

# Medicolegal Issues in Endoscopic Sinus Surgery

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## KEYWORDS

- Endoscopic sinus surgery • Medicolegal • Malpractice
- Lawsuit

## OVERVIEW

"Few issues in health care spark as much ire and angst as medical malpractice litigation."<sup>1</sup> The current malpractice climate in the United States has fueled much debate and emotion on the part of attorneys as well as physicians. Physicians may feel pressure, real or perceived, to order additional testing or take additional steps to document for fear of litigation, adding to the cost of health care delivery.

Frivolous lawsuits comprise approximately 37% of malpractice cases, accounting for about 15% of the system's cost.<sup>2</sup> Studies have shown that the great majority of patients who sustain a medical injury as a result of negligence do not sue.<sup>3,4</sup> However, lawsuits, whether appropriate or frivolous, are viewed as an assault on the character and competence of the physician. For psychologic, monetary, and patient safety reasons, the malpractice system has tremendous effect on physicians and society.

Functional endoscopic sinus surgery (FESS), due to its location adjacent to the orbit and beneath the skull base and its proximity to the optic nerve and carotid artery, is a procedure fraught with potentially catastrophic complications.<sup>5</sup> Sinusitis is the most common diagnosis involved in otolaryngology lawsuits. From 1985 to 2005, rhinology claims represented 70% of the total indemnity compensation for otolaryngology claims.<sup>6</sup>

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ANATOMY OF A LAWSUIT

Malpractice law is part of personal-injury tort law. To win a lawsuit, the plaintiff must “prove that the defendant owed a duty of care to the plaintiff, that the defendant breached this duty by failing to adhere to the standard of care expected, and that this breach of duty caused an injury to the plaintiff.”<sup>1,7,8</sup> Typically, the standard of care and causation must be determined by testimony of expert witness. In theory, the mere occurrence of a complication should not result in loss of a lawsuit, if the physician was following the standard of care. The reality, however, is that the occurrence of a disastrous injury is predictive of payment to the plaintiff regardless of whether the standard of care was met.<sup>2,9</sup>

MALPRACTICE AND RHINOLOGY

Endoscopic sinus surgery is one of the most litigated surgeries in otolaryngology. It can also be the most expensive in terms of judgments. The 3 most common complications listed in FESS lawsuits are intracranial complications (including cerebrospinal fluid [CSF] leak), orbital injury (including blindness), and anosmia (Box 1).<sup>10</sup>

In Lynn-Macrae and colleagues’<sup>8</sup> review of 41 cases from 1989 to 2003, they found that the average award to plaintiffs in FESS cases was \$751,000, with a range of \$61,000 to \$2.87 million. The highest awards were in cases of CSF leak, anosmia, blindness, wrongful death, and intractable pain. The following allegations were noted in Lynn-Macrae and colleagues’ review: 76% of cases alleged negligent technique; 37%, lack of informed consent; 5%, wrongful death; 27%, surgery not indicated; and 7%, failure to diagnose. Multiple allegations are often present within a case. About 41% of cases were won by plaintiff, whereas 56% of cases were successfully defended by the physician. Lydiatt and Sewell<sup>10</sup> similarly found that in 62% of cases, the physician defendant won the case, with plaintiffs winning 23% of cases that went to court, whereas 15% of cases were settled. In the study by Lydiatt and Sewell, the median judgment was \$650,000, with a median settlement of \$575,000. The range of awards given was from \$16,000 to \$25 million. FESS complications, sinonasal cancer, and misdiagnosis were the most common cases seen in their analysis of sinonasal lawsuits.

INFORMED CONSENT

Failure to obtain a patient’s informed consent before sinus surgery is malpractice. A patient has the legal right to consent, or refuse consent, to any recommended treatment or procedure and the right to sufficient information to make a knowledgeable and informed decision about a proposed procedure. Informed consent is not simply a form or the signature of the patient on the operative permit. It is the process of

Box 1

Most common complications cited in rhinology lawsuits

- Intracranial complications (CSF leak, brain injury, meningitis, hemorrhage)
- Orbital injuries (blindness, diplopia)
- Anosmia
- Atrophic rhinitis
- Death
- Failure to diagnose or delayed diagnosis of cancer.

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