Malpractice Prevention: Everything the Nurse Practitioner Needs to Know

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Objectives

• Upon completion of this lecture, the participant will be able to:
  - Discuss the essential components of a malpractice suit
  - Identify 10 techniques to prevent a malpractice claim
  - Discuss pros and cons of an individual malpractice policy

Medical Malpractice

• The failure of a healthcare professional to exercise such care as would a reasonably prudent healthcare professional under the same or similar circumstances
How Is This Determined?

• Standards of Care
• Expert Witness
• National Guidelines
• Consensus Opinions

Today’s Medicine...

• Nurse practitioners are facing increasing demands to...
  - Interact with more patients
  - Return more calls
  - Review more charts

Today’s Medicine...

• Study conducted at a major teaching hospital
  - Over a 9 month period, an error was made on 50% of patients
  - 18% suffered a serious consequence
  - 1% sued for malpractice
Additional Statistics

• More than ¼ of U.S. adults have experienced a major medical error within the past 2 years
• Although not all litigate
  - 1% – 4% do file a claim

Accessed 01-18-06

This is Very True for NP’s …

• Nurse practitioners are frequently being named as defendants in cases
• Increasing responsibilities
• Increasing numbers of NP’s

Quote from CLE Program For Attorneys

“Midwives, Nurse Practitioners…are not always employees of hospitals or attendings and may actually be independent medical practitioners. Even when they are employees, you may consider naming them as defendants since they may have their own insurance policies.”

Seminar: May 2, 2003; Prosecuting and Defending Medical Malpractice Claims; NYSBA CLE; Uniondale, NY
Statistics

• Approximately 50% of all claims are unfounded and have no basis
• Approximately 20% have some merit but will not reach a settlement or trial
• 30% will be resolved either out of court or in trial

2002

• 18,977 malpractice payouts
  - 80.6% for physicians
  - 11.0% for dentists
  - 8.4% other healthcare professionals
• 4075 payouts for nurses
  - Majority RN, LPN
    • 21.9% Nurse anesthetists
    • 8.6% midwives
    • 5.9% nurse practitioners (242 payments)

National Practitioner Data Bank

• Reporting database designed to prevent negligent health care professionals from moving across state lines for practice
• Administered by the Dept of Health and Human Services
• Information contained
  - Licensure
  - Malpractice payments
  - Professional memberships
  - Clinical privileges
National Practitioner Data Bank

• Additional information contained
  - Drug enforcement action
  - Medicare and Medicaid exclusions

National Practitioner Data Bank

• How does it work?
  - When you apply for a job, the prospective employer queries the data bank
  - You can query your own record to make sure it is accurate (www.npdb.com)
  - Hospitals are required to query the data bank every two years for any health care professional employed or on staff; JCAHO:2003 mandates same for long-term care facilities and sub-acute facilities

Legal Terminology
Tort

• The word tort is derived from the Latin word torquere - to twist (Synonymous with wrong)
• Tort: wrong or injury that results from the breach of a duty (negligence)

Intentional Tort

• Nurse practitioner commits the act with the intent to bring about the result
  - Assault and battery: forcing a person to take a medication when the person is competent to refuse the medication
    • This has been a big issue in long-term care facilities as well as hospitals

Intentional Tort

• Nurse practitioner commits the act with the intent to bring about the result
  - Invasion of privacy: divulging information to others without a patient’s consent to do so
    • Giving a progress report on a patient without permission
Hobbs vs. Lopez, Ohio, 1994

• College student had pregnancy test performed by MD. Told MD she wanted a 1st trimester abortion if positive. Test was positive. Physician instructed RN to call and give information to patient. RN called and reached Mrs. Hobb’s (patient’s mother). Gave mom the results and information on locations of abortion sites. Patient sued for medical malpractice, breach of privilege, and negligent infliction of emotional distress.

