The Medical-Legal Arena in Obstetrics

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Objectives: Upon the completion of this CNE article, the reader will be able to

1. Explain the various parts and terminology of the medical legal arena.
2. Describe the deposition process and state the importance of knowing the subject matter versus the recall of events.
3. Discuss the different aspects of time that can come into play in a medical legal case.
4. State the important factors that surround the medical records regarding charting and the use of words.

Introduction:

A patient with preterm premature rupture of the membranes was admitted at 28 weeks gestation with expectant management. A total of 4 vaginal exams were performed (1 on admission and 3 others for various patient complaints). The patient delivered 4 days later following the onset of labor with presumed chorioamnionitis. The child developed cerebral palsy and a lawsuit entailed. The case was tried in arbitration and was found in favor of the plaintiff. The award was 10 million dollars. The judge determined that the vaginal exams performed by the clinician and the nursing staff led to the preterm delivery and the ultimate outcome.

While stationed in California, a patient with supraventricular tachycardia on a beta-blocker medication sought prenatal care. Serial ultrasounds were not performed (based on a potential risk, though not well established, of developing intrauterine growth restriction with beta-blocker medications). The child delivered near term with intrauterine growth restriction and was found to have severe mental retardation. A lawsuit was filed. The case was found in favor of the plaintiff. The award was 28 million dollars. The case was tried in front of a single United States District Judge and the court determined that the child would need fulltime care by at least a licensed-practical nurse level at $300,000 per year. The life expectancy was felt to be normal. In addition, the court determined that the child would have obtained a Bachelors degree and was awarded 40 years of income based on that level of attained education.

These two cases unfortunately illustrate the fact that medical-legal issues have become a large aspect of the healthcare industry. To add to this, the field of Obstetrics is number one on the list when looking at the economic side of this dilemma. Obstetrics may not be the number one area of medicine that is sued; however, a child with neurologic impairment has the near universal potential of having a multimillion-dollar settlement. This problem has escalated over the past 10 years to a serious level. Currently, there are 23 states in the United States where Obstetricians cannot even obtain medical malpractice insurance. In analyzing the lawsuits that are filed across the United State in
Obstetrics, 60% involve fetal heart rate monitoring.

Two questions that must be asked are "What is the public's opinion of medicine in the 21st century?" and "What do people expect from the medical profession?". One of the easiest ways to answer part of this is to ask yourself the same question as to what you would expect in the care and treatment of your own family member (understanding the caveat that you are part of the profession and therefore know some of its inner workings). The type of care that you would desire for your own family member is probably no different from what the public expects.

Thus, it is very important that obstetricians, nurses, hospitals, and other connected healthcare specialties (anesthesia and pediatrics/neonatology) obtain a better understanding of this dilemma and take a proactive approach in dealing with it. Otherwise, the medical profession as we know it will disappear or be radically reformed. In attacking this problem, healthcare providers need to show the patient and the public that they do care and are truly interested in their welfare. Healthcare providers need to see patients at a level that is generally accepted in the community and when finished, write a note with the date and the time. The use of exact terminology and management plans along with minimizing errors and mistakes is paramount. If all of this is accomplished, defendable cases will become more defendable.

A series of courses have been generated and will continue to be created that address the major areas in obstetrics that commonly result in medical malpractice claims. As stated above, 60% of the obstetrical cases involve fetal heart monitoring and therefore, at least half of these articles will touch upon that area of obstetrics. However, it is also important to understand other aspects of the medical-legal arena that are outside of or loosely attached to the medical issues themselves. Some of this involves the legal process and will be covered next.

