintiff lawyers."

Most medical malpractice cases are taken on a contingency fee basis, McConnell noted, meaning that the plaintiff's lawyer is not paid unless the claim is successful.

"This means that the plaintiff's lawyer is risking 2 years of intensive labor on a case which may yield no fee at all," he said. "Obviously, any reasonable lawyer is going to want to minimize that risk. The only way to minimize that risk is for the case to be solid, not weak, and certainly not frivolous."

But Segal, the health law attorney, says that plenty of frivolous liability claims are levied each year, with attorneys willing to pursue them.

It's true that seasoned plaintiffs' attorneys generally screen for merit and damages, Segal said, but in some instances, attorneys who are not trained in malpractice law accept frivolous claims and take them forward. In some cases, they are slip-and-fall accident attorneys accustomed to receiving modest amounts from insurance companies quickly, said Segal, founder of Medical Justice, a company that helps deter frivolous lawsuits against physicians.

"If we lived in a perfectly rational universe where plaintiffs' attorneys screened cases well and only took the meritorious cases forward, we would see less frivolous cases filed, but that's not the universe I live in," Segal said. "There are well over a million attorneys in this country, and some are hungrier than others. The attorneys may frequently get burned in the end, and maybe that attorney won't move another malpractice case forward, but there's always someone else willing to take their place."

Medical Justice has twice run a Most Frivolous Lawsuit Contest on its website, one in 2008 and one in late 2018. The first contest drew 30 entries, and the second garnered nearly 40 submissions, primarily from physicians who were defendants in the cases, according to Segal. (Dr G's lawsuit was highlighted in the most recent contest.)

In one case, an emergency physician was drawn into litigation by the family of a deceased patient. The patient experienced sudden cardiac arrythmia at home, and paramedics were unable to intubate her or establish IV access. She was transferred to the hospital, where resuscitation efforts continued, but she remained in asystole and was pronounced dead after 15 minutes.

At the hospital, blood tests were conducted. They showed that her serum potassium concentration was elevated to about 12 mEq/L, Segal said. The family initiated a claim in which they accused the emergency physician of failure to diagnose hyperkalemia. They alleged that had the hyperkalemia been discovered sooner, the patient's death could have been prevented.

"If you had no other facts about this, you would wonder how a person with potassium that high would even be alive," Segal said. "But what they were looking at was the body decomposing and all the potassium in the cells being released into the bloodstream. It wasn't the cause of the problem, it was an effect of the problem. She really was dead on arrival, and she was probably dead at home."

The case was eventually dropped.

Although the outcome for the patient was tragic, says Segal, the case is one of many types of frivolous claims that exist today.

"Yes, frivolous cases are out there," he said.

Fraudulent Claims Uncommon

As for fraudulent medical liability claims, legal experts say they're rare. J. Richard Moore, JD, an Indianapolis-based medical liability defense attorney, said he's never personally encountered a medical malpractice claim in which he believed a plaintiff caused an injury or an illness and attempted to blame it on a physician.

However, Moore has defended many claims in which the illness or condition the plaintiff claimed was caused or was made worse through medical negligence was actually a preexisting condition or a preexisting condition that worsened and was not related to any medical negligence, Moore said.

"Although I have often felt in such cases that the plaintiff really knew that the condition was not affected by any alleged medical negligence, I would not put that in the 'fraudulent claim' category because it can be very difficult to establish a person's subjective state of mind," he said. "Usually in those cases, the plaintiff just denies memory of previous medical records or claims that the previous doctor who treated him or her for the same condition 'got it wrong.' In those cases, it is generally left to the jury whether to believe the plaintiff or not."

Stinson also says he has not come across a truly fraudulent medical liability case. He noted that such a claim might be similar to a person falsely claiming a soft tissue injury following an alleged slip-and-fall accident.

"Clearly, a fraudulent claim could be viewed as riskier from the plaintiff's perspective, because they could face criminal prosecution for insurance fraud, whereas if a claim is merely frivolous, they probably only run the risk of court-issued fine, if even that. That may be why we don't often see fraudulent MPL claims."

Ways to Prevent or Fight Frivolous Lawsuits

Since Stanwicki's legal nightmare as a resident, rules have tightened in Pennsylvania, and it is now more difficult to file frivolous claims, he said.

