

Lawsuit Outcomes Often Tied to Breach of Duty

BY DAMIAN McNAMARA
Miami Bureau

MIAMI BEACH — Dermatologists often prevail in malpractice lawsuits when there is no breach of duty and no permanent damage, according to presentations at a symposium sponsored by the Florida Society of Dermatology and Dermatologic Surgery.

"As long as you are doing what others are doing, and not doing something kooky or as an outlier, you did not breach your duty," said Dr. David J. Goldberg. "If there is no nexus between breach of duty and their alleged damages, they can take you to court—but they cannot win."

A patient receiving an aesthetic procedure who sues a dermatologist over postprocedure erythema that later resolves, for example, should not have a viable case. And then there's the patient treated periorally who, unbeknownst to the physician, has a history of herpes infection.

"This is my patient. I goofed up. We all make mistakes. I treated her mouth, and I neglected to ask her if she had a history of cold sores. But her adverse outcome cleared up, so there were no damages," said Dr. Goldberg, director of laser research and Mohs surgery at Mount Sinai School of Medicine, New York.

"If you really made a mistake, you are really better off acknowledging it. You may have a hassle on your hands, but you may not get to a lawsuit," said Dr. Goldberg, who also is adjunct professor at Fordham University School of Law in New York.

Poor communication, retribution, economic gain, and negligence are the primary reasons that patients sue their physicians. Cosmetic patients also sue over hyperpigmentation and scarring. "Hyperpigmentation generally goes away, although sometimes it does not. It is less

likely to go away in darker-skinned individuals," Dr. Goldberg said. "These people may be angry and upset." Often, scarring is permanent.

Dr. Goldberg said that he knew of two scarring cases—one after a deep peel and another after a cosmetic laser treatment—that resulted in malpractice claims: "One case settled; one went to court for significant damages."

In a separate presentation at the meeting, Dr. Brian Berman highlighted some dermatology medical liability cases from 1997 to 2006 that were extracted from the LexisNexis database. There were two isotretinoin lawsuits, a case in which a doctor was sued when his cosmetologist "botched" a trichloroacetic acid (TCA) peel and a case in which a doctor was sued over hyperpigmentation after laser treatment.

"We looked at the cases that went to verdict, not those settled out of court. Perhaps these are the best cases to represent scenarios where a dermatologist had a chance to be successful," said Dr. Berman of the departments of dermatology and internal medicine at the University of Miami.

In one of the isotretinoin cases, the dermatologist prescribed the drug to a 14-year-old girl with her stepmother present. Both assured the physician that the patient was neither pregnant nor sexually active. The dermatologist decided against testing her for pregnancy.

"Turns out she was pregnant and had a child with cerebral palsy and mild mental retardation," Dr. Berman said. "Interestingly, it was not the stepmom but the adoptive parents of this new baby who sued the dermatologist." The jury verdict was \$2.7 million against the doctor.

The second case involved a dermatologist who prescribed tetracycline to a 17-year-old boy with acne. The patient then consulted another dermatologist, who dis-

continued the tetracycline and prescribed isotretinoin. "The first doctor was sued for not prescribing [the retinoid]," Dr. Berman said. "There was a defense verdict, so there was no award."

In the third case, a cosmetologist had treated the hands of a long-term patient with a 30% TCA peel. The peel was done incorrectly, and the patient experienced second- and third-degree burns, as well as permanent scarring and hypopigmentation.

The cosmetologist was a previous regular employee of the dermatologist but had established a corporation within the office of the doctor prior to treating this patient. The dermatologist testified that he had trained her not to use 30% TCA on the dorsal aspects of hands. The verdict was \$500,000 against the cosmetologist and nothing against the physician, Dr. Berman said.

Informed consent was the issue in the fourth case he discussed. In this instance, a pediatric dermatologist used a laser to treat multiple port wine stains on the face, neck, and arms of an 8-year-old with Sturge-Weber syndrome. The patient experienced hyperpigmentation, including permanent hyperpigmentation on the left forearm.

"The plaintiff contended there was a lack of consent" to treat the arm, he said, but "the dermatologist testified that she followed her customary practice and provided full informed consent." The doctor was not liable.

After reviewing a decade of dermatology cases, Dr. Berman concluded that "anyone can sue for any reason, and there will always be a dermatologist willing to be an expert witness for the plaintiff." He also noted that "there was a paucity of cases on the use of systemic medications that dermatologists worry about, such as interferon, methotrexate, and all the biologics—nothing in the last 10 years." ■

With Skin of Color, Use Lasers Carefully to Avoid Malpractice

BY ALICIA AULT
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WASHINGTON — Special consideration should be taken when conducting cosmetic dermatologic procedures—especially with lasers—on skin of color, because the malpractice risk is higher, Dr. David J. Goldberg said at the annual meeting of the American Academy of Dermatology.

