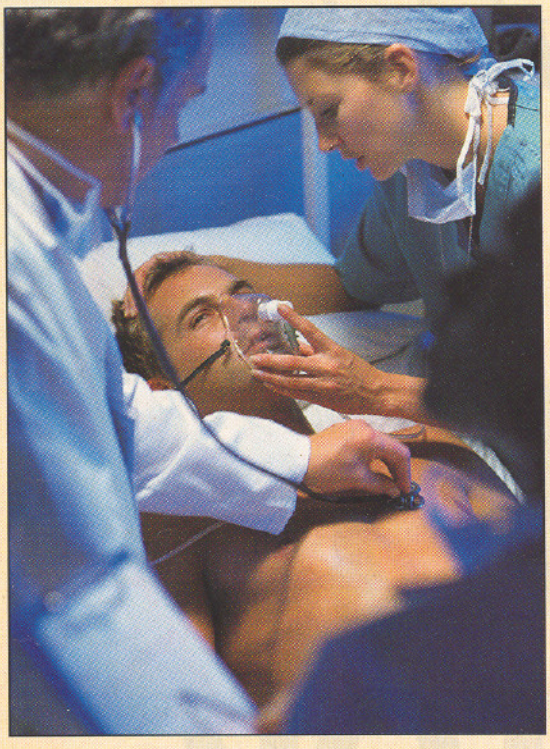

GETTY IMAGES

HEART ATTACK MISREAD AS FLU

A PA is sued when a patient's chest and shoulder pain is shrugged off as a viral infection.

By David S. Starr, MD, JD

Ms. L is a 35-year-old PA-C who works in a small three-physician practice in rural Pennsylvania. After spending her college years attending an urban university, the slow pace of her small-town life agreed with her. She and her husband moved into a restored 19th-century farmhouse with their two children. In her practice, Ms. L treats a large variety of conditions, but patients with cardiovascular problems seem to predominate.

One afternoon, an active and healthy 39-year-old man presented with a sore throat and muscle pain across the back of his shoulders. At times, the pain extended to his arms on both sides. Ms. L had recently seen several similar cases. It was flu season, and a variety of viral infections presented with severe muscle aches. She told the patient that in all likelihood, he had a viral infection but gave him a course of amoxicillin as a precaution. Her charting was brief and to the point, noting "viral syndrome; muscle aches and pains in chest and shoulders." The patient went home to rest but called Ms. L's office two days later to tell her that the symptoms were unchanged and that he had not been able to return to work. It was a busy day at the clinic, and Ms. L reassured her patient that "the infection would have to run its course." Two weeks later, the patient went to the hospital ER, where he was assessed for cardiac chest pain. His ECG showed changes indicative of an acute anterolateral MI. He was admitted and experienced a routine recovery. Because of the amount of myocardium damaged, however, he temporarily experienced symptoms of congestive heart failure and had restrictions imposed on his activity after he was discharged.

Following his recovery period, he consulted a plaintiff lawyer and decided to sue Ms. L for missing his heart attack. His lawyer called for the chart and sent it to a review service for an opinion. It was not long before the expert cardiologist returned his opinion that Ms. L had missed the cues of cardiac pain and caused the patient to proceed to a massive MI, resulting in subsequent severe disability.

The case lumbered through a prolonged discovery process before finally ending in a tornado of paperwork faxed from one office to the other as the court deadlines approached and the lawyers turned their attention toward strategy. In his deposition, the patient swore that in addition to the sore throat and chest pain he had described to

Cases presented are composites of actual occurrences. Names of participants and details have been changed. Cases are informational only; no legal advice is intended. Persons pictured are not the actual individuals mentioned in the article.

Ms. L, he had also told her about another pain that went across his chest and down his arms. Not even the defense's expert physicians could testify that this pain was consistent with the viral infection Ms. L had diagnosed. She consulted her notes on the case, but the patient's symptoms were not recorded. Under the heading marked "Subjective," she had entered only the phrase "feels bad." When it was finally her turn to testify, Ms. L was unable to contradict the plaintiff lawyer's claim that the patient had complained of pain down the arms at the initial consultation. She was only able to say feebly that her diagnosis "seemed to fit the symptoms at the time."

At trial, the evidence consisted of the patient's recounting what had happened at his first visit to the clinic and the ways his life had changed since his heart attack. He told the jury that he was still weak and frequently short of breath. His experts backed up his testimony with a description of his impaired left ventricular function, which produced a mild persistent heart failure and a decreased ejection fraction. Ms. L gradually shrank into her seat as the jurors listened while the evidence from her own experts and the plaintiff lawyer pounded away at her credibility. The case rested on the fact that Ms. L could not say that pain down the arms as described by the patient was consistent with her diagnosis of viral infection. The jury returned with a $1.2-million verdict in favor of the plaintiff.

