LEGAL PRINCIPLES AND PRACTICE IN OBSTETRICS AND GYNECOLOGY

VOLUME I

EDITED BY
Max Borten, MD, JD
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Legal Principles and Practice in Obstetrics and Gynecology

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PREFACE

It was a pressing perceived need, expressed with increasing vigor over time by growing numbers of both the legal and the medical communities, that served as the stimulus to create a bridge for fostering communications between the professions. The vehicle chosen as the means for satisfying that need was a series of conferences structured to explore a range of issues felt to be relevant to interested participants. The enthusiasm generated from the very beginning has been most encouraging. From the outset, it was clear that providing a nonthreatening milieu for open discussion would give all parties the opportunity to learn the language, to recognize the concerns, and to probe for the solutions of problems they all share regardless of their primary perspective. This applied whether for viewing the issues as physician or lawyer, for supporting the interests of plaintiff or defendant, for addressing risk management or quality assurance, or for seeking legislative guidance.

In the course of these symposia, matters were raised, issues were explored, and recommendations were made to warrant publication not only as a ready reference for the participants, but also as a resource for the much wider audience of those who had not had the benefit of attendance. Although this book is based on the foundation of transcripts of the prepared talks and the spontaneous and perspective discussions generated by them, the editors and formal contributors have taken advantage of the opportunity to expand and otherwise modify the material freely to make it more complete and thereby more widely used. Other volumes in this series will follow the same format, paralleling the content of each of the conferences, enlarging and clarifying without duplicating rigidly. Since our intention was to ensure freedom of expression and open exchange of ideas and concerns, we must enter a disclaimer here that the opinions expressed by the participants represent their own personal views and should not be considered to reflect those of the editors, the publishers, or the sponsoring institutions.

We are especially grateful to Professor Thomas F. Lambert, Jr for having provided strong encouragement in the planning stages of this endeavor, to Judge John J. McNaught for the motivation to proceed on the basis of clear demonstration that it was needed, to Professor William J. Curran for fostering the concept of a forum for interchange, and to James F. Holzer for smoothing the way in soliciting important contributors to participate. Dr. Stephen E. Goldfinger, Associate Dean, and Norman Shostak, Director of Management and Fiscal Affairs, Department of Continuing Education, Harvard Medical School, were particularly helpful in working out the myriad details for the conferences. We are grateful to the

Harvard Department of Continuing Education and the Beth Israel Hospital Department of Obstetrics and Gynecology for their collective sponsorship and support of this endeavor. We acknowledge with sincere appreciation the expertise provided by Salomon Borten in taping the talks and discussions, Joan F. McLean for producing the transcript of the material, Audrey Landay for her skillful typing and editing of the manuscript, and Cindy McCann for the illustrative artistry. To Frank N. Paparello and Richard J. Wallace, Year Book Medical Publishers, we must express our gratitude for their aid in creating a work worthy of the effort; their commitment to publishing all the future volumes of these conferences attests to their belief in the intrinsic value of the project. Equally important, we wish to thank all participants for their liberal and thoughtful input; important concerns and ideas surfaced as a consequence of their active involvement.

We firmly believe this book will prove to be a valuable addition to any legal and hospital library. It will help both young and seasoned attorneys who are called upon to handle either side of civil litigation—the defense or the plaintiff bar—by giving them insights not readily available in other source material by virtue of its unique blending of medical and legal matters. It should be useful to physicians who practice obstetrics and gynecology, whether generalists, family practitioners, or specialists, because it offers certain important legal perspectives that are relevant to the way medicine is practiced today. The material is especially pertinent in regard to risk management. Important principles and practical suggestions are discussed to guide physicians in means for avoiding problems that might lead to litigation and for dealing with specific complications so as to avert potential suits. Newly introduced licensure and relicensure requirements in some jurisdictions qualify this material for category II continuing medical education credits because it encompasses education in risk management. It may also serve some of the needs of risk managers and those working in the area of quality assurance both for case finding and evaluation and for establishing standards for performance and criteria for assessment of care practices. In this latter regard, hospital credentialing committee personnel may find it useful as well. Legislators, their health assistants, and those who advise them will benefit from the guidance the presentations and discussions offer to those who are in the forefront of creating new legislation, perhaps now already in its embryonic stages.

