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10 keys to defending (or, better, keeping clear of) a shoulder dystocia suit

The main requirement is your time and attention. The payoff is a verdict in your favor.

The heightened risk of being sued for a poor outcome—even when you and the obstetric team have delivered excellent care—is a sad reality of ObGyn practice, especially when shoulder dystocia is involved. Not so long ago, some physicians viewed a lawsuit as one of the costs of doing business and considered settlement of claims to avoid disruption to their practice. Today, with insurance rates skyrocketing, settlement is not as palatable, unless a clear breach of the standard of care has occurred. And although only a small percentage of cases ever reach trial, and fewer still go to a jury verdict, don't be lulled into a false sense of security. A single case can take 5 or more years to make its way through the system.

What can you do to avoid the appearance of negligence and prevent litigation? And what tangential actions on the part of the physician or staff can cast defensible cases into the abyss of negligence? This article addresses these questions, focusing on 10 keys to avert or win a lawsuit involving shoulder dystocia.

Before you begin. Here is one preliminary piece of advice: Be vigilant. Air crash investigators frequently note that a crash occurs when a number of small errors link together. To prevent a poor outcome, it is critical to be alert to even minor inconsistencies in the care you and the obstetric team provide so you can rectify the situation before the small errors link into a disastrous chain.

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1. Don't downplay the "D" word

There are three important rules in medicine: Document, document, document. Yes, you've heard many people stress the importance of good notation, and I can back them up: A well-documented chart is a defendant's best friend. Time and again, I've heard defense counsel lamenting—and plaintiff's counsel exhorting—"if it isn't documented, it didn't happen."

Careful documentation begins early. If a child is expected to be large for gestational age (LGA) or macrosomic, clear documentation of that fact and a plan in the prenatal record to address it during labor and delivery is critical. It also is important to communicate the potential for a large infant to the labor and delivery staff. Consider using a stamp or other indicator to mark the prenatal chart for this potentiality.

Make it legible

Clear handwriting or typed notes add substantial benefit to the defense of a dystocia case. They also help prevent

the uncomfortable silence that can overwhelm a courtroom as 12 jurors stare at a witness who is unable to decipher her own notes or those of a colleague. The inability to interpret a note is almost as damaging to a case as the complete lack of a note. If a detail is important enough to warrant documentation, it's important enough to document legibly.

Sooner is always better

Any shoulder dystocia case that involves injury to the child—whether temporary or permanent—holds significant potential to blossom into litigation. It is important to document the diagnosis of dystocia, steps taken to resolve it, and the outcome—and to do so during the delivery or as soon thereafter as possible.

The importance of this recommendation cannot be overstated. A quick 8 PM summary of a delivery that took place at 1:30 PM is bound to be vague and, in some respects, inherently inaccurate. In contrast, a 1:45 PM note that consumes an entire page, noting the time of diagnosis, sequence of efforts to resolve the dystocia, use of vacuum or forceps, number of pop-offs, and who was present in the room is unquestionably superior.

Once mother and infant are stable and under the care of qualified personnel, take sufficient time—even as long as 1 hour—to draft your delivery note. Sit down. Calm down. Strive for clarity. The sequence and timing of events will be important.

The parents' ability to recall the delivery will be blurred by emotion. If the case goes to trial, your well-documented note, combined with your accurate testimony, will have a significant advantage over what might be the understandably muddled recollections of the parents.

Call for a scrivener

If it seems as though it will be difficult to recall all the details of a delivery, consider calling a nurse or staff member into the room for the sole purpose of documentation once shoulder dystocia is diagnosed. Remember, once dystocia occurs, the risk of a poor outcome and years of litigation increases substantially. Having an extra staff member take notes is a small price to pay for documentation that may later establish your defense. The thinnest paper can sometimes extinguish the hottest litigation flame.

Prepare for a considerable lapse of time

Most states allow a claim to be filed on behalf of a child as late as 2 years after the child reaches the age of majority, which is 18 years in most states. Therefore, a child in many states can file suit as late as his or her 20th birthday. It is not uncommon for the events of an obstetrics case to be 10 or 15 years in the past by the time a claim is filed. Over such a long period, memories fade, radiographs and other imaging studies may get lost in storage, and so on. No matter how busy, tired, or hurried you may be from the events of the day, the most important 30 minutes you can spend are those in which you take time to sit, think, carefully draft, and proofread a delivery summary and check it for consistency against other documents generated during delivery. If necessary, call your partner in to cover you for an hour or two while you get the documentation right. If it helps your practice avoid a lawsuit, it is time well spent.

