

The Legal Process

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- Law suit • Malpractice • Expert witness
- Tort reform • Negligence

Medical malpractice litigation is pervasive in the United States and all physicians, regardless of specialty, are likely to be named in a malpractice claim at some point in their career.¹ Emergency physicians are at particular risk because the patient typically presents to an emergency department with high-acuity illness² and the delivery of emergency care is complex.³ Also, emergency physicians rarely have an ongoing relationship with their patients, and care is frequently passed off from one provider to another.⁴ Include emergency department (ED) and hospital overcrowding and it becomes clear that the ED is a legally risky environment.⁵

Although tort reform has had some effect on the current malpractice crisis, the effect has been variable and dependent on jurisdiction.⁶ Litigation continues to exact an emotional toll on the health care providers involved and a financial one on the health care system as a whole, by raising malpractice insurance premiums and contributing to the practice and culture of defensive medicine.⁷ By understanding the legal system and the medical litigation process, physicians may avoid litigation and, when named in a lawsuit, may better participate in their defense.

Before examining the specifics of the system and process, one must understand the intended societal goals of malpractice litigation: to deter unsafe practices, to compensate persons injured through negligence, and to exact corrective justice.⁸ These laudable goals form the basis of our current system, although they may be difficult to recognize when monetary reward for attorneys and patients seems paramount. Equally important to recognize are the similarities and differences in the relationship between the physician and patient and between the attorney and client. Both relationships require professionalism, ethical conduct, extensive skill and training, and confidentiality, yet they are practiced in diametrically dissimilar fashions.⁹ Although this description is overly simplistic and entire texts have been devoted to both types of relationship, in the physician-patient relationship, the physician's job is to prevent, diagnose, discover, and, if possible, remedy an illness and alleviate suffering. The legal system is based on an adversarial process; the attorney has an ethical duty to

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ferently represent a client and attempt to win the case or argument,¹⁰ which is often decided by a third unaffected party: jury, judge, or mediator. Winning may not be synonymous with truth or justice. An adversarial process requires that a patient or client enters into a situation in which a former physician is now an adversary. Also a matter of some controversy and debate is that in most medical malpractice cases, attorneys representing patients are paid on contingency, collecting an agreed portion of the settlement or award after expenses only if they are successful. If the lawsuit is unsuccessful, the attorney not only is uncompensated for time and advocacy but also is likely to have incurred much expense in bringing the case to litigation. The expense of bringing a case to litigation is often in the hundreds of thousands of dollars.¹¹ Contrast this with the way in which physicians are compensated. Even though an argument could be made that neither relationship or system of compensation is ideal or even just, it is telling that they are so different.

BASICS

The legal system is based on the premise of trial advocacy, which relies on the adversarial arrangement of opposing parties, a judge, and a jury. The jury serves as the decider of fact, whereas the judge decides all questions of law. Some of the questions of law on which a judge may be asked to rule are which statutes or specific laws apply in a certain situation, what evidence is germane and allowable, who may or may not be permitted to testify in front of the jury, and to what they may testify. Although all of these issues can affect the outcome of a trial, the jury decides the facts, including whether a physician was or was not negligent and did or did not commit malpractice, whether there was any injury related to the said malpractice, and if that injury warrants monetary award. The jury will also decide the amount of that award, and the judge is only involved if the decision of the jury is unreasonable.¹²

Medical malpractice is generally categorized as the “failure of a physician or health care provider to deliver proper services, either intentionally or through negligence, or without obtaining informed consent.”¹³ Most medical malpractice litigation in the United States revolves around the concept of negligence¹⁴ and liability, making this type of litigation part of tort law. The word *tort* comes from the Latin term *torquere*, which means “twisted or wrong.”¹⁴ Tort law, as defined by West’s *Encyclopedia of American Law*, is

“...a body of rights, obligations, and remedies that is applied by courts in civil proceedings to provide relief for persons who have suffered harm from the wrongful acts of others. The person who sustains injury or suffers pecuniary damage as the result of tortious conduct is known as the plaintiff, and the person who is responsible for inflicting the injury and incurs liability for the damage is known as the defendant or tortfeasor.”

Tort law is a combination of legislative enactments and common-law principles. These laws may vary substantially from state to state because they are often based on the precedents from previous rulings. In contrast to legal actions for breach of contract, tort actions do not depend on a previous contract or agreement between the disputing parties, and unlike criminal cases in which the government serves as the plaintiff, tort actions are brought by private individuals. The tortfeasor or defendant is not subject to incarceration or fines in civil court.

In a malpractice suit, the plaintiff is usually the patient or someone acting on behalf of the patient and the defendant is any medical provider, which may or may not include a hospital or health center. A plaintiff can bring a successful medical malpractice claim

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