



# Legal Issues in Dermatology: Informed Consent, Complications and Medical Malpractice

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Legal considerations can arise in almost any aspect of a dermatology practice. A full textbook on health care law would be required to adequately cover the varied legal issues as they relate to dermatology. This article will focus on the relationship between informed consent and the development of complications that may lead to a cause of action based on negligence. Because it is the lack of informed consent that may form the basis of a medical malpractice claim, the issues of what constitutes a medical malpractice claim will be fully described.

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The principle of informed consent establishes the patient's right to consent to treatment or procedures after being informed of the benefits or risks involved. The informed consent doctrine has 3 goals: (1) to include patients in the decision-making process; (2) to involve the patient in values and choices that affect the social and physical aspects of life; and (3) to ensure the patient is aware of the potential benefits and hazards of the treatment.<sup>1</sup>

The informed consent doctrine would logically apply to patient approval of the procedure itself. In addition, such consent also would apply to any and all photographs and videotapes of the procedure. In complying with the principles of informed consent, a physician should notify the patient as to the benefits of the procedure as well as photography and videotaping. There is value to the use of such photography for teaching purposes, but the acquiescence to the videotaping and photos must come with appropriate patient consent.

## The Standard of Care

In general, in regard to medical care, a patient must be told all material issues that a reasonable medical practitioner would tell them. Thus the novice dermatologic surgeon would have to provide identical informed consent, as would the more experienced physician. This is referred to as the "standard of care." Physicians are held to the "reasonable" standard of care. It would

be reasonable for a physician to warn a patient about the risk of scarring from a laser procedure. It would not be the reasonable standard of care to warn a patient of a risk of death following antibiotic intake. Of course, what is reasonable is often determined by expert witness testimony. This standard of care will be same for a dermatologist, plastic surgeon or even radiologist performing a laser hair removal procedure. If there is a breach in that standard of care leading to direct and proximate damages, the physician will usually be held liable in a malpractice case.

## Informed Consent Requirements

Although there are many potential causes of a physician malpractice case, the most common issue is one of appropriate informed consent. It should be noted that consent could be either verbal or written. However, at the time of testimony in court, a signed patient document provides enormous credibility that the physician did give such consent. Appropriate signed consent is mandatory in today's litigious society. Although initially the lack of informed consent was used to assert claims of assault and battery against physicians, today the lack of consent is at the very heart of medical malpractice claims based in negligence. Complications do occur. They, in themselves, do not constitute medical malpractice. Whether a complication leads to a successful medical malpractice claim based in negligence lies in whether all the legal elements of cause of action, based in negligence, are fulfilled.

## Negligence

Any analysis of physician negligence must first begin with a legal description of the elements of negligence. There are 4

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required elements for a cause of action in negligence. They are duty, breach of duty, causation, and damages. The suing plaintiff must show the presence of all 4 elements to be successful in his or her claim.<sup>1</sup>

Defining the 4 elements of negligence, as relates to medical malpractice, is elusive but can be simply described as: (1) Duty is the conduct undertaken by another reasonable physician performing that very same treatment; (2) A breach in that duty means the allegedly negligent physician did not undertake the treatment in the same manner as another reasonable physician undertaking the same treatment; (3) Causation refers to a connection between the breach in that duty and the fourth element of damages; (4) Damages generally are measured in terms of economic damages to the suing plaintiff but also may refer to noneconomic damages such as emotional damages.

The duty of a physician performing dermasurgery is to perform that surgery in accordance with the standard of care.<sup>2-4</sup> Although the elements of a cause of action in negligence are derived from formal legal textbooks, the standard of care is not necessarily derived from some well-known textbook. It is also not articulated by any judge. The standard of care is defined by some, as whatever an expert witness says it is, and what a jury will believe. In a case against any dermatologist, the specialist must have the knowledge and skill ordinarily possessed by a specialist in that field and have used the care and skill ordinarily possessed by a specialist in that field in the same or similar locality under similar circumstances. A dermatologist, plastic surgeon, or otolaryngologist performing cutaneous surgery will all be held to an equal standard. A failure to fulfill such a duty may lead to loss of a lawsuit by the physician. If the jury accepts the suggestion that the surgeon mismanaged the case and that the negligence led to damage of the patient, then the physician will be liable. Conversely, if the jury believes an expert who testifies for the defendant doctor, then the standard of care, in that particular case has been met. In this view, the standard of care is a pragmatic concept, decided case-by case, and based on the testimony of an expert physician. Dermasurgeons is expected to perform cutaneous surgery in a manner of a reasonable physician. They need not be the best in their field; they need only to perform the procedure in a manner that is considered by an objective standard as reasonable.

