

## Guest Editor

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The last several years have resulted in an almost geometric increase in malpractice suits across the board, against physicians, hospitals, nurses, everybody. People are becoming more and more aware of their rights. Lawyers, of course, I suppose, are generating a certain amount of it and, being aware, they are bringing suits for all kinds of things. Thus far AmSECT hasn't been exposed to a lot of this litigation, but you're in a situation where I sincerely believe the exposures are substantial.

I am going to also discuss insurance. This is really the ultimate answer to the problem. Insurance companies are like women. They conceive with pleasure and deliver with pain. You are going to find that this is a problem. The insurer, either the hospital's or the doctor's is trying to save money. It is not trying to make money. Your situation gives you all a kind of unreal security because of the sense that you are working for someone else or working through someone else. You might say to yourself, "We must be covered because all intelligent hospital administrators have insurance, all intelligent physicians have insurance, so we don't need it." As I see it, in your general working situation there are three basic arrangements. I would suggest talking with your attorneys to check out the details of what I am going to tell you because the law varies from state to state. Generally what I am going to tell you is a fair representation of the law around the United States.

### SITUATIONS, CIRCUMSTANCES AND SPECIFICS

You should also check with your insurance companies. They will know the local situations, the circumstances of that particular locale and will be able to give you specifics. In general the way you all work is that you are an employee of the hospital and of course you are paid by the hospital which should make it a very close relationship. And of course you assume that since you work for the hospital, you must be covered by the hospital's insurance policies. There is a doctrine of the law which states that an employer is responsible for the negligent acts of his employees. Therefore, he has to respond to the damages if the employee is guilty of negligence. And, of course, everyone assumes this is a truism.

Some policies exclude you specifically from coverage unless you have the proper endorsements. They exclude professional and medical acts. Now what does this mean? Well, you are getting into semantics. The hospital says we will cover for administrative acts; an example, if a patient is malpositioned on the table and falls off. For acts which require professional skill and expertise, many policies exclude

coverage. The general law of many of the states is that at that point when the medical person is guilty of a professional act of negligence the hospital is not responsible.

Now that leaves you pretty much up in the air. From my knowledge of what a perfusionist does, it is unlikely that much is going to happen such as you dropping someone off the table or failure to count something. You are going to be doing that which is professional. Now this is something that will be determined in each case. But the outcome is that this is going to be a professional act. Something that requires medical skill and hints the hospital may not be responsible for you and you may not be covered under the hospital's insurance policy. Now that is **not** so good.

### INSURANCE RIDERS

It is possible that with the three general ways you work, everything can be bad. You may not be covered by anybody. The second situation you have is that you work for a doctor. Well, that is good and everybody knows that doctors are intelligent people and they generally have some kind of insurance. But that policy is going to cover the physician. It would probably cover the physician to be responsible for the acts of his employees, but will not, without the proper rider, cover the employee as an individual. One of the cases which I read, listen to this, the doctors are sued, the operating physician, in turn sues the perfusionist. Now **that** kind of protection you don't need!

It seems to me this is a very real possibility. The doctor is not in control of the litigation, the insurance company is in control. And remember the basic premise that insurance companies conceive with pleasure and deliver with pain. Any defense they can get, anybody they can interpose to limit their liability or reduce their liability or eliminate their liability is standard procedure. Now who is a good likely subject? I suggest the perfusionist is the perfect fellow for the doctor who says he has good hands and who doesn't like to make mistakes. He can off load on anybody.

There are ways to get around that. You can get covered under the doctors policy if you are working for him. All it takes is a little more premium and a rider. Now a serious question, will the doctor add you on his policy and what will the cost be?

In the final situation that you all work in, that of an independent contractor, you are out of luck. The theory of the operating surgeon being the captain of the ship is old hat. Let's face the facts, what is happening now is that the courts and juries are being more selective because it's obvious when you have 15 people in the operating room, the doctor can't really be much of a captain. If you are an independent contractor you may not even then come under the auspices of the doctor. You are thereby yourself. The real kicker in all of this is that in some jurisdictions when an employee is guilty of negligence, in the absence of an insurance coverage, the jury says the employee is doing an administrative act and in a state like New York where they don't have that distinction any more, they say the hospital is responsible. In theory, the hospital can turn around and recover what it loses back from you.