2. Educate your attorney

This point may seem rudimentary, but I have encountered a number of physicians who allowed their anger over being sued to taint their initial contacts with defense counsel.

A physician who sets aside 3 to 4 hours to meet with counsel, educate the attorney about medical issues, and review the medical literature is a cherished ally and is much more likely to be defended successfully. Physicians who treat the lawsuit as though it is an imposition on their personal or professional life and distance themselves from

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defense counsel do themselves a great disservice.

3. Be fluent in shoulder dystocia

If you are sued, and your case proceeds to trial—or even to depositions—a number of concepts particular to shoulder dystocia are very likely to arise, and you will be expected to address them coherently and to educate the jury and judge about their proper meaning.

Shoulder dystocia is unpredictable

Be conversant with the literature and statistics that show dystocia to be an unpredictable event.[1]

Fetal weight estimates are imprecise

Know the numbers. It is important to be conversant about projected birth weights and lines of demarcation for macrosomic and LGA fetuses. Plaintiff's counsel and experts may try to obscure the lines between these definitions and terms. Keep your facts and definitions straight.

Also emphasize that ultrasonographic weight estimates are just that—estimates. There is no way to determine precise fetal weight in utero. Some studies suggest that ultrasonography (US) and physician weight estimation via palpation have similar accuracy rates. Do not allow the plaintiff's attorney or expert to create the impression that US estimates are infallibly accurate.

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Restitution of the head is a natural rotation

Understand the concept of "restitution of the head." Do not allow plaintiff's counsel to suggest that you turned the child's head to one side or the other with your hands. Restitution is a natural rotation, and your hands merely guide and support the child's head in this process. Gentle guiding of the head is appropriate.

The term "downward" is similarly misused. If ever there was a loaded term, it is "downward traction," a favorite of plaintiff's attorneys. Downward, as in "out of the birth canal," versus downward, as in "90-degree angle to the birth canal and toward the floor," are descriptions frequently misused in testimony and evidence. Be clear that any use of the term downward does not imply that the child's neck was bent 45 to 90 degrees, with the top of the head inclined toward the floor. If a vague question regarding downward traction arises during the course of a legal case, ask for clarification of the term.

Degree of traction is another poorly understood concept. I am not aware of any reliable study that conclusively proves that major Erb's palsy occurs when a greater degree of traction is applied and minor Erb's palsy with a smaller degree of traction. Some counsel will use the fact that most brachial plexus injuries resolve over time to suggest that permanent Erb's palsy is caused by overwhelming traction. Be prepared to dispute this argument!

Explain stations of the head

It is important that a jury understand that only a few inches separate –3 and +3 stations. Try to prevent plaintiff's counsel from making the distance between these points seem like a long journey. Tissues stretch, caput occurs, and the station of the head may therefore become difficult to identify with pinpoint accuracy. A nurse's estimate of –2 and a physician's estimate of –1 for the same patient may, in fact, be consistent.

Use terminology precisely

If the infant develops a hematoma as a result of vacuum extraction or a similar device, be clear and concise about exactly what the injury is. Don't let a subdural hematoma be described as a "brain bleed"!

Beware the magic gloves!

Studies in which physicians work on a model using pressure-sensitive gloves tend to suggest that excessive pressure is used. However, when the gloves are

used in actual deliveries, pressure tends to be appropriate. Any mention of pressure-sensitive glove studies by plaintiff's counsel should raise a red flag.

Growth charts are unreliable

Many shoulder dystocia–related trials use growth charts as exhibits. If you are confronted with one of these charts, be certain that you know what type of chart it is and the age and location of the children on whom it was based. Prenatal and postnatal growth charts are not the same. A child who is LGA on a postnatal chart might not be on a prenatal chart.

An expert witness once pointed out to me the existence of some charts from high-altitude cities; on these charts, the 95th percentile is slightly lower because children born at high altitude may be slightly smaller. Use of a high-altitude chart for a marginally LGA child in New York will make that child appear even larger than it is.

Triple-check each chart exhibit to make sure it is accurate and based on reliable data.