It is important to note that where there are 2 or more recognized methods of diagnosing or treating the same condition, a physician does not fall below the standard of care by using any of the acceptable methods even if one method turns out to be less effective than another method. Finally, in many jurisdictions, an unfavorable result due to an "error in judgment" by a physician is not in and of itself a violation of the standard of care if the physician acted appropriately before exercising his professional judgment.

Evidence of the standard of care in a specific malpractice case includes laws, regulations, and guidelines for practice, which represent a consensus among professionals on a topic involving diagnosis or treatment, and the medical literature including peer-reviewed articles and authoritative texts. In addition, obviously, the view of an expert in crucial. Al-

though the standard of care may vary from state to state, it is typically defined as a national standard by the profession at large.

## The Role of An Expert Witness

Most commonly for litigation purposes, expert witnesses articulate the standard of care. The basis of the expert witness testimony, and therefore the origin of the standard of care, is grounded in the following:

- The witness' personal practice and/or
- The practice of others that he has observed in his experience; and/or
- Medical literature in recognized publications; and/or
- Statutes and/or legislative rules; and/or
- Courses where the subject is discussed and taught in a well-defined manner.

The standard of care is the way in which the majority of the physicians in a similar medical community would practice. If, in fact, the expert does not practice like the majority of other physicians, then the expert will have a difficult time explaining why the majority of the medical community does not practice according to his or her ways.

It would seem then that in the perfect world, the standard of care in every case would be a clearly definable level of care agreed on by all physicians and patients. Unfortunately, in the typical situation the standard of care is an ephemeral concept resulting from differences and inconsistencies among the medical profession, the legal system and the public.

At one polar extreme, the medical profession is dominant in determining the standard of care in the practice of medicine. In such a situation, recommendations, guidelines, and policies regarding varying treatment modalities for different clinical situations published by nationally recognized boards, societies and commissions establish the appropriate standard of care. Even in some of these cases, however, factual disputes may arise because more than one such organization will publish conflicting standards concerning the same medical condition. Adding to the confusion, local societies may publish their own rules applicable to a particular claim of malpractice.

Thus, in most situations the standard of care is neither clearly definable nor consistently defined. It is a legal fiction to suggest that a generally accepted standard of care exists for any area of practice. At best there are parameters within which experts will testify. A dermatologist's best defense that he is acting in accordance with the standard of care, to document appropriate risk assessment of the surgical patient, provide appropriate medical record documentation, appropriate informed consent and finally to utilize an appropriate surgical approach.

## The Role of Societal Guidelines

American physicians have in recent years put forth substantial efforts toward standard setting and specifying treatment

approaches to various conditions. Clinical practice guidelines have been developed by specialty societies such as the American Academy of Dermatology and the American College of Mohs Micrographic Surgery and Cutaneous Oncology. The Institute of Medicine has defined such clinical guidelines as “systemically developed statements to assist practitioner and patient decisions about appropriate health care for specific clinical circumstances.” Such guidelines represent standardized specifications for performing a procedure or managing a particular clinical problem.

Clinical guidelines raise thorny legal issues.<sup>5</sup> They have the potential to offer an authoritative and settled statement of what the standard of care should be for a given skin cancer. A court would have several options when such guidelines are offered as evidence. Such a guideline might be evidence of the customary practice in the medical profession. A doctor acting in accordance with the guidelines would be shielded from liability to the same extent as one who can establish that he or she followed professional customs. The guidelines could play the role of an authoritative expert witness or a well-accepted review article. Using guidelines as evidence of professional custom, however, is problematic if they are ahead of prevailing medical practice.

Clinical guidelines already have had an effect on settlement, according to surveys of malpractice lawyers. A widely accepted clinical standard may be presumptive evidence of due care, but expert testimony will still be required to introduce the standard and establish its sources and its relevancy.

Professional societies often attach disclaimers to their guidelines, thereby undercutting their defensive use in litigation. The American Medical Association (AMA), for example, calls its guidelines “parameters” instead of protocols intended to significantly impact on physician discretion. The AMA further suggests that all such guidelines contain disclaimers stating that they are not intended to displace physician discretion. Such guidelines, in such a situation, could not be treated as conclusive.