### MALPRACTICE

Generally speaking, of course, what we are talking about is malpractice. Of course it is a kind of negligence and it means a failure to perform to a standard of care. It means that you failed to discharge a duty that you owe to somebody which resulted in a risk or damage, which was foreseeable. In malpractice there are a couple of other kickers that are added on which are actually to your advantage. The standard of medical practice, and generally here again, we are talking about different stages, all come from different places. You should check these things also with your attorney,

but the general rule is to conform to the standard of care that is observed by other medical persons of good standing in your community. A pretty simple concept.

The standard may vary from place, except that's a maybe. As the laws constantly change, a lot of jurisdictions have gotten away from this locality rule and are now allowing expert witnesses to testify in, let's say, backwoods Georgia where no one has heard of the advanced procedures. So they will get themselves a hired-gun doctor who will come down from "someplace" and testify what he, in his wisdom, might do. He attempts to establish a standard which is no way possible for the guy in backwoods Georgia. When you have that situation you are really in trouble. In a suit, there are very agitated people and they will find somebody to testify that what you do is wrong. They will bring him down from where ever and then all of a sudden you are facing a standard that you didn't know existed and you are facing a jury that is looking at someone who is severely injured.

In malpractice cases, there are generally two charges to be levelled at a perfusionist. As I see it, both are awful. One is the patient dies. If he is 30 years old, has three kids, a lovely wife, and makes \$25,000 a year, you are talking about "big money." The other thing is that he turns into a vegetable. Now, if he is the same guy, he has a life expectancy which is not going to be depreciated by his injuries and you may be looking at supporting this fellow for 40 years. Then you are really talking about big money.

The two worst things that you can face in a malpractice suit, or any suit, is death or total or complete disability or organic brain damage.

How much can such cases be worth? I want to tell you a couple of horror stories.

Here is the general lay-out. See if this does not seem similar to something that might happen to a perfusionist. A man was injured in an industrial accident. Some sheet metal fell on him and he is paralyzed from the nipples down. He suffered terrible organic brain damage. He had a total change of personality. He is mostly out of it although he has some periods of sanity.

His condition is so bad that he has to have 24-hour nursing care. At the time of the trial, that nursing care was costing about \$1,000.00 per week or \$52,000.00 per year.

He was 56 and making about \$18,000 per year. The defendant position was that the man only had about nine years work expectancy. We represented the injured party.

The case went to trial because the defendant team wouldn't settle — not reasonably, that is. The case was tried for about eight days and it went to the jury.

The jury returned a verdict of \$2,481,000.00 That is the biggest verdict ever in Louisiana. As a practical matter, this man suffered the basic kind of injuries you would expect if something happened in a coronary bypass situation.

The case recovered \$2,481,000. Now that is scary.

Another case was defended and which is not going to trial will have a value of \$500,000 to \$1,000,000.00. It involves a young, male college student. He went in for a simple shoulder operation. There was no perfusionist involved but there was an anesthetist.

The boy went in with a bad shoulder and an IQ of 150 or so. He came out with an IQ of 70.

He is nice looking and about 22. He wasn't brilliant in college but he surely had a reasonable future and now he is with the birds and the fairies.

A jury is going to lean all over that anesthetist even if there was no negligence.

The same type of thing can happen to you if there is a bad result of surgery. There will be sympathy just oozing out of the jury to try to help the injured party. This is all important not just because of the potential loss if you are found guilty of malpractice but because we know that in most cases you will be able to win.

The statistics in most cases of malpractice that are filed favor the defense. These statistics are kind of misleading because a lot of times suits are filed with people that really don't know what they are doing in the field. But most of the time the doctor can feel secure that he has a good chance to win the case. The problem may be true in your case, too, particularly because you are not from the front line, you are down a ways.

But consider the attorney's fees if you don't have any coverage and you are sued individually. Now the average run of the mill, unimportant garden case malpractice suit costs in defense, (that means the attorneys, the medical experts, deposition expenses, travel expenses, all those various things) about \$5,000. That's run of the mill, no big medical questions, no complicated issues no substantial recoveries. Serious cases to defend can have expenses that go between 15 and 25 thousand or even over. So you are going to get a substantial bill even if you win. Suppose you go to the trial and you are vindicated. It's wonderful, you've shown them you are right. Then the guy pops a \$15,000 bill on you! Now what do you do? That's almost as bad as losing because if you lose something like \$2,480,000 it doesn't matter. But you can't go into bankruptcy for \$15,000 so you have to borrow it. You are working for your wife, your children, your family and also your lawyer! You see, that's not the way it should be.

