Prove patient’s non-compliance: A defense verdict might result

But physician defendants need proof

If a patient failed to see a surgeon after you diagnosed a malignant tumor in her breast, should this bar her from recovering any damages? What about a patient’s refusal to wear a medically prescribed orthotic device, or a patient falling while getting out of bed despite being repeatedly cautioned to call for assistance?

These are actual cases in which juries have been allowed to consider the plaintiff’s “contributory negligence” as a defense to the patient’s claims, adds Erin McNeil Young, JD, a partner with Yates, McLamb & Weyher in Raleigh, NC.

In general, the defense of contributory negligence has been recognized in medical malpractice actions when the patient has failed to follow medical instruction; refused or neglected prescribed treatment; or intentionally given erroneous, incomplete, or misleading information, says Young.

In states that recognize the doctrine of contributory negligence in the context of medical malpractice claims, a plaintiff is completely barred from any recovery when his or her own negligence was a proximate or contributing cause of his or her injury, says Young. (To view state-specific information, go to http://bit.ly/QkRSh6.)

In other states, the principle of “comparative fault” has replaced the defense of contributory negligence. “Comparative fault is a system which provides for the reduction of a plaintiff’s recovery, in proportion to the plaintiff’s fault,” says Young.

When contributory negligence is used as a defense, the burden then shifts to the defendant to show that plaintiff’s negligence contributed to his own injury and the defendant should not be held liable, says Brandy Boone, JD, a senior risk management consultant at ProAssurance Companies in Birmingham, AL.

Good documentation of the physician’s recommendations and the patient’s non-compliance still can be used as evidence ...
Physicians need proof

Bobbie S. Sprader, JD, an attorney with Bricker & Eckler in Columbus, OH, has seen several claims against primary care physicians by patients diagnosed with conditions such as colon cancer that arguably would have been picked up earlier had they undergone routine screening.

The issue was whether the physician recommended the screening at all, and whether they provided sufficient information to the patient about the need for the screening to shift responsibility for having the test to the patient, explains Sprader.

“Often, patients are not good about scheduling routine physical exams, so they only see their physician for sick visits,” she says. “They still claim that they should have been advised to have the screening exams or, at a minimum, advised to schedule a routine physical where this could have been discussed in more detail.”

The better a physician is able to prove that the recommendation was made, that the patient was told the risk of non-compliance with the recommendation and that the patient then did not comply, the more likely that the patient’s own non-compliance will be successful in reducing or eliminating the liability, if any, on the part of the physician, says Sprader.

Delicate subject

A patient’s non-compliance with a doctor’s advice to quit smoking might well have contributed to complications with a subsequent orthopedic injury. However, making this an issue during litigation could easily backfire on a physician defendant.

“You have to be careful any time you point the finger at a patient for causing harm to themselves,” says Dupont. “It’s a delicate subject in front of a jury. The question is, to what extent do you push

Executive Summary

A patient’s non-compliance can be used to support a defense of “contributory negligence,” which might bar the patient from recovery, or “comparative fault” which might reduce the plaintiff’s recovery in proportion to the patient’s fault. Even if neither defense is used, the patient’s non-compliance can be helpful to a physician defendant. Physicians should:

- Be specific in the chart about what they told the patient.
- Document admissions and even suspicion of non-compliance.
- Consistently chart recommendations every time they’re given.

and whether obesity can be used to prove contributory negligence, p. 52.)
that?”

If there is no documentation of non-compliance, it might look like an after-thought. “The jury would say, Why didn’t you tell the patient that in the first place? It’s not in your notes.” Now it just looks like you are picking on them,” Dupont says. Here are some opportunities before trial to raise this issue:

• **During the patient’s or physician’s deposition.**
  “Both the physician and the physician’s lawyer need to be careful,” cautions Dupont, as poor treatment of the patient or a hostile-appearing physician can anger the jury.

• **During the expert’s deposition.**
  “Obviously, if the physician’s expert is going to opine that the patient has some responsibility for his or her own injuries, that needs to come out in the deposition,” says Dupont.

**References**


**SOURCES**

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**Real-time charting tells compliance story**

You can offer ‘strong evidence’ of recommendations

A note stating “routine screening discussed” might help a physician defend prove a patient was non-compliant.

“You now have documented proof that a discussion did occur,” says **Bobbie S. Sprader, JD**, an attorney with Bricker & Eckler in Columbus, OH.

However, she says it would be much better to have a note that says, “Patient advised that a colonoscopy is recommended for screening due to his age and family history of colon cancer. Patient understands risks and benefits of this test, including the risk that he may have polyps or pre-cancer that can be treated if found now before it progresses to colon cancer that may be fatal.”

Here are risk-reducing strategies:

- **Send a follow-up letter to the patient that outlines the recommendation and the basis for the recommendation.**
  “This would be strong evidence that the recommendation was made and that the patient understood the risks of ignoring the recommendation,” says Sprader.