Components of a Malpractice Claim

• Plaintiff must prove the following
  - Duty
    • Relationship with plaintiff was established
    • Visit, phone call, casual conversation
    • Duty can occur in any setting: social event, giving samples, giving advice to family and friends
Example of a Case

- Husband and wife were driving in Texas. He began having chest pain and numbness in his left arm. They stopped at the closest hospital. They spoke to a doctor and a nurse. The nurse observed the man complaining of cardiac symptoms. The doctor told the nurse to send him to another hospital 24 miles away. On the way to the other facility, he died.
- Court ruled: nurse failed to evaluate the patient and initiate proper care. License suspended. Nurse claimed there was no relationship. Court declared there was a relationship by virtue of her license and job.

Components of a Malpractice Claim

- Plaintiff must prove the following
  - Breach of Standard of Care
    - Will be held to standard of care of an NP with the same level of education and practice
    - For NP’s - may or may not be the same standards of care for a physician

Breach of Standard of Care

- Can result in a malpractice case in which compensatory damages are sought for negligence
- Can also result in the loss of the nurse practitioner’s license
Components of a Malpractice Claim

• Plaintiff must prove the following
  - Proximate Cause
    • Compromise in standard of care caused the client's injury

Proximate Cause

• Often difficult to prove
• Foreseeability: One issue that the court considers when trying to establish causation
  - Should the nurse have foreseen the situation in order to have prevented it?

Proximate Cause

• 2 nurses were helping a man into a chair. One nurse let go of the patient to go and find a chair. He fell and broke his hip. Court ruled that the nurse was responsible because she should have foreseen that the patient would need a chair and therefore had the chair ready before moving the patient.
Components of a Malpractice Claim

- Plaintiff must prove the following
  - Injury
    - Actual injury must have occurred

Damages

- Must prove that actual physical or emotional harm (Injury) occurred
  - For instance, there are cases where a nurse is negligent but no damage or harm occurred as a result
- If the malpractice case is successful, damages will be paid
- Damages: monetary compensation paid for loss or injury which resulted from an act of omission or negligence committed by another

Punitive Damages

- Punitive damages: Punish defendants
  - Some states do not allow these
  - Other states allow them in situations where the defendant acted with reckless disregard for the plaintiff’s safety
    - Huge awards
    - Because the actions involved malice, malpractice policies often do not cover the award
Starkey vs. St Rita's Medical Center, 1997

- 36 year old male began experiencing chest pain and pressure, fatigue, diaphoresis at work. Came home and went to bed. Wife gave him antacid with no improvement. He went to bed and wife called a general triage number at the local hospital. Nurse advised her that it sounded like he may be having a heart attack but not to wake him. Let him rest and see how he was when he awoke. When he awoke, symptoms continued. Suffered an MI and is now unable to work.

Example of a Punitive Damage

- Nurse moved a terminal “no code” patient with less than 24 hours to live to a new room. Patient was on supplemental oxygen. Nurse chose to move the patient without the oxygen despite the family’s request. Patient cardiac arrested on the way to the new room and died.
  - Court found that the nurse’s action was a gross deviation from the standard of care and awarded punitive damages

Examples of Payouts

- Pennsylvania
  - 2001: 100 million
  - 2001: 55 million
  - 2001: 49.6 million
Many States Have Imposed Caps

- Many states (50%) have imposed caps on damages – as a means to reduce amounts paid to plaintiffs. This, in turn, reduces premiums.
- Some states have shared fault – award is reduced by percentage that plaintiff was found to contribute to outcome.

Significant Decrease in the Number of Insurers

- Many companies are no longer providing medical malpractice insurance.
- Limiting states in which they will insure.
- Only writing – Claims Made policies.