### SIMPLE SUGGESTION

There is a better way. I am not an insurance agent and I am not trying to hustle anybody to buy insurance and I don't care if you buy insurance from the point of view of the insurance companies making a profit. As far as my position as counselor for this organization I have one simple suggestion. It isn't going to be easy but the thing you have to do is beg, borrow or steal a personal malpractice insurance policy. I strongly urge all of you to give up your vacation this year and get your malpractice insurance.

Another route that should be mentioned to you and that is to talk to the hospital administrator.

There is a wonderful solution to the whole problem which insurance companies will sell. It is called an additional interest endorsement. It may change from hospital to hospital or place to place but they will understand. Talk with your insurance agent, he will know what you are talking about. Some hospitals don't have it. As a matter of fact, some hospitals don't even have insurance anymore. This additional interest endorsement will cover everybody who is an employee of the hospital whether or not his acts are administrative or professional. It covers the whole spectrum of people down through the cafeteria, janitors, up to administrators, technicians, perfusionist and everybody else and it is a great coverage. But I suspect that a lot of your hospitals don't have enough money for such coverage.

### ONLY ANSWER

There is another possibility that is open to you. You can get a rider on your physicians policy that raises his premium. He may not want to do that for you. I think

that the only answer is to get your own coverage. What does that mean, what are we looking for? I think that with a group of this size you will be able to crank yourselves into some kind of decent, reasonably priced policy. Your national office can sit down and work until they are blue in the face and they can get you the best deal known to man and if you all don't use it, you don't come forward and don't meet the requirements of numbers it doesn't do any good. The theory of insurance is to spread the risk. They know that with a group of 1,000 people a very small percentage will get sued. If they get a number of premiums from 1,000 people then they are probably going to make a profit, but they are only insuring one guy they don't have all those other premiums, so they have to soak him just in the event that he is the unlucky guy that gets hit.

### PROTECT YOUR INVESTMENT

The thrust of what I am trying to say is to encourage you to do that which is necessary for yourselves to protect your investments of 5, 10, 15, 20, 25 years of work, of your accumulation of assets. You have to understand that you have not been used and you have not been exposed. You have been in kind of a back-line position.

In many medical records the perfusionist barely appears, if at all. A lot of people that are not knowledgeable about what is going on in medical malpractice don't even pick up people that are in the back-line. That is changing because malpractice is becoming a very popular undertaking for a lot of lawyers. You have to protect yourselves and you have to keep good records. There is no question about that. Records make or break a hospital in malpractice. Good records are a joy to behold. Bad records are a disaster. So keep good records but don't put in too many adjectives. I am not suggesting that you exercise protective medicine, but there is no sense in doing 22 things that you don't have to do. And don't put your head on a chopping block because it is going to get there fast enough the way things are going without helping yourself along. If you can keep yourself out of the general record of the hospital you are better off, but you probably can't, the way things are going now.

Watch your machine for mechanical breakdowns. A lot of times you are going to have mechanical breakdowns. These things are going to continue. The machine breaks down and they say, "Well that's the producers fault," but they may say, however, that the perfusionist, had he been alert, would have picked up what was going on and that makes it his fault. And pretty soon they have all the people going down the tube together, which is nice from the point of view of having company.

If you are running your own show try and keep some reasonable records to show that you are trying hard. Other than that I can't educate you in the intricacies of law. The one thing you should know is that the law is mighty unpredictable. The tendency today is for the jury, the finder of fact, in a bad case, to help out the injured person. It is kind of hard to leave the father of four at age 32 on the beach with nothing when you have all kinds of people with the capacity to pay. That is not to say that juries do wrong things, but generally if you look at what happens in an operating room, five minutes, two minutes, three minutes, whatever it is, the minute goes by just like the snap of your fingers and you are all hustling around doing wonderful work. But you let those lawyers talk about it for five days and before you know it you look like "Jack the Ripper." This is our job as lawyers, we are supposed to take a position and flail away, even at the nicest guy.

So you have to be careful. When the AmSECT officers try to get you some help through an insurance company, give them some cooperation.