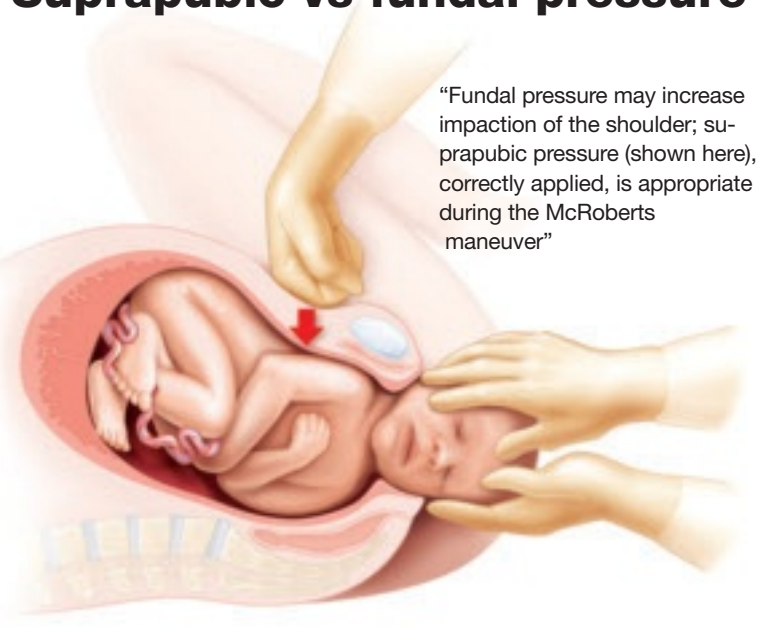
4. Don't lose the case at deposition

You can't win your case at deposition, but you certainly can lose it. Misplaced words and artless answers can damage your defense irreparably. Work with your attorney to fully explore any medical issues or terms on which the defense hinges. A simple misstatement of fact or misuse of a medically significant term can lock the defense into a difficult position.

Because the deposition is a major aspect of litigation, you should study for it and meet with your counsel well in advance of the date. A preparation session more than a week before your deposition will give you time to mull the issues and resolve any conflicts in your mind. A second session may be necessary to revisit difficult issues.

FIGURE

Suprapubic vs fundal pressure



"Fundal pressure may increase impaction of the shoulder; suprapubic pressure (shown here), correctly applied, is appropriate during the McRoberts maneuver"

Know likely points of contention

Medical terminology and the sequence of events are two of the most likely areas of confusion. For example, although most physicians can readily distinguish between suprapubic and fundal pressure, many staff members confuse the two, as do many patients and lay witnesses to the birth. Fundal pressure may increase impaction of the shoulder; suprapubic pressure, correctly applied, is appropriate during the McRoberts maneuver (see **FIGURE**).[1]

Some attorneys prefer to have the physician present when witnesses and parents are giving a deposition. This certainly conveys the message that the physician is committed to defense of the case.

If you choose to be present during a deposition, understand that lay witnesses may give inaccurate testimony. If this occurs while you are present, don't get emotionally involved; do remain a passive observer. Remember, a deposition is not a trial. Although inaccurate testimony can be frustrating to the physician, it will ultimately trap the witness at trial and may be his (or her) undoing.

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A child who is large for gestational age on a postnatal chart may not be so on a prenatal chart; know which type of chart is being presented

5. Retain the best expert you can find

Because the credentials and strength of expert opinions are critical to your defense, endeavor to retain the most highly qualified expert possible. Seek out an expert on the standard of care as soon as possible after filing of the lawsuit. Your counsel should be in consultation with this expert early in the case—certainly before your deposition. You don't want to risk giving testimony that is inconsistent with your expert's opinion or impossible for your expert to defend.

A highly qualified expert may be someone who has written about dystocia or participated in major studies. He or she also should be active in the delivery of babies and use any instrumentation or devices involved in your case. I recently cross-examined a plaintiff's expert in a vacuum extraction case who hadn't used the device since he finished his residency in 1974! This left several jurors with expressions of incredulity on their faces.

If you are practicing in a rural area, the availability of personnel or equipment may be an issue in your case. In such circumstances, an expert from a rural institution may be preferable to an expert from a major metropolitan area.

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Scrutinize the expert's credentials and communication style

Most defense counsel who practice in a specialized area of medicine will have access to the curriculum vitae of several potential experts. Review these documents with your attorney and investigate other cases in which the experts have testified.

If neither you nor your counsel has ever met or seen the expert, it may be helpful to explore whether the expert has ever given videotaped testimony. This will help you evaluate his or her physical appearance, demeanor, and general likeability, all of which influence the jury's response to the testimony.

Remember, the plaintiff's case is usually presented first. A jury may first be exposed to the facts of your case through the testimony of the plaintiff's experts and witnesses, including emotional and at times weeping family members. Your expert will therefore need to refocus and reeducate the jury and dispel the opinions rendered by the plaintiff's experts. To be successful, your expert must be able to create rapport with the jurors to keep them interested in his or her testimony and opinions. In this regard, your expert's communication skills are paramount.