Other Important Information
Board of Registration in Nursing

• Board of registration in nursing that determines our scope of practice
• Job is to ensure public safety by making sure that all individuals, licensed to practice in that state, meet minimum qualifications
  - Each state has its own set of qualifications

Nurse Practice Act (Scope of Practice)

• Nurse Practice Act is a state law that regulates the practice of nursing
  - Each state has a different scope of practice
  - Nurse practice act provides general guidelines regarding those duties which can be performed and those which can not be performed by the nurse or nurse practitioner
  - Your employer has the right to restrict you to a narrower scope of practice BUT can not expand your scope beyond the nurse practice act

Make Sure That....

• When you are performing a function or job, you ask yourself you ask yourself the following:
  - Am I qualified educationally and experientially to be performing this task?
  - Could I defend my education re: this task/job in court and would the jury believe that I am qualified
Keep Up With the Latest Treatment Options

- Review textbooks and journals
- Discuss cases with colleagues
- Continuing education programs
- Agency for Health Care Policy and Research (AHCPR) Guidelines

Always Assume the Worst

- Consider the most serious diagnoses first
  - In particular, consider myocardial infarction, ectopic pregnancy, testicular torsion, breast cancer, appendicitis, aneurysm
  - NP evaluated a middle-aged man with chest pain. Examined him, discussed case with MD. Diagnosed muscle spasm and sent home.
  - Patient suffered a myocardial infarction and sued for loss of wages, failure to diagnose
  - Physician and nurse practitioner paid claim

Follow-up on High “Ticket” Items

- It is the nurse practitioner’s and MD’s responsibility to follow-up on potentially serious problems
  - This is true even if the patient does not complain of continued symptoms
  - Duty to follow-up with the patient is yours until the issue has been resolved
    - I.e. Mammogram, Pap smear, Breast lump
When a patient asks...

- Strongly consider getting the test
- Particularly when some provider’s may consider the test standard of care
  - 1 million settlement paid in NH
  - 52 year old male patient asked a family physician for a PSA test
  - Physician told patient that the test had a lot of false positives and was often an inaccurate test
  - Patient had prostate cancer

Breach of Confidentiality

- This can result in a malpractice claim
- Examples
  - Discussing a patient where others can hear
  - Releasing information without permission
  - Leaving a message on an answering machine
  - Discussing a patient’s condition with family members
  - Leaving record in view of others
  - Not shredding documents

Avoid the Risk of Negligent Nondisclosure

- If you examine a patient and find an abnormality
  - You must inform the patient of that abnormality
  - All facts to assist the patient with making decisions regarding the problem need to be provided
  - I.e. colon cancer screening recommendations
Always Obtain Informed Consent

- Informed Consent
  - Document that establishes proof that the procedure was discussed with the patient; including the risks and benefits
  - Allows patient or proxy to ask and have all questions answered
  - No coercion
  - Person performing the procedure must be involved in the informed consent process

Warn Patient of Side Effects

- Psychiatrist prescribed a medication which called for a warning to avoid driving or operating heavy machinery
- Failed to provide the warning to the patient
- Patient took the medication, drove and caused an accident which injured a third party
- Third party sued the psychiatrist for malpractice and won

Discontinue a Medication When It Causes a Cautioned Side Effect

- Physician prescribed OCP’s for a patient
- She developed migraines
- Called physician who advised her that she could continue the pills
- She suffered a stroke

(Buppert, C. Nurse Practitioner’s Business Practice and Legal Guide; 1999)
Don’t Contribute to Substance Abuse

- Patients have sued providers for contributing to a substance abuse problem
- Consult with other specialist’s regarding long-term narcotic prescriptions

Documentation

- Documentation is crucial at a malpractice trial
- It provides a record of the quality of care you provided
- Lack of documentation can make you vulnerable to a malpractice claim
Poor Documentation is Dangerous

- Notes and prescriptions must be legible
  - Cardiologist wrote prescription for Isordil. Pharmacist read it as Plendil and filled the prescription. Patient died as a result
  - Settlement: $225,000 from cardiologist and $225,000 from pharmacist

Document All

- No shows
- Canceled appointments
- Telephone calls made to a patient to check on him/her
- Letters sent and calls made to remind patient of a particular test needing to be done
  - Keep copies in chart of these letters