A patient-initiated callback may signal a tendency to sue.

Legal theory

Medical negligence is established by a jury's weighing the evidence and determining whether the provider's conduct was above or below the standard of care as defined by the experts. Unfortunately, the standards set vary widely depending on the expert testifying and which side hired him. A confused and frustrated jury often draws its own conclusions and looks for signs that the provider was careful, conscientious, and compassionate in his or her work. In this case, the plaintiff lawyer's questioning of the defendant and her experts dramatically emphasized the contrast between the testimony regarding the patient's symptoms (particularly the pain down both arms) and Ms. L's diagnosis of viral infection.

Unlike defense lawyers, who are paid an hourly fee, plaintiff lawyers collect a percentage of the jury award—even when this amount is reduced by court costs, expert fees, and other administrative expenses. The percentage varies anywhere between 25% and 50%, depending on the difficulty of the case and the skill and avarice of the plaintiff attorney involved. Attempts to regulate plaintiff attorney fees have met with stiff protest due to a powerful political presence in Washington, D.C.

Risk-management principles

Ms. L made a mistake in her diagnosis, but this was not her biggest error. She had a chance to cover herself when the patient called the clinic with news that he was not doing any better. If she had asked him to come in for reassessment and had found that his symptoms were more typical of ischemic pain than a viral infection, her case would have been viewed by the jury with considerably greater sympathy, even if the outcome had been the same.

Patient callbacks, although the least valued function in many offices, have an important risk-management function beyond their medical value. As well as a means of reassuring anxious patients that developments are progressing according to plan, they are also an opportunity to have the patient return for reassessment and for the clinician to detect and correct past diagnostic errors. There is considerable value in simple printed handouts with instructions to "return to clinic if symptoms do not improve within 24 hours." If handled correctly, a callback initiated by the patient is a more sensitive risk-management device, since this is a self-selected high-risk group.

Legislation to limit lawyer's fees and jury awards for noneconomic damages presently hangs in the balance before Congress. If passed, this legislation could have a dramatic effect on malpractice litigation by removing the enormous economic incentives for plaintiff lawyers to actively seek and develop malpractice cases. Direct and frank input from health-care providers is essential to counter the considerable political influence of plaintiff lawyers. Providers may have the public sympathy, but plaintiff lawyers have the money to offset it. Clinicians need to make their feelings known to their elected representatives. Every phone call made and letter written will help the effort to pass this important legislation.

take a break to regain her composure. The plaintiff lawyer realized he had hit pay dirt. After the recess, he remained polite but unrelenting, focusing on the "late entry" in the office chart and Dr. A's alleged failure to "refer a patient with an emergent condition." It was not long before the plaintiff lawyer had Dr. A admitting that she had made a mistake in not referring the patient to the ER for her TIAs.

After the depositions, the defense lawyer consulted with the insurance company representative and agreed to recommend settlement. They obtained permission from the hospital attorney, Dr. A, and Dr. M before offering the plaintiff lawyer $2 million. After several weeks of negotiation, the case was finally settled for $2.5 million. The optometrist's insurance company contributed only $50,000, with the balance coming from the hospital's insurance company.

Process servers

The U.S. Constitution requires defendants to receive due notice of lawsuits against them and to be served with court papers that detail the specific charges. Process servers can be employees of the court system, connected to law enforcement (e.g., sheriff's deputies), or self-employed. They typically try to find their quarry at his or her place of business, since they cannot enter an individual's home to serve papers. They must positively identify the plaintiff and then merely hand over the papers. A process server learns to leave the scene quickly, since the plaintiff's reaction may be violent and unpredictable. Although most process servers are men, some attorneys employ women to track down and serve divorce papers to philandering husbands.

Risk-management principles

At times, defense lawyers take a passive approach during the depositions of clinician clients. This behavior often frustrates the providers, who expect a more impassioned response to the plaintiff lawyer's attacks. There are a number of reasons for this otherwise puzzling phenomenon. Strategically, the defense lawyer wants to see how his or her client will react under pressure and views the deposition as a dress rehearsal for the trial. Second, the defense lawyer assumes that as a medical professional, his or her client is used to functioning under stress and does not need to be protected from the opposition's aggressive questioning.

Impaired clinicians should be careful to arrange their practices to provide themselves with a protected environment under adequate supervision. These providers are at risk not only from plaintiff lawyers but from medical boards as well. State medical boards are under considerable pressure to play an active role in protecting the public and constantly strive to provide evidence of their vigilance. Since an impaired clinician frequently presents the combination of an unsympathetic figure and a poor performance under questioning, plaintiff lawyers are thrilled to have such an individual as a defendant. Dr. A's fragile mental state played right into the plaintiff lawyer's hands, leading to a poor deposition and a multimillion-dollar settlement in an otherwise defensible case. ●