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Question Marks Lead to Dollar Signs

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An employee of a sawmill in Kentucky sustained paralyzing injuries when a large piece of milling equipment struck him in the back. His coworkers took him to the hospital in the back of a pickup truck.

At the time, some of the hospital's nursing staff were on strike and had been replaced by temporary staff provided by US Nursing Corporation. A female nurse helped load the patient into a wheelchair for transfer into the hospital.

The patient was evaluated for a spinal injury; it was determined that he had sustained an L-3 burst fracture that impinged his spine. He was transferred to another hospital. However, due to the nature of his injuries, he is permanently paralyzed from the waist down.

The plaintiff presented a products liability claim against the machinery manufacturers, which was settled for $3.05 million. He later filed a medical malpractice complaint to include the nursing contractor and 3 individual nurses (1 from the contractor and 2 employed by the hospital). The complaint alleged that the nurses "failed to stabilize and immobilize" the patient when moving him from the pickup truck to the emergency department (ED), which worsened his injuries. A nurse employed by the contractor was identified as the nurse who had transferred him to the wheelchair.

The latter case was litigated for several years. On the eve of trial, the hospital settled for $2 million and the nursing contractor for $1.1 million. However, the hospital brought an indemnification claim against the nursing contractor to recover the $2 million settlement.

At the time of trial, there was a question regarding the identity of the nurse who had transferred the plaintiff from the pickup truck to the wheelchair. The US Nursing Corporation contract nurse contended she did not transfer the plaintiff to the wheelchair. Resolving the uncertainty, the jury concluded that the contract nurse was the nurse who had transferred the plaintiff.

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VERDICT

At the conclusion of a 7-day trial, the jury awarded the plaintiff $2,823,522.

COMMENTARY

Who doesn't love a good mystery, right? Well, not everyone. Years ago, I was given a gift: a "host your own murder mystery party" game. I recently gave it away when I realized I was statistically more likely to be murdered than ever to host a "murder mystery party." Love them or hate them, I think you will agree: Mysteries belong in novels or movies or board games. They have no place in your clinical practice.

In litigation, lawyers obsess over trivial details. I've attended enough malpractice depositions to see physicians, NPs, PAs, and nurses, with puzzled faces, answering seemingly nonsensical questions that appear to have no bearing on clinical matters. The clinicians respond half amused and half annoyed, through a litany of telephone logs, record access logs, chain-of-custody records, transfer center logs, recorded ambulance communications, time-stamped records, and recollections of who brought a specimen to the lab or what time someone was at the nurses' station—all peripheral to practice. I understand the quizzical looks and sympathize with providers' annoyance at having to answer seemingly inane questions. Yet these matters, collateral to practice, can take center stage in a legal case.

These issues form part of the puzzle: the who, what, where, when, why, and how of any case. For example

Who carried a specimen from the operating room (OR)? (Because it was sent from the OR, but the lab has no record of receiving it and knowing the identity of the runner is now key.)

What time did the attending call the hospital to alert the surgical team? (Because precise timing from surgeon's knowledge to first incision is now at issue.)

Where, specifically, was the culture taken from?

(Because there were three wounds, and it turns out later two wounds were from a different source than the third.)

When did scrub tech A clock out of a surgery and scrub tech B clock in? (Because one of the surgical counts was wrong, and a surgical item was retained.)

Why did the patient leave against medical advice? (Because in the ED, he said he "needed to feed his cat." This wasn't recorded; the chart only states "patient left AMA." During litigation, plaintiff claims he left because a nurse told him "it would be better to see your regular doctor.")

How did a patient get a KFC value meal to eat in his hospital bed when strict oral intake was needed? (Because the hospital's knowledge of the patient's dietary intake is now at issue.)

I know—such a list of who, what, etc, can appear cutesy and cloying. Further, some of these trivial details are not recorded by clinicians, so why bring them up? I raise it because in your practice setting, you may be in a position to influence decision-making with regard to recording those minor details, which can become critically important later.

In a medical malpractice case, every tiny detail is potentially part of the puzzle. If a piece of the puzzle is missing, it becomes a mystery, and a mystery can become a problem. A plaintiff's lawyer who sees question marks also sees dollar signs.

In this case, the presence of a "mystery nurse" likely kicked up enough dust to confuse the jury. Most clinicians are aware a malpractice plaintiff must prove 4 elements: (1) duty, (2) breach of duty, (3) causation, and (4) harm. The plaintiff must prove all elements by a preponderance of the evidence (ie, greater than 50% likely). Duty and damages are not at issue in this case; there was a clear patient relationship, and the plaintiff is clearly paralyzed. The plaintiff has the burden to prove elements (2) and (3): that there was a breach of the standard of care and that breach caused the plaintiff's harm.

With respect to element (2), the plaintiff had the burden of showing that the act of putting him into the wheelchair was a breach of the standard of care. I think we'd all agree: The standard of care requires a registered nurse to recognize that a patient struck by a heavy object is at risk for spinal injury and spinal immobilization is required. The patient should have been removed from the vehicle with spinal immobilization techniques.

However, with respect to the causation element, the plaintiff would have been required to prove it was more probable than not (ie, 51% or greater) that the act of putting him into the wheelchair caused the paralysis. This is a stretch. The jury would have to believe it was at least 51% likely that the act of car-to-wheelchair transfer caused the injury—not the heavy mill equipment falling on him in the first place, not the efforts of his coworkers to move him from the scene, not the efforts of his coworkers to load him into the truck, not the bouncy ride in the back of a truck over to the hospital. The plaintiff was able to overcome a big causation hurdle because the identity of the nurse was not known.

The plaintiff would also generally have to show that the coworkers did not mislead the transferring nurse—that is, the statements made at the time of transfer would lead a reasonably skilled nurse to suspect spinal injury, halt transfer attempts, and see to it the patient's spine was immobilized. Although doubtful, it is possible that in the split seconds when the car arrived at the ED, the initial communications were errant and a reasonable nurse would *not* have just cause to suspect spinal injury. However, we will never know. We don't have testimony on what was said during transfer.

So we don't know who the nurse was. We don't know what was said. We don't know exactly how the plaintiff was transferred out of the vehicle. And those mysteries, to a jury, are suspicious.

IN SUMMARY

Any time a lawyer can draw a giant "?" on a whiteboard during summation, rest assured, someone is in trouble. That someone could be you. I've seen lots of question marks in my life; none carry a $1 million/$3 million malpractice policy. The presence of a mystery will transform a case that was defensible into one with unanswered questions. Those unanswered questions open the door to the suggestion or outright accusation of a cover-up. Do your best to document details and work within your system to encourage documentation. In short, don't let the plaintiff host a mystery party at your expense. **CR**