Max Borten, MD, JD
Emanuel A. Friedman, MD, ScD

FOREWORD

In the arena of the courtroom, physicians and lawyers are too often in a confrontational attitude. After having spent more than thirty years of intense professional involvement with both groups, I can say with conviction that they don't speak the same language; they seldom understand each other; they even misinterpret the other's motives; their relationships are fragile, hostile, fearful, and distrustful, even if they are ostensibly on the same "team." This is a most unfortunate situation because, as professionals, they have much the same goals and objectives. If it were possible to reestablish communication linkages, there is no doubt that each could help the other considerably, contributing to their mutual advantage and even facilitating the alleviation of some of the problems relating to plaintiff patients.

It was with special pleasure, therefore, that I attended the first of the series of Harvard educational conferences which provided a forum for both doctors and attorneys to meet on common ground and really begin to talk together. This book represents a distillate of those useful and meaningful dialogues. The fine balance struck between medicine and law, between plaintiff and defense positions, between science and art, between information and opinion, is everywhere in evidence. The scholarliness, wisdom, candor, and honesty of the participants are tempered by their free expression, enlightenment, wit, and articulateness.

These attributes reflect well both on the organizers of this important and informative exercise and on those who contributed to it so effectively. As an active member of the audience, I personally felt the excitement of the innovative approaches being used to foster understanding, probe concepts, exchange ideas, and think creatively.

I feel I can recommend this book enthusiastically as must reading to all lawyers who are or expect to be involved in medical malpractice liability litigations, whether for plaintiff or defense bar, and to all obstetrician-gynecologists and general and family practitioners who are involved in maternity or gynecologic care. The material should also be of considerable interest to insurance carriers and their legal and fiscal representatives as well since so much of the information it contains is pertinent to their activities. They are clearly important participating players in the contest in which doctors and lawyers find themselves so frequently in this litigious era.

Douglas Danner, JD

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Introduction

Max Borten, MD, JD
Emanuel A. Friedman, MD, ScD

Burgeoning numbers of medical malpractice claims and astronomical awards and settlements characterize the current medicolegal climate. Recriminations and faultfinding abound. No one is content with the system as it now exists, neither patients nor physicians, plaintiff lawyers nor defense attorneys, insurance carriers nor risk managers, legislators nor judges. Despite this universal unhappiness with what exists and the discouraging assurance that it will only get worse, there do not appear to be any remedies in the offing to correct the problem and halt the trend or reverse it. There is thus an obvious and overriding urgency to face this apparently insoluble dilemma forthrightly. Only by doing so are those who are embroiled in it likely to be able to begin to work toward even the semblance of a mutually satisfactory solution.

Toward this end, it is imperative to recognize that, with few exceptions, physicians and lawyers have widely different training and background. Entirely different intellectual, logical, and rhetorical approaches and orientations are brought to bear when specific types of challenges are addressed. They barely speak the same language. Their emotional baggage is very different. Given this diversity, it is small wonder there is an almost universal lack of effective communication between them. The problems this creates can be insurmountable.

Bad as such problems ordinarily are, they may be considerably aggravated by sometimes irrational, albeit firmly held, convictions that

one's colleagues in the conflict, whether adversary or even protagonist, are on a personal vendetta. Accusation substitutes for accommodation, acrimony for amity, causticity for consideration, hostility for harmony, invective for inquiry, rancor for respect. The cycle of mutual antagonism and antipathy thus feeds on itself to ensure against any possible remedy or reversal. The sense of distrust generated impedes and may overtly negate any efforts at working toward resolution.

Since the system fosters such conflictual relationships, resolution is not likely to be readily forthcoming without a strong, positive, persistent striving to bring the "combatants" together to speak, to learn, to exchange. Only when they can begin to understand their shared concerns, anxieties, and needs and pool their collective skills and insights will it be possible for them to embark on meaningful and fruitful dialogues.

