Commentary on: Factors Influencing Judicial Decisions on Medical Disputes in Plastic Surgery

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The Brazilian experience described by Vila-Nova da Silva et al demonstrates the importance of informed consent and a good medical record, defined as including informed consent information, preoperative and postoperative photographs, and information allowing an outside expert to adequately review the chart. That may be where this study stops reflecting similarities to our system. The reality is there are similar areas of litigation in the US by procedure. Informed consent documentation can be quite good when signed by the patient and demonstrating an understanding of the potential inherent risks and complications each procedure includes. The key difference lies in expectations. Expectations have become generally quite unrealistic. I have reviewed litigation at the end of the first stage of a reconstruction where two additional procedures are intended, but the patient is dissatisfied at the beginning. I have reviewed litigation where a known inherent risk or complication occurs through no fault of the surgeon and the patient acknowledges they were aware of that risk. But they believe something must have been “wrong for it to have happened to them. It remains to be seen whether, in our zeal to schedule all patients, we downplay such risks in our informed consent discussion, or if societal trends have swung to lessened accountability and therefore the patient expects perfection every time.

One can make an argument that judicial review will help sort through this. However, many jurisdictions where judges are elected are known to exhibit a trend either in favor of the plaintiff or for the physician. Laws of evidence have helped limit what can be introduced at trial, but this is still left up to judicial discretion. I question whether the “blindfolded Lady Justice” in certain jurisdictions isn’t already biased to affect outcomes.

The battle of the experts is yet another difference between our systems. One can hire a physician to say almost anything about the care and treatment of a patient. There are often experts outside of our specialty who claim to be similar enough to render opinions. There is an affidavit requiring peer-accepted literature and opinions based on personal current experience, but an expert who is not a member of a reputable plastic surgery society is not required to adhere to those restrictions. There are many ways to reach a desired outcome in most (if not all) cases. However, if the defendant’s choice does not match the opposing side’s expert’s choice, negligence is asserted.

There are lessons established by this article. The medical record is important to aid the physician in defense of a claim. Often such lawsuits take place years after the event. The better the medical record reflects contemporaneous treatment and progress, the easier it is to defend. Informed consent does not have to be onerous or “legally binding. The process can be utilized as a tool to educate the patient and can also assist the physician on whether to accept the patient. An informed consent process and document that better explains, documents, and shows understanding, with adequate time for questions and answers, will be easier to defend as well. The expectation piece is the real challenge. I believe we have to be better at evaluating prospective patients as to their goals and expectations. Secondly, the question of whether we can meet those goals is equally important. I have described the “Babe Ruth Syndrome” of having to hit a home run each time.
should remember that Babe Ruth led the league in strikeouts five times (and had the second-most strikeouts in the league seven times), as well.²

The better the relationship we have with our patients, the better able we are to avoid conflicts. I also believe it is important to “like our prospective patients. So my method has become: (1) question the ability to meet the patient’s realistic goals and expectations; (2) conduct a thorough informed consent process, including a detailed review of medical records, preoperative and postoperative photographs, and documentation; and (3) confirm they are a prospective patient you “like and will look forward to seeing and following them in your practice.

Disclosures

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REFERENCES