LAW & MEDICINE

Learned-Intermediary Doctrine

Question: A patient develops life-threatening angioedema after taking an angiotensin receptor blocker (ARB) prescribed by her doctor for diabetic nephropathy. The Physicians' Desk Reference (PDR) mentions this side effect, but the doctor did not warn the patient because it's uncommon. When promoting the drug, pharmaceutical sales representatives have regularly emphasized its benefits but not the risks. Which of the following is true in a malpractice action?

BY S.Y. TAN, M.D., J.D.

A. A good defense is to emphasize that the benefits of an ARB in diabetic nephropathy greatly outweigh any potential side effects.

B. The prescribing physician is justified in not informing the patient about the risk of angioedema, in accordance with the customary practice of doctors not to disclose this rare adverse effect.

C. The pharmaceutical manufacturer shares malpractice liability because its drug is "defective."

D. The pharmaceutical manufacturer is liable because its sales reps are supposed to consistently emphasize this serious risk.

E. The learned-intermediary doctrine shields the pharmaceutical manufacturer, placing full liability instead on the prescribing doctor.

Answer: E. Choices A and B are incorrect. Benefits outweighing risks may indeed form the basis for Food and Drug Administration approval of a drug, but this does not constitute a defense against a malpractice lawsuit. And in cases alleging lack of informed consent, the "professional" standard (what physicians would ordinarily disclose) is no longer the law in some jurisdictions, being replaced by the more onerous "reasonable person" standard (what a reasonable person in the patient's position would want to know, even if it's a rare risk).

Choices C and D are also incorrect. Drug or device manufacturers can be sued for a "defective" product, a legal term of art used in products liability litigation, but not in malpractice lawsuits. And although pharmaceutical sales representatives have a responsibility to inform doctors of both benefits and risks, a process termed "fair balance," they frequently defer to the drug's package insert, as featured in the PDR, to completely discharge this duty.

Generally speaking, if a doctor fails to warn the patient of a medication risk, and injury results, the patient may have a claim against the doctor but not against the drug manufacturer. This is termed the "learned-intermediary" doctrine, and it is also applicable to medical devices such as dialysis equipment, breast implants, blood products, penile prostheses, and even contact lenses, although the situation is less clear where an optometrist does the prescribing (Products Liability 63A Am. Jur.2d Products Liability §1214, updated Sept. 2008). The justification is that manufacturers can reasonably rely on the treating doctor to warn of adverse effects, which are disclosed to the profession through its sales reps, in the drug's package insert, and in the PDR. The treating doctor, in turn, is expected to use his or her professional judgment to adequately warn the patient. It is simply not feasible for the manufacturer to directly warn every patient without usurping the doctor-patient relationship.

In a litigated case where a woman developed a hypertensive crisis after being prescribed Deconamine, a sympathomimetic decongestant, the pharmaceutical company successfully relied on the learned-intermediary doctrine for its defense. The plaintiff happened to be taking Nardil, an MAO inhibitor antidepressant, which is a contraindication to the concurrent use of a sympathomimetic agent. She contended that drug manufacturers should directly provide a wallet-sized informational card to all patients taking an MAO inhibitor since the simultaneous consumption of various foods, beverages, and interacting drugs can raise the blood pressure to dangerous levels. The court, however, sided with the defense's position that its legal duty was to inform only the physician and not the patient (*Ferrara v. Berlex Laboratories Inc.,* 732 F. Supp. 552 [E.D. Pa. 1990]).

Occasionally, a court sidesteps the doctrine. When a manufacturer knows that the drug will reach the consumer without the intervention of a physician (e.g., over-the-counter preparations), it must take reasonable action to directly warn the consumer. Another situation is where extensive advertising of a drug to the public has taken place. For example, the manufacturer of the oral contraceptive Norplant was successfully sued because the Supreme Court of New Jersey ruled that the company's nationwide direct-to-consumer advertising created a duty to directly warn all patients using its drug (*Perez v. Wyeth Laboratories Inc.,* 734 A.2d 1245 [N.J. 1999]). Manufacturers may also be liable if they have not disclosed all known risks, as alleged in the recent litigation surrounding rofecoxib (Vioxx) and rosiglitazone (Avandia).

The latest development in drug products liability law comes from the landmark case *Wyeth v. Levine* (555 U.S. 2 [2009]), in which a plaintiff lost her arm after the drug Phenergan, given by intravenous push, extravasated into the surrounding tissues and entered an artery, resulting in gangrene. This serious drug risk was known to the company and to the FDA, which had approved a warning statement contained in the drug's package insert, but the lawsuit asserted that the warning was inadequate and should have been modified. A Vermont jury had earlier awarded damages of $6.7 million. On appeal, the defendant pharmaceutical company maintained that its warning was appropriate because it had been approved by the federal government through the FDA. It further argued that the drug's package insert could not be unilaterally altered or modified without running afoul of federal regulations. However, in a 6-3 decision, the U.S. Supreme Court held that the company was at liberty to issue a more rigorous warning, that FDA approval does not bar lawsuits, and that federal law was not pre-emptive of state law claims involving drug injuries. ■

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Medicare May Cover PET Scan for Cervical Cancer Patients

BY MARY JO M. DALES

A single18-fluorodeoxyglucose PET scan would be covered for staging biopsy-proven cervical cancer under a proposal issued by the Centers for Medicare and Medicaid Services.

The agency is soliciting public comments on the proposed decision and anticipates receiving expert opinion and professional society position statements before issuing a final decision.

The CMS is recommending against coverage of 18-fluorodeoxyglucose (FDG) PET imaging for the initial diagnosis of cervical cancers, since "there is no credible evidence that the results of FDG PET imaging are useful" for this indication, according to the proposal.

Prospective data collection on FDG PET imaging for initial staging of cervical cancer and evidence analysis led CMS to conclude that the results are "used by the treating physician to make meaningful changes in therapeutic management and improve health outcomes and thus are reasonable and necessary."

CMS proposes to cover one FDG PET when performed to determine the location or extent of the tumor for the following purposes related to the initial treatment strategy:

► To determine whether the beneficiary is an appropriate candidate for an invasive diagnostic or therapeutic procedure; or

► To determine the optimal anatomic location for an invasive procedure; or

► To determine the anatomic extent of tumor when the recommended antitumor treatment reasonably depends on the extent of the tumor.

The finding of distant metastases, in particular to the supraclavicular lymph nodes, changes the treatment strategy for cervical cancer. "Compared with other noninvasive methods, FDG PET is more sensitive in determining lymph node involvement in initial assessment of cervical cancer," the proposal said. In addition, the published literature supports the beneficial effect of this strategy on initial treatment planning, "with the majority of the effect being avoidance of futile surgery," CMS said.

More information is available at https://www.cms.hhs.gov/mcd/viewdraftdecisionmemo.asp?from2=viewdraftdecisionmemo.asp&id=232&. ■