DOES PRACTICING EVIDENCE BASED MEDICINE INCREASE YOUR RISK OF BEING SUED BY A PATIENT?

[A meeting to discuss the legal ramifications of evidence based medicine, and other issues, was recently held at the University of Buffalo, Department of Family Practice. After that meeting, your professional liability carrier, Academic Health Professionals Insurance Association, requested that we write an article regarding this issue for the benefit for all Academic subscribers.]

Medical professionals are required to follow the standard of care and provide patients with the best care possible. However, what exactly constitutes the "standard of care" is often hotly debated in court rooms throughout the country in medical malpractice trials. In theory, "evidence based medicine" (EBM) should clarify the standard of care, improve the quality of care and reduce the number of medical malpractice cases. This article examines whether practicing EBM will actually decrease your risk of being sued.

Throughout the ages, those who took on the mantle of being responsible for the health of others in their community learned from their past experiences and then passed down the wisdom they learned. Of course, like today, some were better than others. Some were able to process the good and bad experiences and determine what would be best for that next patient. But what constituted the "standard of care" differed greatly depending on the when the care was rendered, where the care was rendered and who was rendering the care.

Today, it has become obvious that society as a whole is better off if medical professionals join together in broad reaching studies that determine the best way to treat patients with existing and emerging medical technology. In the 1990s, the term that became vogue for this practice was "evidence based medicine" (EBM). With the rise of EBM, the "standard of care" has become much more easily defined, as the care and treatment of various diseases has become standardized throughout the country.

At medical malpractice trials in New York State, courts instruct juries that medical malpractice is, "… the failure to use reasonable care under the circumstances, doing something that a reasonably prudent doctor would not do under the circumstances, or failing to do something that a reasonably prudent doctor would do under the circumstances. It is a deviation or departure from accepted practice." (New York Pattern Jury Instructions, 2:150, 3rd Edition, 2007)

In New York, courts are willing to play a very limited "gate-keeper" role in that they will reject evidence that is clearly without scientific basis. But, as long as the "expert" physician has documented qualifications within his/her area of specialty and the evidence offered is not obviously lacking scientific basis, courts will leave most decisions about strength of evidence and standards of practice up to a jury. The jury (almost always made up of laypersons) ends up having to judge whether the expert witnesses at trial are credible and/or reliable when testifying about the usual and customary standard of care. Of course, these critical issues are being decided by lay jurors with little or no medical

background, who are undoubtedly influenced by sympathy for the injuries, which may or may not have been caused by the alleged malpractice.

EBM, if available for every medical decision, would take away the need for trials in medical malpractice litigation. If we were able to establish rules for the care and treatment of all diseases, when a practitioner was challenged regarding the care provided, the court would only have to turn to page 7568 of the EBM textbook to determine if the care provided was acceptable. The problem we encounter is that in the everyday world, EBM has not evolved to a point where it has answers for every problem, nor will that ever be possible. There are only certain areas of medicine where EBM has established rules that have effectively determined how certain conditions should be treated. And as we know, even those findings which now appear clear, may be refuted in the future as further evidence is gathered and analyzed.

The following is an example of how EBM practice could play out at a trial. Current EBM is that annual chest x-rays in smokers do not affect mortality rates for lung cancer. However, while annual chest x-rays are not the current standard of care, even though an annual chest x-ray does not decrease mortality rates, it does increase the odds of earlier diagnosis. Imagine the cross-examination of the doctor whose long-time smoking patient has died at age 50, leaving behind a wife and two kids.

Plaintiff's Attorney: Doctor, am I correct that in general, the earlier you detect cancer, the more likely the patient is to survive?

Defendant-Physician: Yes.

Plaintiff's Attorney: Am I also correct that if you order annual chest x-rays for a heavy smoker, such as Mr. Smith, you are more likely to detect lung cancer at an earlier point in time?

Defendant-Physician: Yes, but according to national studies, even though we may be able to detect lung cancer earlier, we have learned that detecting it earlier does not increase the odds that the patient will have a better outcome.

Plaintiff's Attorney: But didn't you just tell this jury that if you detect cancer early, the patient has a better chance to beat it?