Plaintiffs usually will use their own expert, as opposed to the physician’s expert to define the standard of care. Although such a plaintiff’s expert may also refer to clinical practice guidelines, the physician’s negligence can be established in other manners as well. These methods include (1) examination of the physician defendant’s expert witness, (2) an admission by the defendant that he or she was negligent, (3) testimony by the plaintiff, in a rare case in which he or she is a medical expert qualified to evaluate the allegedly negligent physician’s conduct, and (4) common knowledge in situations in which a layperson could understand the negligence without the assistance of an expert.<sup>6,7</sup>

It is clear then that for plaintiffs to their negligence cause of action against any dermatologist, they must establish that their physician had a duty of reasonable care in treating them and had in fact breached that duty. However, that breach must also lead to some form of damages. A mere inconvenience to the plaintiff, even in the setting of a physician’s breach, will usually not lead to physician liability in a cause of action for negligence.

## Complications Versus Medical Malpractice

It should be noted that the occurrence of a complication is not by definition medical malpractice. Laser thermal injuries can occur; ulcers can occur after sclerotherapy; basal cell carcinoma can recur even after appropriate treatment. Despite all this, when complications do occur, aggrieved patients often do seek legal advice. To lessen the likelihood of a lawsuit being filed, dermatologists must be very communicative with their patients. Plaintiffs file lawsuits for a variety of reasons. A patient who likes his or her doctor and can communicate with them is less likely to sue even when a complication has occurred. However, the best defense against a successful medical malpractice case, based on complications, is to be certain the dermatologist practices in accordance with the standard of care. The standard of care requires that informed consent relay to patients all reasonable risks of a procedure.

## Hypothetical Malpractice Cases

It often is difficult to predict, in any given malpractice cause of action, what the ultimate outcome will. The following teaching hypotheticals are designed to be suggestive of potential malpractice cases and the likely results. Any connection between these scenarios and actual malpractice cases is fortuitous.

J.H. is a 48-year-old man with a multiply recurrent basal cell carcinoma of the nose (Fig. 1) Ultimately, he is referred for Mohs surgery. The lesion is removed with 5 stages the Mohs fresh tissue technique. Reconstruction is undertaken by a local plastic surgeon. The patient does not return to the Mohs surgeon for follow-up but continues to see the plastic surgeon. One year after the Mohs surgery, a thickening of the scar is noted. The plastic surgeon gives 7 monthly steroid injections to the purported hypertrophic scar during the ensuing 8 months. Ultimately another biopsy shows recurrent basal cell carcinoma. The plaintiff patient sues the Mohs surgeon for negligence. He contends that there must have been a breach of duty for the skin cancer to return.

Did the Mohs surgeon breach the standard of care? If so, will he be liable for negligence? The Mohs slides are evaluated by an expert for the suing plaintiff. There was no missed tumor, the slides are of good quality. The plaintiff’s expert refuses to



**Figure 1** Recurrent basal cell carcinoma of the nose. (Color version of figure is available online.)



**Figure 2** Recurrent squamous cell carcinoma of the cheek. (Color version of figure is available online.)

testify because there is no evidence of malpractice by the defendant Mohs surgeon. Recurrence of skin cancer is not de facto negligence. The case will be lost by the plaintiff.

In another example, a well-known dermatologist treats a large number of basal cell carcinoma and squamous cell carcinoma patients. A referred patient has a large recurrent ulcerative squamous cell carcinoma of the cheek (Fig. 2). In consultation, the patient is told by way of informed consent that the facial nerve may be damaged. The patient is told the consequences of such nerve damage. During surgery, it becomes quite evident that the tumor involves a significant portion of the parotid gland. In removing the remaining tumor, the facial nerve is partially severed with a resultant unilateral lower facial paralysis. The patient sues the dermatologist.

Is the dermatologist liable? It is clear that there is permanent damage to patient. Reconstructive surgery can improve the situation but may never return to the patient full use of the nerve. The dermatologist did provide informed consent to the patient. Although verbal consent legally is enough, the written consent provides documentation that the dermasurgeon performed his legal duty.

Skin cancers continue to increase in number. Excisional surgery is a well-accepted technique for the removal of many skin cancers. By the nature of this surgery, complications can arise. It is imperative that physicians be aware of their duty of reasonable care. Should they breach that duty, they may be found liable in a medical malpractice cause of action.

## Conclusion

The development of complications may lead to a cause of action based on negligence. However, that medical malpractice cause of action will not succeed if the dermatologist has not breached his duty. Even if he breaches that duty, the plaintiff will not succeed unless there is a nexus between the breach and some form of damages. The standard of care begins with appropriate informed consent.

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