The High Cost of "Free Advice"

A couple had their first child in May 1998. The boy exhibited developmental delays and had chronic problems with eating and weight gain. In August 1999, he collapsed with uncontrollable seizures. He was placed in a drug-induced coma. A month later, when he emerged from the coma, he was neurologically compromised. He recovered somewhat but then regressed, experiencing another seizure episode. He died in January 2000. MRI of his brain showed a lesion on his thalamus.

The couple's second child was born in April 2002. This child also had delays and developed seizures, was placed in a coma, and emerged neurologically impaired. She too was found to have an abnormality in her thalamus. She died in July 2004.

The couple was referred to Dr. S, a geneticist. They consulted Dr. S both before and after the second child's death. After their daughter's death, the couple asked Dr. S whether it was possible to have biological children who would not have the same problems. Dr. S told them that he could not identify the specific gene causing the defect but advised that it would be safe to conceive a child with a donor egg from the general population and the husband's sperm through in vitro fertilization.

Dr. S allegedly advised the couple that a child conceived this way would have essentially the same risk for the unidentified disease as anyone in the general population. The couple asked in writing if it would be safer to use both a donor sperm and a donor egg to further reduce the risk, and Dr. S replied by letter that the difference was "negligible."

In June 2007, the couple had a child who was conceived with a donated egg and the husband's sperm. This child suffered the same fate as the two previous children, dying in September 2008. MRI of the child's brain, like the others, showed an abnormality of the thalamus. The child was diagnosed with Alpers syndrome postmortem.

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The plaintiffs claimed that the chances of having a child with Alpers syndrome are about 1:200,000 in the general population, but that the chances if one parent is a known carrier are about 1:1,000. The plaintiffs claimed that if they had known of this risk, they would have used a donor egg and donor sperm to conceive a child or would have adopted. The plaintiffs alleged negligence by Dr. S in failing to give them this information.

OUTCOME

A $1,086,612 verdict was returned, with the jury finding Dr. S 25% at fault and the plaintiffs 75% at fault.

COMMENT

A skilled tax accountant will provide guidance on how to claim deductions. Many lawyers listen and advise but do little else. These people sit at a desk and provide advice—that is what they do. Dispensing advice from a seated position is their only stock in store.

By contrast, clinicians are kinetic people. They are on their feet, up and about. They perform workups and surgeries, procedures and treatments. Clinicians are people in motion accustomed to action.

Yet clinicians often forget: Dispensing advice is practicing medicine. They are conditioned to dispense this advice freely, and by freely I mean both casually and without compensation. As a result, clinicians often fail to realize the value and potential liability of the spoken word. Make no mistake: Giving medical advice incurs legal risk. Lawyers know this; how many give free advice while absorbing the risk for that advice? Yeah, I thought so ....

Clinicians can be held legally liable for misinformation as easily as they can for misdiagnosis. The key is *detrimental reliance*. When a clinician gives a patient incorrect information, there is no legal case. The patient has a legal case if, and only if, he or she relies on that information and is injured

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Commentary by **David M. Lang, JD, PA-C,** an experienced PA and a former medical malpractice defense attorney who practices law in Granite Bay, California. Cases reprinted with permission from *Medical Malpractice Verdicts, Settlements and Experts*, Lewis Laska, Editor, (800) 298-6288.

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(detriment) based on that reliance.

Here, the standard of care required the geneticist to be familiar with Alpers syndrome and accurately convey the risk associated with different courses of action. Like an accountant or attorney, the service sought and tendered is advice. The plaintiff was told that the risk for having another child with Alpers syndrome was "negligible" and made a decision based on that risk assessment.

The risk, however, was not negligible; it was 200 times greater than that in the general population. Relying on the geneticist's information, the plaintiffs decided to use the father's sperm and suffered legally compensable injury when their third child was born with the same condition. There was clearly clinician error.

Nevertheless, the jurors found the parents 75% at fault (for attempting to have another child) and the physician 25% at fault. Some states only allow a plaintiff to recover damages if they have no fault at all (pure contributory negligence), while others permit recovery if the plaintiff is 50% or less at fault. A handful of states—including Florida, where this case occurred—allow a plaintiff to recover even if they are 99% at fault (pure comparative negligence). In those cases, the jury determines the damages and the parties' respective fault percentages, and the plaintiff's recovery is reduced by that percentage. Here, the physician was responsible for 25% of the $1,086,612 award and thus had to pay $271,653.

IN SUM

Don't give "free advice" too freely. Document advice and options, and make sure the patient understands them. Understand that providing advice establishes a clinician–patient relationship and that you are legally responsible for advice given.

Beware of dispensing advice electronically or over the phone, where you are off your turf and lack the usual preconditions to high quality care (eg, a chart, vital signs, a medication/allergy/problem list). Never provide advice in situations where you cannot do so (my recurring favorite: a request for telephone diagnosis of a rash you've never seen). Dispense advice as you would medication: cautiously and with documentation. **—DML** **CR**

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