Pennsylvania is one of at least 28 states that require a certificate of merit in order for a medical liability claim to move forward. The provisions generally state that an appropriately licensed professional must supply a written statement attesting that the care the patient received failed to meet acceptable professional standards and that such conduct was a cause in the alleged harm.

"There is now a much greater burden of proof regarding what can proceed," Stawicki said. "I've been involved in a couple cases that did not proceed because there was no certificate of merit."

Although these reforms may help, not all merit rules are created equal. Some states require that the expert who signs the affidavit be knowledgable in the relevant issues involved in the action. Other states have looser requirements. In one of the

cases featured in Medical Justice's Most Frivolous Lawsuit Contest, a podiatrist signed a supporting declaration for a claim related to obstetric care.

For physicians facing a frivolous claim, fighting it out in court depends on a number of factors. Without a consent-to-settle clause in the contract, an insurer can make the final decision on whether to defend or settle a case.

Resolving a malpractice claim is generally a business decision for the insurer, Studdert said.

"When the claim is for a relatively low amount of money, the costs of moving forward to defend that claim may be much more than the costs of simply settling it would be," he said. "On the other hand, liability insurers and their lawyers are repeat players here, as are the plaintiffs' attorneys. They don't want to incentivize plaintiffs' attorneys to bring questionable claims, and if they settle quickly, that may do so."

Stinson, of the MPL Association, said a truly frivolous claim — one with no legal basis — is highly unlikely to be settled, "especially by MPL Association members who go beyond having a purely financial interest in their insureds to also focus on their professional reputation/integrity." MPL Association members insure nearly 2 million healthcare professionals globally, including 2500 hospitals and more than two thirds of America's physicians who are in private practice.

Physicians should make sure they know what is and what is not included in their policy, Segal said.

"The broker should sit down with the doctor, ideally before initial purchase or renewal, and explain in clear terms what the carrier's obligations are and what the physician's obligations are," he said. "Know what type of protection is being purchased and what conditions might trigger a surprising and unhappy outcome."

Should I Countersue?

For truly frivolous claims, physicians have the legal right to sue for damages caused by the unfounded complaint.

Perhaps the most well-known case of a successful malpractice countersuit is that of Louisville neurosurgeon John Guarnaschelli, MD, who in 2000 won $72,000 in damages against a plaintiffs' attorney for malicious prosecution.

The physician's countersuit followed the dismissal of a negligence claim against Guarnaschelli by a patient who contracted meningitis. The plaintiffs' attorney had made little effort to gather evidence to connect Guarnaschelli to the patient's injuries and had consulted only one other physician, a client of his, before filing the lawsuit, according to a summary of the case in the *American Bar Association Journal.*

Malicious prosecution is the most common legal theory of recovery for physicians in countersuits, according to a review of successful countersuits by doctors. Stawicki is a coauthor of that review. Other legal theories that physicians can raise include abuse of process, negligence, defamation, invasion of privacy, and infliction of emotional distress. Of the 13 cases evaluated in the article by Stawicki and colleagues, damages awarded to physicians ranged from about $13,000 to $125,000.

Although some doctors have success, pursuing a counterclaim can be a difficult feat, said Benjamin Braslow, MD, a trauma surgeon and professor of clinical surgery at the University of Pennsylvania, in Philadelphia.

"The main take-aways were it's an uphill battle often met with not only resistance but diminishing returns to countersue," said Braslow, a coauthor of the countersuits analysis. "You have to meet very specific criteria regarding leveling the suit, and it may end up being a costly, time-consuming battle."

To prove malicious prosecution, for example, a physician must show that a claim was instituted without probable cause, that the suing party acted maliciously in instituting the action, and that the doctor was damaged by the action, among other essential elements.

As for Dr G, the surgeon, he now has a contract with a consent-to-settle clause and has taken other legal precautions since his lawsuits. He requires that his patients sign an agreement that any negligence claims they levy go to arbitration. If an arbitrator finds in the patient's favor, the case may proceed to court, he said. However, he requires another agreement such that if patients lose in court, they are responsible for his legal fees.

"I'm just more careful," he said. "I ask all my staff in the office to use their judgment, however superficial, if they feel something is wrong with an individual to tell me so. I'd rather send them away than operate on them and have it result in a lawsuit."

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