Dr. Goldberg, director of laser research and Mohs surgery at Mount Sinai School of Medicine, New York, and adjunct professor at Fordham University School of Law, New York, said that thinking like a first-year law student and being aware of the inherent risks associated with using lasers in darker skin can minimize risk.

Lawsuits are brought for a variety of reasons, primarily because of negligence, but also because physicians are poor communicators or because patients may be seeking retribution for unsatisfactory results or just trying to get some money, said Dr. Goldberg.

For a lawsuit to be successful, though, it must be proved that a physician breached his or her duty, that the breach caused the problem, and that it is serious enough to warrant damages. These basic tort components are drilled into first-year students, he said.

With laser and intense pulsed light (IPL) procedures, ethnic skin is more susceptible to damage because melanocytes in the skin compete with the technologies, Dr. Goldberg said.

Often, insufficient protection against

cold is employed when surgeons treat patients with darker skin types.

Side effects that could lead to claims include erythema, hypo- or hyperpigmentation, infections, and scarring. Warning patients with darker skin about these potential complications is essential. White patients may experience pigmentation issues, but the changes are generally not permanent and will not likely lead to a lawsuit, said Dr. Goldberg.

Those changes can be long-lasting or even permanent in skin of color. "If it's permanent, it will be a successful lawsuit," Dr. Goldberg said. He noted one of his cases from a decade ago, in which he had used an IPL device to remove tattoos on a young man's skull. IPL devices were approved for that indication, but he said "they clearly don't work at all." He induced hypopigmentation, which was fairly long-lasting. The patient did not file a claim, but "today it would lead to a lawsuit."

Complications don't automatically lead to a claim or to a successful lawsuit. If a physician performed a procedure correctly, and there was no breach of duty but there was a complication, there would be no negligence, he said.

If there is a cold-induced injury and the patient hasn't been warned, or was warned but the physician did something wrong, and the damage is permanent, there will be a lawsuit, Dr. Goldberg said.

Getting patient consent is crucial, but if a patient says he or she does not remember the warnings in the consent, a lawsuit could proceed.

Some suits might not ever come to fruition because of the slow pace of the U.S. legal system.

"Sometimes, by the time you get in front of the jury, the jury looks and says there is not much here any more," he said, and noted that what had appeared per-

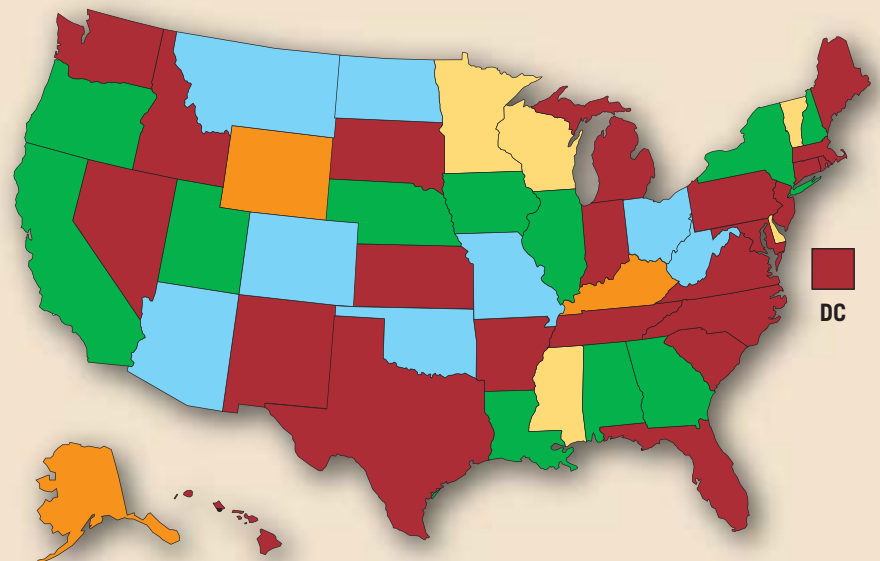
manent might have faded by trial time.

To reduce the risk of getting to that stage, physicians should handle disgruntled patients head on. "Keep them happy, talk to them, and think like a first-year law student. That's going to solve 99% of your problems," he said. ■

DATA WATCH

State Medical Boards' Serious Disciplinary Actions (per 1,000 physicians)

≤1.9 2.0-3.5 3.6-5.0 5.1-6.5 ≥8.1



Note: Rate is calculated by averaging the rates from 2003 to 2005.
Source: Public Citizen