It was with this goal in mind that this forum was convened in which interested people could be brought together for purposes of fostering effective communication in a constructive, unemotional environment. Under the sponsorship of a respected medical school and a large metropolitan teaching hospital, this is the first of six proposed three-day meetings to take place. The structure is that of a postgraduate education course aimed principally at doctors and lawyers. This approach was chosen to stimulate open discourse, objective examination, and intelligent scrutiny, devoid of personal challenge and *ad hominem* diatribe. The overriding aim was to bring the factions together and focus their interest on those areas of mutual concern and relevance.

A number of recognized authorities have been invited to contribute informational background and conceptual principles to help elucidate the specific issues being addressed. A balance was sought by ensuring the participation of representatives with experience, scholarship, and knowledge from the vantage points of law (both plaintiff and defense bar), medicine, risk management, and justice. Legislators and insurance experts will be involved in forthcoming conferences.

Judge John J. McNaught, who was instrumental in helping to writing the compendious Federal Rules of Evidence, will speak authoritatively on evidentiary issues. Professor Thomas F. Lambert, Jr, who served with the Nuremberg Tribunal at the Nazi war criminals trials, will address the rights of injured parties. Professor William J. Curran, who aided the United States Congress to explore tort reform measures, will review potential ways to solve our current dilemma, and James F. Holzer of the Harvard Risk Management Foundation will provide an in-depth review of the current status of medical malpractice, both in general and as it refers specifically to obstetrics and gynecology, and also talk at length about preventive risk management.

Circumscribed topics were selected. To spark interest, these were chosen from among problems identified as being foremost in terms of

frequency or fiscal impact. Both didactic and case study formats will be used with plenty of opportunity afforded for discussion. We will present eight comprehensive discussions of identified problem areas, giving the medical overview, an illustrative case as the vehicle for case study, and both the defense and the plaintiff perspectives. Other series of pertinent and pressing subjects will be dealt with in the subsequent conferences.

This framework was intended to stimulate exchange of ideas and expose participants to how others see and articulate the issues. Not only was it expected to provide better understanding among physicians about how lawyers think, and vice versa, but it could be anticipated to disclose the shortcomings and obstacles faced by either or both. The enthusiastic response has been most gratifying. It attests to the intrinsic worth of this forum to those who attended and confirms that the basic need could perhaps be met in large measure by this approach.

While the primary thrust of this series of discussions is to provide a fertile environment from which prospective solutions might germinate, it is fully appreciated that real reform, if any is to be forthcoming at all, will ultimately have to develop in the legislative arena. The issues are so complex that no one can expect legislators to be able to create solutions as if by magic to deal with the many knotty problems in this multifaceted discipline. Reform of long-standing legal principles is not easy to bring about even in far less controversial fields. The need notwithstanding, it is unlikely to be readily achieved here because we are confronted with a problem of overwhelming proportions.

Legislators respond to their perceptions of society's needs. To respond appropriately, they seek (or should be required to solicit) input from all components of society with an interest in the specific issue, especially those directly involved or likely to be affected by statutory changes. This means lawmakers have to be sensitive to and aware of the needs of injured patients as well as those of physicians, bearing in mind the opposing attorneys' obligations to safeguard the rights of both. Striking a balance in this regard involves Solomonic wisdom for ensuring that the rights of all parties are upheld. Helping those who write and enact such laws to tread the narrow path between conflicting interests so that basic rights are not violated is a role which can be undertaken only by well-informed individuals who understand all the nuances of the issues.

In this way, redress for one needful group will not come about as a consequence of the loss of the opportunity for relief for another group. Unilateral accommodation may help an identified individual or group of individuals, but this relief may come about at the expense of others. It is difficult for those who feel they are being oppressed by circumstances to take a dispassionate and tempered view of the problem. For example, physicians who attribute the rapid escalation of their malpractice insurance premium costs to the sizable and well-publicized jury awards of recent

years cry out for the imposition of arbitrary dollar caps on such awards. They do not necessarily fully appreciate (or are not willing to consider) what that might mean to injured persons insofar as providing for their long-term, perhaps lifetime, care. Thus, it is imperative that the interests of both aggrieved parties be considered simultaneously within the context of societal needs and available resources. These are among the many considerations that must be weighed in the balance and which will be discussed here.