Defendant-Physician: Yes, but …

Plaintiff's Attorney: And now you want this jury to believe that if you had ordered annual chest x-rays on Mr. Smith and diagnosed this disease before it spread throughout his body, it would have had absolutely no bearing on his outcome?

Defense Attorney: Objection your Honor. Counsel has misstated the Doctor's testimony.

As you can see from this exchange, while an impartial physician who is well versed in the applicable EBM would not be influenced by this exchange and would understand that studies have proven that earlier detection of lung cancer does not lead to a better outcome, it is difficult to convince a lay jury to accept this type of evidence. It is easier for a layperson to accept the general rule that if you diagnose a problem earlier, you increase the odds of a favorable outcome. It is much more difficult, although certainly not impossible, to explain to a jury that an earlier diagnosis may not help at all, even though you have the best evidence in the world to support your position.

There are still quite a few physicians who order annual chest x-rays for patients who smoke. Therefore, the plaintiff's attorney will not have any trouble recruiting an expert who truly believes that the standard of care requires annual chest x-rays under these circumstances. This sets up a "battle of the experts", with a jury of lay persons left to determine the winner. Imagine the closing argument by plaintiff's counsel, who will argue that if the physician had ordered a simple chest x-ray, the patient would have had the opportunity to walk his daughter down the aisle; that the failure to order the chest x-ray deprived him of the chance to be a grandfather; that the defendant's failure to provide good and appropriate care forced the patient's wife to live the rest of her life as a widow; etc…

The other problem that is encountered in court is the hearsay objection to EBM. As we all know from television, a court will not allow a witness to testify about hearsay, which is what someone else said. On the stand, Dr. Jones will not be allowed to testify that Dr. Smith told him that he would have done the surgery in exactly the same way. In order for that evidence to come in, you have to call Dr. Smith to the stand.

While hearsay usually refers to words spoken by a person, it also covers a medical article or study. Generally speaking, courts will not allow a physician to cite a medical article or study in court to support their position because the author of that article or study is not subject to cross-examination by the opposing party. In the above example, for instance, the court would probably sustain an objection to the doctor's reference to "national studies". So, even if a physician closely follows all of the EBM guidelines, the guidelines themselves may not be allowed into evidence at trial. As a defendant, you would need to rely on the testimony of your own expert to present the EBM guideline as the standard of care.

One of the key factors in EBM is how to best use limited medical and financial resources. Studies examine whether the benefit of using a screening test makes financial sense. The problem is that at trial, a defendant in a medical malpractice case can <u>never</u> argue that a test was not ordered because it was too expensive. Regardless of finances, medical practitioners must follow the standard of care when ordering tests or meticulously document why a test cannot be performed. In the event that an insurer

refuses to pay for a test you believe is necessary, you should become an advocate for the patient and document your efforts in the patient's chart.

With that background information in place, we still need to address the question: Does practicing evidence based medicine expose you to an increased risk of a medical malpractice claim? The answer to that question, of course, is no. If you are practicing EBM, you are keeping yourself closely aware of the current standard of care and following all of the guidelines for patient care which are established. However, it must be noted, that just because you are practicing EBM does not mean that you are insulated from exposure to a malpractice claim. Malpractice trials almost always come down to a "battle of the experts" and, unfortunately, there are physicians out there who will create their own standard of care and will testify that specific EBM are either wrong or not relevant to the situation under review.

In theory, EBM should decrease the number of medical malpractice cases. Clear standards on the care and treatment of conditions you face in practice will not only improve your care, but document that your service meets the standard of care. However, whenever possible, plaintiffs' attorneys and their experts will use EBM to their advantage, as they attempt to define the standard of care and establish that an error was made. This makes it more critical than ever that practitioners keep themselves up to date with new developments and implement those developments into their daily practice in a timely fashion.

Of course, while EBM gives you good general rules to follow in your practice, it does not, and cannot, replace common sense. Each patient presents you with a unique set of circumstances and you must not allow EBM to fully dictate how you practice. Each patient must be dealt with as an individual and each patient's specific issues must be closely evaluated to determine the best course of action.

Our belief is that practicing EBM will not prevent you from getting sued, but EBM should increase the quality of care that you offer your patients, as well as the confidence you have in the treatment provided, thereby decreasing your odds of winding up in court.

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