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Ethics

RESUSCITATION ATTEMPTS IN ASYSTOLIC PATIENTS: THE LEGAL TAIL WAGGING THE DOG?

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□ **Abstract—In today's litigious society, legal worries can cause Emergency practitioners to alter their delivery of clinical care. One clinical scenario in which this particularly true is in resuscitation of the so called "medically futile" patient. Patients who arrive to the Emergency Department in prolonged asystole have a uniformly dismal prognosis at best. Yet, many Emergency Physicians often continue resuscitative efforts for fear of being sued. These fears are largely unjustified. This article attempts to analyze the factors and elements involved in support of the assertion that the risk of a lawsuit is negligible at best. © 2006 Elsevier Inc.**

□ **Keywords—futility; resuscitation; asystole; malpractice; negligence**

INTRODUCTION

Emergency physicians often continue unsuccessful EMS resuscitative efforts on the "medically futile" patient, even after the patient arrives in the Emergency Department. Some have suggested that a significant factor in this behavior has been a "fear of litigation" on the part of the emergency physician (1). In the context of the "medically futile" patient, this fear seems to be unfounded for several reasons.

In addition to realistic economic considerations, plaintiff attorneys would have a difficult time establishing a claim of medical negligence. Difficulties in proving breach of care, causation and damages would make this type of suit extremely unappealing to most plaintiff attorneys.

Part I of this paper identifies the subset of patients who comprise the "medically futile." It then proceeds to review the medical literature that demonstrates the poor prognosis of this subset of patients. Part II offers a legal perspective as to why a claim of medical negligence would be so difficult to prove. Part III concludes by suggesting that emergency physicians should alter their current practice and suggests some ways that this can be accomplished.

MEDICAL FUTILITY

Since the advent of Advanced Cardiac Life Support (ACLS) nearly 30 years ago, there has always been a subset of patients who have suffered dismal outcomes, the so-called "medically futile" patient. Although there is no accepted medical definition of "medical futility," most emergency physicians would agree that the overwhelming majority of patients who arrive in the Emergency Department (ED) in asystole after prolonged prehospital resuscitative efforts are unlikely to survive (2–8).

As early as 1985, Smith and Bodai proposed a set of resuscitation termination guidelines based on a number of poor prognostic factors described in earlier studies (9).

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These guidelines suggested that patients who have received pre-hospital advanced cardiac life support (ACLS) for more than 45 min without establishing a native rhythm are not salvageable by current standards and therefore termination of efforts is warranted (9). Numerous other studies conducted since this review have confirmed the nearly uniformly dismal outcomes for patients with a pre-hospital initial rhythm of asystole (5,8,10).

There are certain clinical circumstances in which patients have been reported to recover from prolonged bouts of asystole (11). In fact, the latest American Heart Association Guidelines acknowledges as much in its latest recommendations for the treatment of asystole (12). Part of the asystole algorithm now includes a careful search for any atypical clinical features (i.e., age, toxin or drug overdose, or profound hypothermia) for which there have been scattered reports of clinical recovery (12–14). If these unique clinical circumstances are absent, however, the algorithm recommends ceasing any further resuscitative efforts.

Despite all of the medical evidence to the contrary, many emergency physicians continue the practice of a "second code" once the patient arrives in the ED. Although there may be other reasons for this practice, fear of lawsuit is a central reason for physician behavior (1). The next section analyzes this behavior from a legal perspective and asserts that this fear may be unwarranted.

LEGAL ISSUES

Legal Background

Malpractice suits are a matter of state common law. The cause of action is generally a claim of medical negligence. In any negligence claim, the injured party has the burden to establish all of the elements that define a negligence action.

First, the plaintiff must prove that the defendant had a duty to the plaintiff. Secondly, it must be established that the defendant breached that duty. Thirdly, there must be shown a reasonably close connection between the conduct and the resulting injury. Finally, the plaintiff must show definite damages flowing from the defendant's negligent act or omission (15).

For the purpose of discussion, consider the following hypothetical scenario. A patient arrives at the ED after 45 min of an ACLS field resuscitation. The initial field rhythm as well as the presenting ED rhythm is asystole. The physician elects to confirm asystole in two separate leads and immediately terminates the resuscitation.

Before analyzing the legal elements involved in the above hypothetical case, a proper risk assessment begins with evaluating some very real world issues. Whether the particular plaintiff legal counsel is a sole proprietor or part of a large law firm, the essential compensation mechanism remains the contingency fee. This type of compensation scheme requires the plaintiff's attorney to make an early presumptive judgment about the relative merits of the case.

Various factors involved in this assessment include the intrinsic merit of the claim, various evidentiary hurdles, and other non-legal or medical factors. The strongest cases are those in which the facts of the case fit favorably within the framework of historical case precedent.

Most plaintiff attorneys would reject the kind of case presented in the above hypothetical scenario because they would likely view this type of case as one in which the chance of success was extremely low. The following section offers a legal analysis in support of this assertion.

It is worth noting that although attorneys who have a pecuniary interest in winning a malpractice case tend to represent the majority of lawsuits, in many instances, irate relatives often sue without legal representation. Unfortunately, these types of cases tend to drag on the longest and can be quite bizarre.

ANALYSIS OF THE LEGAL ELEMENTS IN THE HYPOTHETICAL SCENARIO

Proving the element of a duty towards the patient would be easily satisfied. From the moment that the patient presents to the ED, there is an implied contract between the physician and patient. In this context, this would presumptively establish the element of duty (16). The difficulty for a plaintiff attorney would be to prove the remaining elements of breach, causation and damages.

To establish a breach, the plaintiff would have to argue that the defendant breached the standard of care by failing to resuscitate the patient. The threshold question, therefore, becomes what is the standard of care for ED resuscitation of patients who have failed advanced resuscitative efforts in the field?

The courts would be likely to interpret the standard of care in this clinical scenario by looking to the custom within the medical profession. Custom is developed over time and represents the clinical practice of physicians within a given specialty. Customary clinical practice is, in turn, typically derived from a recognized body of peer reviewed research. As noted, in the area of resuscitation, there has been a tremendous amount of research that demonstrates the overwhelmingly dismal outcome of this subset of patients (5,8,10,17,18).

Typically, recognized organizations may also inform this process. For example, the American Heart Associa-