6. Be steadfast—the courtroom is a fishbowl!

At trial, you will be stared at, evaluated, and judged even while you are sitting in a chair at the defense table well before your testimony. This may seem unreasonable, capricious, and outrageous…and it is! However, until you take the witness stand, the jury has no other source of information about you.

Jurors are naturally curious. They begin to wonder about the case and, being human, may leap to conclusions. To protect yourself against unfair inferences, be mindful of your behavior, and assume that anything you say or do within two blocks of the courthouse will be seen by a juror. Here are some basic courtroom "don'ts," culled from personal experience:

- Unless you are handicapped, do not park in a handicapped spot, even for a minute to unload a box of documents. A juror may see you and find your action inconsiderate.
- Don't wear clothing or jewelry that is significantly more expensive than that worn by the plaintiffs or jurors.
- Be serious but not aloof.
- Remember to teach—not lecture—the jury.
- Take advantage of conference rooms. Important discussions with counsel and experts should take place in private where there is no chance that a juror will accidentally observe or overhear the conversation.

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7. Make exhibits informative, not disturbing

The purpose of a trial exhibit is to illustrate or demonstrate a point to the jurors. Any evidence that is presented must be accurate and based on facts already established in the case. The physician should assist defense counsel in the selection and preparation of exhibits. Here are a few tips:

- **Make it easy to use.** An exhibit—particularly a medical instrument—must be easy to use. Misusing, breaking, or fumbling with it on the stand is not only embarrassing, it casts doubt on the credibility of the witness. Have you ever seen a doctor accidentally fire a surgical staple into his own palm from an "empty" stapler while demonstrating the device in court? (I have.)
- **Make it accurate.** There are several types of vacuum extractors. If you choose to bring an exhibit—particularly a medical instrument—into the courtroom, it should be exactly the same type that was used in the delivery. Any variance should be insignificant. In a recent case, a plaintiff's expert intended to use an outdated vacuum device that was rather large and ungainly and appeared to be far more ominous than the device that was actually used in the delivery. The court precluded its exhibition.
- **Make sure it is unambiguous.** There is great potential danger in using a defense exhibit that can be misinterpreted or reinterpreted to actually support the plaintiff's position. Fetal growth charts, charts summarizing medical literature, and similar exhibits all have a potential for reinterpretation.
- **Don't send the wrong message.** Photographs, medical instruments, and other exhibits can be gruesome or shocking to a jury. For example, if demonstration of a vacuum extractor is not critical to the defense of a case, the device may be inappropriate for courtroom demonstration. The reason? It may cause jurors to feel uncomfortable or place considerable focus on a minor issue. Any negative aspect of a potential exhibit should be evaluated in determining whether the exhibit will be used in front of the jury.

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Any medical instrument you choose to bring into the courtroom should be the very same type that was used in the delivery

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8. Get to the scene!

If at all possible, make a trip to the exact labor room where the events in question occurred, and take your counsel with you. Like Lieutenant Columbo wandering about, you never know what you might see. Suppose the family claims it was in the waiting room and heard the doctor shouting. How far away is the waiting room? How large is the labor room? Was the bed high enough that a 4-foot 7-inch nurse acted reasonably by standing on a stool to apply suprapubic pressure—despite how odd it seemed to the family?

The physical environment influences perceptions and recollections of witnesses. It's impossible to know what you'll find until you visit the location.

9. Never alter your records—never

A physician has a duty to keep accurate records. Never change your records to

improve your position. I have seen several cases in which it was alleged that a physician went back and added a small notation to the record. That is a big mistake because many potential plaintiffs obtain their records before the child's discharge.

If an error in a medical record merits a late correction, contact the risk-management staff and review the issue with them. A separate addendum note addressing and correcting the errant information may be preferred.

Whenever there are two versions of the labor record—especially when they are exhibited side by side in the courtroom—the die is cast, credibility is irreparably shattered, and the case may very well be lost.

10. You can pull a rabbit out of a hat!

The first lawyer I worked for asked me one day, "How do you get a rabbit out of a hat?" The answer? "First you put the rabbit into the hat."

Preparation is essential to your testimony. Review the questions and responses to be covered during your testimony at length with your counsel. Be familiar with the issues and themes to be covered, and learn to phrase each answer truthfully, appropriately, and confidently.

The witness chair is charged with some invisible magic. Sitting there in front of a judge, jury, and packed courtroom can cause even the most confident and polished witness to become shaken and confused. Never underestimate your need to prepare. ■

Reference

1. American College of Obstetricians and Gynecologists. Shoulder Dystocia. Practice Bulletin No. 40. Washington, DC: ACOG; 2002.