Arbitration vs. Jury Trial

Most medical malpractice actions are filed in Superior Court and are handled via trial. A trial involves a jury that consists of 12 jurors with usually 2 alternates, in case someone is unable to continue or is dismissed (making a total of 14 jurors that are chosen). In some instances, providers have arbitration agreements, which California courts have found binding, and require that the patient arbitrate their case against the provider before either one or three arbitrators. The lawyers (both plaintiff and defense) typically agree on a single neutral arbitrator and this would be the one judge arbitration example. In other occurrences, in addition to the single neutral arbitrator, each side (plaintiff and defense) chooses their own party arbitrator that are actually advocates for the side in which they are chosen. This is the 3-arbitrator system where the plaintiff-chosen arbitrator tries to sway the neutral judge to a plaintiff decision, and likewise, the defense-chosen arbitrator tries to sway the neutral to a defense verdict once all of the testimony is completed.

Standard of Care

Although there is a legal definition for this term, it is basically doing what is reasonable. It is not about being right or making a mistake. In essence, it is about doing what other reasonable physicians or nurses would do under the same or similar circumstances. Standard of care is the first part of the legal process. In a trial or arbitration, the plaintiff must succeed in "proving" or winning the decision that the care that was rendered fell below the standard of care (that the healthcare provider(s) were negligent). If this is lost by the plaintiff (the court finds in favor of the defense that there was no negligence), then the trial or arbitration is essentially completed.

Causation

Causation is the second element that the plaintiff must meet in order to prevail. Not only must the plaintiff prove (and win) that the provider was negligent in the care, but that the provider's negligence was a substantial factor in causing harm. Causation defenses are not at all uncommon and most frequently are seen in cancer cases but can also be utilized in some obstetrical lawsuits. What a "causation defense" means in a medical-malpractice claim is that a jury or judge may determine that the rendered care fell below the standard, but the cause of the injury (or bad outcome) was not related to this care. To provide an example, let's say a lawsuit is filed regarding a child with significant neurologic impairment and the labor, unfortunately, was mishandled. However, during this process it is discovered that the child's neurologic disorder is actually genetic. The jury may find that the care of the mother in labor was negligent, but that it was not the cause of the final outcome because the cause was genetic. For the plaintiff to win the case, they must prove and win that the care was negligent and that the negligent care was a substantial cause for the eventual outcome.
Probable and Possible

In the legal system, the words probable and possible often come up. Legal issues primarily deal with probable, which by definition is > 50% (also called "more likely than not"). Possible is < 50% and essentially "anything is possible".

Deep Pocket

The term "deep pocket" refers to a situation where there is more than one defendant in a case. The "deep pocket" defendant is the defendant who has either more coverage or more assets and therefore has more money than perhaps their exposure would necessarily require them to pay. In medical malpractice cases in obstetrics (especially if they involve a neurologically impaired newborn/child), the hospital is most often the "deep pocket".

Motion for Summary Judgment

A Motion for Summary Judgment or MSJ is a motion brought by the defense supported by a declaration from a medical expert essentially stating that the provider complied with the standard of care. In order to defeat the Motion for Summary Judgment, the plaintiff must provide a declaration from a qualified expert indicating that the defendant did breach the standard of care. If the plaintiff fails in this regard, then the matter for the defendant is dismissed. If the lawsuit only involves the one defendant, then the case is also dismissed. However, if there are other individuals or entities in the case, the process will continue in their regard. Those that continue to be involved in the case cannot point a finger at an "empty chair" of the entity that got out of the case on an MSJ (see below).

Empty Chair

This situation occurs when a defendant who has liability either settles out of a case or is not named as a defendant to begin with, therefore creating an "empty chair" at the time of trial. The empty chair represents a provider who is not present at trial who arguably bears some liability. Some defense aspects may involve deflecting some of the blame onto or "pointing a finger" at the "empty chair". If the provider, however, got out of the case on a motion for summary judgment, they cannot be used by the defense as an "empty chair".

Statute of Limitations in Obstetrics

Actions by a minor 6 years of age and older shall be commenced within three years from the date of the alleged wrongful act. Minors that are under the full age of six years shall be commenced within three years, or prior to his or her 8th birthday, whichever provides the longer time period. In other words, in a baby case, the attorney has until the child's 8th birthday to file. The one exception in obstetrics regarding the baby is a stillbirth or fetal demise case where the statute of limitations is 1 year.