- **Have patients initial something to acknowledge that they were advised and all their questions were answered.**
  “This would prevent any argument that they were unaware,” says Sprader.

- **Document any admission of non-compliance.**
  “Physicians are frequently asked in a deposition whether they consider their patient to be compliant in general,” says Sprader. “It is hard to say no if there is no documentation of non-compliance anywhere in the chart.”

- **Document even suspicions of non-compliance.**
  For example, if diabetic patients report compliance with their diet and are checking their blood glucose levels regularly, but their HgbA1C is high, this situation is evidence that they are less compliant than they profess to be. “If confronted, they may ‘fess up, and this, too, should be documented,” says Sprader.

- **Be specific about what you told the patient.**
  Physicians often bring up the topic of non-compliant patients during risk management seminars, says **Brandy Boone, JD**, manager of risk resource at ProAssurance Companies in Birmingham, AL. Boone tells them that simply documenting “patient non-compliant” isn’t enough for a defense. Physicians need to be very specific about what they recommended.

“Day after day, I see delay in diagnosis claims where the patient is alleging that the results of diagnostic tests weren’t given to them in time to seek necessary treatment,” says Boone. “It’s a little harder to make those allegations when the physician record makes it clear that it’s the patient who did not follow up.”

- **Document every time you give instructions.**
  **Karen B. Everitt, JD**, regional...
vice president of risk management at ProAssurance Companies, recalls a claim involving a physician who had cared for an overweight diabetic patient with cardiac disease for many years. At the beginning of the relationship, the doctor always documented giving instructions regarding diet, smoking, and lab tests, and the patient’s noncompliance.

“Over the years, the physician became less diligent about documenting those instructions at each visit and patient statements about noncompliance,” says Everitt. “Eventually, the patient had a problem and sued the physician.”

Although the defense attorney tried to show that the physician continually gave instructions and the patient did not comply, the medical record didn’t appear that way. “In that situation, you are asking the jury to take the physician’s word for it,” Everitt says. “A physician cannot over-document their instructions and the fact that the patient did not comply.”

Patient might claim blood work not ordered

Most lawsuits involving contributory negligence relate to patients who fail to follow up with routine blood work and to return for scheduled appointments, according to Molly L. Farrell, vice president of operations for MGIS Underwriting Managers in Salt Lake City, UT.

“Only with very clear documentation of everything that the physician did and everything that the patient didn’t do will a jury assign fault to the patient,” Farrell adds.

In one case, a patient taking a daily dose of divalproex sodium alleged that the physician never ordered the required routine blood work, but the medical record clearly showed these weren’t obtained by the patient despite being ordered over a two-year period. The prescriptions still were renewed on a monthly basis.

“The patient in this case developed aplastic anemia and sued. The case was settled for a small amount, due to the prescription issue,” Farrell says. “While the case could have been defended, given that the physician ordered all the tests, the fact that he continued to order the refills was an issue of liability.”

In another case, a patient was referred to his cardiologist for a cardiac work-up due to a strong family history of heart disease with recent complaints of intermittent chest pain. The patient did not make an appointment with the cardiologist, and the issue was discussed at the next visit.

At that point, the family practitioner had his office manager secure an appointment and advised the patient of the date. “The patient did not go to the appointment and died of a massive myocardial infarction seven days after the appointment,” says Farrell. “The patient’s family sued. However, the case was dismissed due to the clear documentation in the physician’s chart.”

The physician’s charting needs to make the “story” of the appointment and the patient’s lack of follow-through clear, including the fact that they told the patient the reason for a diagnostic test, says Farrell. “The physician has a much higher standard to prove that the patient was non-compliant, simply because jurors expect that physicians have a better understanding of the situation,” she says.

Can patient’s obesity be successful defense?

*This contributory negligence defense might be ‘difficult argument’*

When it comes to using a patient’s obesity as a contributory negligence defense, “there is a fine line,” says Philip R. Dupont, JD, a partner at Husch Blackwell in Kansas City, MO. “I don’t think you will find a court that allows you to base a percentage of fault on a patient being obese,” Dupont says.

Obesity is a medical condition, and physicians are expected to take patients as they find them, he explains. “You can point out that the patient is obese and that it affects a number of medical issues in the care and treatment of the patient, but you’re probably not going to be getting a comparison of fault on that,” Dupont says.

A patient’s obesity might be considered when evaluating a traumatic injury case such as a lacerated common bile duct, as surgery is made more difficult because the visual field available to the surgeon is smaller, but it’s a “difficult argument,” says Molly L. Farrell, vice president of operations for MGIS Underwriting Managers in Salt Lake City, UT. “Jurors tend to feel that the physician knew what he or she was getting into before they did the surgery.”

“Lifestyle” factors relevant

“Lifestyle” factors such as drug use, obesity, and smoking often can be used as evidence of a patient’s contributory negligence, says Erin McNeil Young,