NonAdherence

- Always document discussions trying to get the patient to improve adherence
- Document the patient’s verbal responses
Examples of Things NOT to Write in the Chart

- COM (Crotchety old man)
- FLK (Funny looking kid)
- FLK from FLP (Funny looking kid from funny looking parents)
- Two hands stamped on the chart (Treat with kid gloves)
- FFC (Fit for coffin)
- 29 year old well-endowed beautiful young woman
- T/T = 2/3

Document a Patient’s Refusal of Care

- Document that you have explained the risks, benefits and alternatives of treatment
- Also discuss and document the risks of refusing treatment

Why Do People File Malpractice Claims?
Reasons for Malpractice Claims
• Reasons for Malpractice Claims
  – Expectation: Expect better outcome
  – Investigation: Want to see if anyone is at fault
  – Blame: Someone else’s fault
  – Retribution: Punish nurse
  – Remuneration: Money
  – Institutionalization: Punish the system

The Research Is Clear
• The relationship we have with a patient is our biggest risk and our biggest protection
  – Effective communication is an important way to prevent a claim

Customer Service: Little Things Can Make a Big Difference
This Is Your Biggest Protection
Let Me Give You Some Examples

• Beckman and colleagues studied 45 depositions and focused on why plaintiffs decided to bring malpractice actions
  - Determined that – it was the process of care, rather than the bad outcomes which determined the decision to file a claim
  - 71% of depositions revealed problems with MD-patient communication


Claims Against Surgeons Focused On Four Issues

• 1. Perceived unavailability (no one returned our calls, no one came when I rang)
• 2. Devaluing the patient’s or family’s views (cultural insensitivity)
• 3. Poor delivery of medical information (failure to explain why a complication happened)
• 4. Failure to understand the patient’s perspective


Compare This To…

• Primary Care Clinicians who have never had a claim tended to:
  - Educate patients about what to expect
  - Used humor more
  - Employed better communication techniques to make sure patients understood and communicated with them
  - Spent an average of 3.3 minutes longer with the patient

Remember What I Said When I Started Today: Happy Patients Do NOT Sue

Angry Ones Do!!!!

In Summary...

• How do you protect yourself?
  - 4 C’s
    • Caring
    • Communication
    • Competence
    • Charting

Malpractice Policies
What Type of Policy is Best?

• Occurrence vs. Claims Made
• Best: Occurrence Policy:
  – This covers the nurse for any incident that occurred while the nurse was insured
• Claims: Only covers the nurse while the policy is in effect
  – If you purchase a claims policy, make sure you purchase a “tail”

I Recommend Having Your Own Policy Because...

• Institutional Plans
  – Coverage may be denied for private duty activities
  – You may have no coverage for off duty incidents
  – Your coverage may be canceled following a job change
  – Limits of coverage may be shared by others

Plan at TCHS

• Malpractice Plan
  – Insured for any claims related to your employment at TCHS
  – Claims Made plan
  – TCHS will provide coverage for any event that occurs while you are employed and is reported during that time OR after you leave
Malpractice Coverage at TCHS

- Liability coverage
  - 1 million per claim
  - 9 million policy aggregate
  - 16 million of umbrella coverage

Drawbacks of an Individual Policy

- Some experts propose that you may be more likely to be sued if you have your own policy
  - A lot of controversy regarding that premise

Average Payout on Behalf of Nurse Practitioners and Nurses

- Average: $155,002.16
- Minimum: $2,062.00
- Maximum: $1,000,000
  - Massachusetts: 15 million dollar settlement against a NP and a large clinic in 2001
Conclusions

• In an era of increasing demands on the nurse practitioner, it is essential that steps be implemented to decrease the nurse practitioner's liability
• Concrete steps can significantly decrease the risk of having a claim filed against the nurse practitioner

Thank You
I Would Be Happy To Entertain Any Questions

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