Medical Injury Compensation Reform Act (MICRA)

MICRA is a statute in the state of California that has been around for approximately 30 years which limits pain and suffering damages to $250,000. It also provides other benefits in medical malpractice actions and in particular, after a plaintiff verdict in some obstetrical cases, it allows for future damages to be periodized (which means paid yearly). The benefit of this issue is that an obstetrical award may involve millions of dollars that was based upon the need of a certain amount of money per year over a designated time period. If the child were to pass away earlier that expected, no further money is spent. MICRA also allows for certain collateral sources to be admissible and has other benefits as well.

Charting versus Custom and Practice

There are different levels of evidence that a doctor or a nurse has at his or her disposal regarding testimony that involves interactions with a patient: (1) an independent recollection of the patient and what occurred; (2) contemporaneous charting which reflects what occurred whether one remembers it or not; and/or (3) a situation where there is no recollection and no charting but the healthcare provider relies on his or her "custom and practice" to be able to testify with certainty as to what occurred under a given set of circumstances and/or at a given location.
Authoritative

In a deposition, attorneys always try to get an expert (or anyone testifying) to commit to a certain textbook or treatise as being "authoritative". This is because once he or she deems that a particular text is authoritative, that expert (or person testifying) can be cross-examined with items from the textbook whether or not he or she relied on the particular textbook or treatise. Obviously it is dangerous for any expert (or anyone testifying) to deem any textbook or treatise authoritative.

Words of Apology

There is absolutely nothing wrong with addressing head on a bad outcome or a complication. In the setting where there is a bad outcome, there is also nothing wrong with expressing sympathy by stating things like "I'm sorry for your loss", etc. This is not an admission that medical negligence occurred, whereas silence or evasion could easily be equated to an admission. Therefore, in obstetrical cases that have a poor outcome, continued involvement is a necessary part of the care that is provided. It is also important however, to carefully choose the words that are used. The following example will be used to better explain this issue. In obstetrics, fortunately bad outcomes are uncommon. When one occurs, a common statement by a nurse or physician is "This shouldn't have happened!" – meaning this is rare so it shouldn't have happened. The family, however, may interpret "This shouldn't have happened!" to mean somebody did something wrong and this shouldn't have happened. Thus, sticking with "I'm sorry for your loss" and "Let's work through this together" demonstrate that you care about how they are doing without saying anything that could be misinterpreted.

The Deposition Process

When a lawsuit is filed, as the case progresses, eventually the plaintiff attorney will ask to take your deposition. This is a legal proceeding that occurs under oath in a front of a certified court reporter. The deposition may also be videotaped. The healthcare provider will be represented by their defense attorney. If other parties are involved in the case, then usually a representative attorney for those entities will also attend. The process is essentially a question / answer session to discover more information beyond what is found in the charting, etc.

Several key facts regarding the deposition need to be covered in regard to the subject matter, the events in the actual case, and wording. To begin with, the deposition can be like an intense oral examination – the healthcare provider needs to know the basic subject matter. In obstetrics for example, if the case involves fetal heart rate monitoring, know the definitions. If the provider cannot correctly define the basic terminology there could be an attempt in front of the jury or arbitrator to make he or she appear ill prepared, uneducated, or sloppy – leading to a plaintiff verdict that something was missed by the provider or was performed below the standard. However, remember that most if not all healthcare providers seldom get 100% on every test (which could include the test that follows this course). The point is that the questions on the subject matter can go deeper and deeper and again "I don't know" or "I don't remember at this time" are acceptable answers. As an example in obstetrics, let's use a fetal heart monitoring case. If the provider cannot correctly define the normal baseline, variability, accelerations, and decelerations, the jury or arbitrator may come to the conclusion that the provider cannot actually read the tracing and thus, how could he or she even determine if something was missed. However, the provider is not going to look bad if he or she cannot remember the full differential for a prolonged deceleration – the provider can mention one or two and then say "I can't remember any more at this time".

