

# Self-Defense in Medical Malpractice: How to Derail a Frivolous Malpractice Lawsuit

Howard Smith, MD, MHA

Every physician in the United States has an 8.5% risk for a medical malpractice lawsuit each year. A patient who is the victim of an adverse outcome understandably misconstrues an error of nature as a medical error and retains an attorney who hires a medical expert. By using statistical significance, a complication that follows any medical intervention can be validated as an error of nature or a medical error with 95% confidence, thus making the malpractice suit frivolous. Therefore, ensuring 18 words appear in a patient's chart — *"With the exception of random occurrences, there is 95% confidence that this medical intervention is safe and effective"* — a plaintiff medical expert must demonstrate a statistically significant difference between the "incident risk" of a medical error representing the medical intervention and the "background risk" of an error-of-nature representing the standard of care. Statistical significance is a professional standard that any physician who professes to be a medical expert should be able to determine.

**KEY WORDS:** Medical malpractice lawsuits; expert witnesses; plaintiff; defendant; preponderance of evidence; statistical significance; frivolous lawsuit.

Every year, a doctor has at least an 8.5% chance of being sued for medical malpractice. Why? With regard to medical procedures, complications are inevitable.<sup>1</sup> Yet not all lawsuits are warranted; some are frivolous.

Consider these three points:

1. Frivolous lawsuits allege that a random error of nature is a medical error. Complications are the results of medical errors or errors of nature. Because the standard of care does not include medical error, any unfortunate outcome following the standard of care can only be a random error of nature.<sup>2</sup>
2. Standards of care are empirical. When a medical expert describes a subtle difference between the standard of care and a medical intervention, this does not necessarily mean there was a departure from the standard of care. Circumstances require calculated risks; a calculated risk is not a medical error. Nevertheless, there is a subtle difference between the standard of care and a medical intervention.
3. Medical experts have codes of conduct and, like physicians, are as accountable to medical principles as they are to legal principles.<sup>3</sup>

## EVOLUTION OF A FRIVOLOUS LAWSUIT

A frivolous lawsuit arises when a patient who is the unfortunate victim of an error of nature understandably holds the physician responsible. The patient retains a personal injury lawyer who operates on contingency fees. For these attorneys, even errors of nature have settlement values.

The attorney, in turn, hires a medical expert. The medical expert prepares a certificate of merit, indicating that there is a preponderance of evidence that the medical intervention departs from the standard of care.

The doctor is served and contacts the insurance carrier, which retains an attorney to represent the doctor. Defense attorneys operate on billable hours; for them, cases have equal value whether they have merit or don't.

The defense attorney hires a medical expert who opines that there is a preponderance of evidence that the medical intervention does not depart from the standard of care. Preponderance of evidence is a principle set by the legal profession.<sup>4</sup> It has a level of confidence of 50% probability plus a scintilla (a faint spark). If the scintilla is 1%, the opinion of a medical expert has a 51% chance of being right and a 49% chance of being wrong.

Expert opinions have less to do with the validation of evidence than with what best serves the interests of the lawyers who hire them, which, for plaintiff attorneys, are contingency fees and, for defense attorneys, are billable hours.

A medical expert, if so inclined, can intentionally misrepresent a calculated risk as a departure from the standard of care or vice-versa. Neither expert regards this as an exaggeration because a scintilla beyond 50% is probability. It is the lawyer who has the burden of proof or the charge to cast doubt upon it.

## THE IMPORTANCE OF STATISTICAL SIGNIFICANCE

One principle set by the medical profession is statistical significance.<sup>5</sup> Statistical significance provides statistical validation regarding whether two variables are related or if one is a result of random chance. Statistical significance has a level of confidence of 95%, so statistical significance indicates 95% confidence that a complication is an error of nature or a medical error.

Any physician, especially one who professes to be a medical expert, certainly should be able to determine statistical significance. Before I embark on a medical intervention, I predetermine statistical significance and record the following 18 words in a patient's chart: *"With the exception of random occurrences, there is 95% confidence that this medical intervention is safe and effective."* These 18 words not only verify informed consent, as I intended, but state the *sine qua non* of statistical significance.

Should there be litigation, the standard mantras for medical experts are: "There is a reasonable degree of medical probability" or "more likely than not." These are the *sine qua nons* for preponderance of evidence. However, by using the 18 words stated above in the medical record, I unequivocally validate that there is no statistically significant difference between this medical intervention and the standard of care. Left unsaid is that any complication that follows this medical intervention can only be a random error of nature.

Although it remains for the plaintiff's attorney to prove that a complication is a medical error, the medical expert must provide validity for that proof. Whether medical experts realize it or not, these 18 words have just raised the bar. Preponderance of evidence is no longer enough when these mantras stand in stark contrast to these 18 words, especially when these 18 words are supported by science.

To allege a departure from a standard of care, a plaintiff medical expert must demonstrate a statistically significant difference between the "incident risk" of a medical error

resulting from this medical intervention and the "background risk" of a random error of nature. It stands to reason that if statistical significance is a professional standard, a certificate of merit prepared by a medical expert should unequivocally state, *"There is 95% confidence that this medical intervention departs from the standard of care and causes a mishap."*

## CONCLUSION

As an obstetrician-gynecologist and no stranger to medical malpractice litigation, I never realized the impact of these 18 words as a self-defense strategy, although I routinely documented them in medical records. In 2005, I explained statistical significance during a deposition<sup>6</sup> and shortly afterward was dismissed with prejudice. In 2021, I insisted that my attorney refer to these 18 words in answers to a complaint. Shortly thereafter, the case was dismissed with prejudice. I was one of 85,000 physicians sued for medical malpractice during those two years. There is 95% confidence that my dismissals with prejudice were not coincidences.<sup>7</sup> It is for this reason that I share this self-defense strategy with my colleagues. ■

## REFERENCES

1. Most Physicians End Up Being Sued. *Today's Hospitalist*. September 2010. <https://www.todayshospitalist.com/most-physicians-end-up-being-sued>.
2. Berlin L. Medical Errors, Malpractice, and Defensive Medicine: An Ill-Fated Triad. *Diagnosis*. 2017;4(3):133-139. <https://doi.org/10.1515/dx-2017-0007>.
3. Spencer FC. The Malpractice Crisis. *Virtual Mentor*. 2005;7(4):325-327. <https://doi.org/10.1001/virtualmentor.2005.7.4.oped2-0504>.
4. American Bar Association. Model Rules of Professional Conduct: Preamble & Scope. Preamble: A Lawyer's Responsibilities. [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/).
5. Social Science Statistics. Single Sample T-Test Calculator. Accessed July 24, 2020. <https://www.socscistatistics.com/tests/tsinglesample/default2.aspx>.
6. Smith H. A Model For Validating An Expert's Opinion In Medical Negligence Cases. *J Legal Med*. 2005;26(2):207-231. <https://doi.org/10.1080/01947640590949931>.
7. Smith H. Risk Management: Gaining Control of Medical Malpractice Litigation. *American Journal of Statistics and Actuarial Sciences*. 2023;4(2):1-17. <https://doi.org/10.47672/ajsas.1431>.

<https://doi.org/10.55834/plj.7667044177>

Copyright © 2025 by American Association for Physician Leadership®



Howard Smith, MD, MHA, is an obstetrician-gynecologist in North Bethesda, Maryland.  
drhsmith@aol.com