How can “standard of care” affect a lawsuit?

The “standard of care” often has a significant impact on the outcome of ED malpractice lawsuits, but the way this is defined can vary according to state law and other factors.

“The suit often will come down to competing interpretations of the applicable standard of care,” says Erin McAlpin Eiselein, a partner at Davis Graham & Stubbs in Denver, CO. “Generally, expert testimony is necessary to prove the applicable standard of care.”

In most U.S. jurisdictions, the rule is that the ED physician should exercise the degree of skill and diligence exercised by others in his/her specialty under the same or similar circumstances.
In theory, a doctor who has done that, whatever it consists of, has complied with the standard, and need do no more,” says Joseph P. McMenamin, a partner at Richmond, VA-based McGuireWoods. “Whatever the outcome, even if it is very bad, he is not liable and has not committed malpractice.”

The term “standard of care” is generally defined as the degree of care and skill used by an average practitioner in the defendant’s specialty. “It is an objective standard, and so the physician’s intent or good faith is irrelevant to the inquiry,” says Eiselein.

There is no universal standard of care, because the determination is comprised of a variety of factors, including the doctor’s specialty, the present state of medical knowledge, and available resources. “Physicians are always held to a minimum level of professional competence. So if customary practice is negligent, a physician following only that minimal standard may face liability,” says Eiselein.

A good example of how important the standard of care can be to the outcome of a lawsuit is found in a Louisiana malpractice case, where the jury was asked to decide whether an ED physician’s failure to administer heparin to a patient presenting with unstable angina violated the standard of care.

Even though a cardiologist offered expert testimony for the plaintiff that heparin was standard procedure at that time, two expert ED physicians disagreed and testified that heparin was not the standard of care for emergency physicians.

“In the end, the jury sided with the emergency department experts and concluded that the physician did not violate the standard of care, and therefore did not commit malpractice by failing to administer heparin,” says Eiselein.

**Key Points**

The outcome of ED malpractice lawsuits often depends on the fact-finder’s estimation of the reliability of competing interpretations of the standard of care, as characterized by expert witnesses. Some factors that come into play:

- The ED physician must exercise the degree of skill and diligence exercised by others in his/her specialty under the same or similar circumstances at the time the care arose.
- Standard of care depends on the doctor’s specialty, the present state of medical knowledge, and available resources.
- Evidence such as new research is not admissible if it was not available at the time the care occurred.

### The way care is compared varies

The court will ask the “finder of fact,” usually a jury, to compare the care the defendant doctor provided with care that other doctors provide in similar circumstances.

“The frame of reference for the comparison that must be made varies with state law,” says McMenamin. States may compare the conduct of the physician-defendant with that of practitioners of the same specialty in the United States, within the state, or within the same or similar communities.

For example, an ED physician is required to use high-dose steroids only if other reasonably prudent members of that specialty would not fail to use them. “If there is no blanket rule, and reasonably prudent members of the specialty would use high-dose steroids in some spinal cord injuries but not others, then as long as the doctor-defendant was not caring for the kind of cord injury where the standard required use of steroids, he is not required to use them,” says McMenamin.

“Lawyers and judges do not presume to tell physicians how to practice medicine,” says McMenamin. “The law recognizes that physicians are uniquely qualified to determine what kinds of care are called for in any given clinical situation. Lawyers and judges, however learned, are not.”

Instead, the law asks the medical profession to state what rules govern its conduct, and its members are then held to those rules. “So how is a lay jury or judge supposed to know what is required in a particular clinical situation? By listening to the testimony of expert witnesses,” says McMenamin.

The plaintiff will call someone who claims, by virtue of his knowledge, training, skill, and experience, to know what reasonably prudent doctors in the specialty do under analogous circumstances, he says. Assuming the court agrees that he is indeed qualified, the expert will offer his opinion on the subject.

The defense also is permitted to offer expert testimony, which typically contradicts the testimony offered by plaintiff’s expert. “The finder of fact is authorized to decide which of the two it believes,” says McMenamin. “And on that basis, it decides whether the care was standard, and hence not actionable, or not.”

The doctor must be judged by the state of medical knowledge as it stood at the time of the care complained of. If new research on high-dose steroids was published a month ago, and the care being scrutinized took place two years ago, then the evidence is not admissible.

Conversely, new evidence might have come out two years ago, while the care took place only a week ago. “A finder of fact might well be willing to agree with the plaintiff that two years is enough time for the doctor to have gotten the message, so he was not justified in providing outmoded care last week,” McMenamin says.
However, the defense might demonstrate that even though a paper came out two years ago challenging the use of steroids, other more recent papers contradict that finding, and that many prudent physicians continue to use high-dose steroids despite the criticism of the practice in some circles. "If the fact finder agrees, the defense will win," says McMenamin.

Reference