When it comes to "recall" of specific events, opposite issues may exist. Healthcare providers often feel that they should have an answer to every question. However, by the time the deposition comes around, in most obstetrical cases, more than a year has passed and in many cases it may be several years. Therefore, it is virtually impossible to "recall" every event. Remember that most people cannot even recall all the events of the day prior, so why would someone be expected to recall everything years later? In cases with a bad outcome, the healthcare providers directly involved in the care may recall a few events and when those are discovered, those "recall" issues can be discussed. Otherwise, "I don't recall" is an acceptable answer. When a healthcare provider has no recall of certain events, this is where "custom and practice" can come into use.

Wording is another topic that needs to be discussed. Terms can be used in a deposition that oftentimes can be taken out of context. Therefore, listen to the questions closely and have certain "words" defined. Some examples are "normal", "high risk", and "non-reassuring". Many more "words" like these exist that are too numerous to discuss at this time; however, words like these can have large gamut's of interpretation and should be defined by the attorney prior to the answer. If we use "normal" for example, remember that a fetal heart monitor tracing may appear "normal" but that
Timing Issues

Time is often an important factor in the medical-legal arena in several respects, which include the timing of events within notes (i.e. phone calls to physicians, etc.), the dating and timing of the actual notes found within the medical record, the time it takes to perform certain procedures, and time differences between clocks (clocks on the walls in different rooms, versus wristwatches, versus the clock in the fetal heart monitor device). As touched upon above, it cannot be overemphasized that writing notes and timing the events in the medical records helps in determining the care that was proved and the events that transpired. The second aspect of time, however, involves the time it takes to perform certain procedures. This most often comes into play when determining whether the healthcare providers acted appropriately in an "emergency" situation, such as a "stat" cesarean section, neonatal resuscitation, shoulder dystocia, etc. Remember that the time it takes to perform certain procedures can vary widely and when it comes to several months or years down the road, the time it actually took in a specific case is nearly impossible to recall.

Therefore, since true recall is probably not possible, wide ranges for time should be supplied. For example, the placement of an IV (intravenous line) may only take a few minutes in most respects but could take as long as 10, 15, even 30 minutes depending on the patients' vein access and other factors. Therefore, if asked in a specific case "How long did it take to start the IV?" – the answer most likely would be "I don't recall" (unless the provider for some reason does recall) "but could have been a few minutes to more than 15 minutes depending on the circumstances". The attorney may then inquire as to why the long time range or how can something that easy take that long – remember all the things that may go into the starting of an IV (obtaining all the supplies – needles, crystalloid, IV pole, tape, alcohol swabs, tubing, gloves, etc. – preparing the tape strips to secure the IV once in place, placing the tourniquet and locating the best vein, using warm compresses if vein access is poor, sterilizing the skin and inserting the needle, filling blood tubes if labs are needed, connecting everything together and making sure the crystalloid flows well, setting the infusion rate, starting all over if the vein "blows", etc.).

Another common timing area occurs in shoulder dystocia cases where the complaint is often that "excessive" traction on the baby's head occurred in the delivery process. A common question is how long did it take to perform the various maneuvers (McRoberts, suprapubic pressure, rotational maneuvers, posterior arm attempt, etc.). On the surface, it may seem that individually each of these maneuvers only takes a few seconds, but if the delivery of the head time to delivery of the body took a few minutes, it may then appear that based on time, all of these maneuvers were done rapidly and the rest of the time was involved in using "excessive" traction. Again there is no way to recall how long it actually took to position the patient and perform each of these procedures, so again give ranges. Other timing events can and will come up; however, the point is to remember that months or years later, no one can truly recall all of the issues in a given case regarding "how long it took" to perform the various procedures in an emergency situation.