While our orientation will, of necessity, be toward obstetric and gynecologic problems, it should be noted that the legal issues and their composite elements are clearly not peculiar to this specialty. They apply broadly to other disciplines in medicine and law. The field of obstetrics and gynecology happens to be particularly hard hit in regard to both number and size of claims, but it is generally acknowledged that it is only a matter of time before other specialties will be comparably affected. The basic principles expounded here will be utilizable by all in due course.

2

Current Status of Medical Malpractice

James F. Holzer, JD

My objective is to give you an overview of the current so-called medical malpractice crisis. I would like to give you some perspective about what we are seeing in the medical malpractice area from the vantage of the physician, the hospital, the insurance industry, and the field of risk management, focusing specifically on obstetrics and gynecology. I plan to share some statistics with you. While they tend to be a bit dry, they are essential for purposes of demonstrating where the problems lie and what the recent trends have been. Such information will help provide some insights into the direction we are likely to be going in the future and where intensive action has to be applied to help control the situation for all concerned.

Data are available, although limited in scope, for both national and local claims experience. The latter are derived from the Risk Management Foundation, an organization that oversees this area for the several Harvard-affiliated hospitals. The former come from several sources, including the United States General Accounting Office (GAO) and the periodic surveys conducted, analyzed and published by the American College of Obstetricians and Gynecologists (ACOG), among others. We will deal with our perspectives on risk management or loss prevention in Chapter 14, detailing the kinds of activities that might make a difference in our collective attempts to reduce adverse iatrogenic events whether or not they may be due to negligence.

My particular perspective is risk management both in pragmatic and

analytic terms. Even though I'm an attorney, my activities do not have anything directly to do with courts or trials. My work at the Foundation is to try to take the opportunity to gather data and analyze what's happening and why it's happening. My overriding objective is to get into the medical institutions, and particularly to work with our physicians, in trying to identify ways of resolving the recurring problems we see that lead to claims.

Let us begin with the important data produced by the ACOG. The ACOG has done membership surveys every other year since 1983 on the professional liability experience of obstetrician-gynecologists throughout the United States. The most recent information was released just a short time ago. Based on these data, the College feels that the professional liability crisis is perhaps the single most significant factor that is impacting on the practice of obstetrics and gynecology today. Here in Massachusetts, doctors have many financial burdens in addition to professional liability issues, but certainly this is one that is really key to the survival of the specialty. In the eight years I have been watching this discipline, I have seen major changes take place. Therefore, I tend to agree that when I look at what has been happening in the field, the malpractice problem looms as a prominent influence.

I really don't think it is overreaction on the part of obstetricians who just throw up their hands in despair and opt to stop practicing this aspect of medicine. Both national and local statistics do clearly verify this gravitation of obstetricians and family practitioners to stop delivering babies. This applies especially in the rural areas of the country. It has caused a shift of this type of practice to the urban setting. There may be some positive gains here, but I think it has serious drawbacks as well. We are also seeing obstetricians leaving the practice of obstetrics altogether at an earlier age than in the past. A significant number are discontinuing patient care activities in this field even before the age of 45 years.

In 1985, almost three quarters of all of the obstetrician-gynecologists surveyed by ACOG, about 2,000 of them in all, said that they had been sued at least once. This is a phenomenal figure. No other specialty, to my knowledge, has anywhere near this type of claims experience. It emphasizes the special position this field has in the liability field and why it is so important for us to focus on the causes and solutions, if possible.

To give you a general sense of where we're at in medical malpractice dilemma, let us briefly look at some of the most recent data from the GAO. Remember that the data in this field are very limited. We really don't have a good sense of how bad the problem is and what some of the recurring themes are because people in different locales tend to count things differently. There are really no data collection standards and no common database nationally. Therefore, it is very difficult to get a good sense about what's going on; and even more difficult to do meaningful analyses. The