The final timing issue that comes into play, especially in obstetrics, is the time differences that exist between the clocks in different rooms along with the clock that is found within the fetal heart monitor device. In a perfect world, all of these would be synchronized; however in reality, they usually differ by a few minutes and in cases that involve emergency situations or that result in a poor outcome, being cognizant of this fact is important. This can also come into play regarding the time differences between the clocks in the hospital and the clocks in a physician's home (in dealing with phone calls between nurses and doctors) or even differences between times with wristwatches. All of these variations are brought up because in some medical legal cases these "timing" differences can be a factor.

The Use of Words in the Medical Records

To begin with, the most important aspect regarding the medical record is --- NEVER, NEVER, NEVER alter the medical records or even add anything to the medical records once the care is completed. When a bad outcome occurs and the plaintiff obtains the services of a plaintiff attorney, the medical records are usually obtained and analyzed before the suit is filed. Therefore, when the healthcare provider is contacted about the case, if he or she reviews the records and decides to add something (to make "some aspect" more clear), the plaintiff side will usually catch this and the case is essentially lost (even if the care was not negligent). Therefore, to say it again, NEVER add to or alter the medical records once the care is completed.

When a lawsuit is filed, the charting will be fully analyzed and the words that are chosen may be dissected. The best advice is to try and accurately describe what is seen or what occurred instead of using numerous descriptive adjectives.
or fancy words. For example, variable decelerations have not been defined, therefore, if identified on the fetal heart monitor tracing, state this fact and what is seen; however, don’t describe them as “mild”, “moderate”, or “severe” because these adjectives have not been defined and thus are open to interpretation. Two other “words” will be discussed as further examples regarding this topic. The first word is “inadvertent”. According to Webster's Dictionary, the first definition for this word is "not attentive" "heedless"; the second definition is “pertaining to a lack of attention”; the third definition is “unintentional”. It is the third definition that healthcare providers mean when using this word – so instead of using inadvertent use what is meant - unintentional or not intentional. The second word is “fail”, which is most often used in the context of a "failed forceps or vacuum" delivery. The purpose of this word is to say that the forceps or vacuum was not successful. However, according to Webster's Dictionary, the definition of fail meaning unsuccessful ranges between the 6th to the 13th supplied. The definitions listed prior to unsuccessful are "weaken", "fail short", "fade or die away", "stop functioning", "inadequate", "decay", "flunk", "err", and "neglect". Again, instead of using the word fail, say what occurred - not successful. These two examples are minor in the full scope of the medical-legal arena, but the point is to use words that are succinct to describe what actually occurred or was performed.

The Economist

In a medical legal dispute, most individuals are aware that the opposing sides (plaintiff and defendant) obtain their own experts to testify whether or not the care that was rendered fell below the standard and if this played a role in causation (as fully discussed above). However, another area that each side often obtains is an economist. This is an individual that determines the costs of future care, based on the child's condition and projected lifespan. It may seem that the defense is offering negligence when an economist is obtained; however, if the case is lost, the “costs” of future care are usually higher on the plaintiff's side. Thus, lower numbers are needed from the defense side in order to potentially decrease the amount of the award.

References or Suggested Reading:


About the Editor

Michael J. Trotter is a managing partner in the law firm of Carroll, Kelly, Trotter, Franzen, and McKenna, which is located in Long Beach, California. He and his firm have been actively involved in defense litigation of medical malpractice claims for more than 20 years and their success in trial and arbitration in these matters exceeds 90%. A large portion of their work in this arena is in the field of Obstetrics and Gynecology. Mr. Trotter reports no conflicts of interest.

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He has authored a book for consumers regarding the safety of over-the-counter medications that are used in treating the common cold entitled “I'm Pregnant & I Have a Cold – Are Over-the-Counter Drugs Safe to Use?” published by RBC Press, Inc. He is also one of the new Editors of the reference book for clinical care providers entitled “Drugs in Pregnancy and Lactation, published by Wolters & Kluwer.