ABSTRACT

Objective: Previous analyses have noted perceived deficits in informed consent (IC) in many otolaryngology malpractice lawsuits. However, no comprehensive analysis of IC in malpractice litigation across surgical specialties exists. Our objectives were to 1) examine IC in litigation across surgical specialties and 2) characterize factors in determining legal responsibility.

Data Sources: Using the Westlaw database.

Methods: Using the Westlaw Database, 694 jury verdicts and settlement reports since 2010 involving defendants practicing general surgery, neurosurgery, ophthalmology, orthopaedic surgery, otolaryngology, plastic surgery, and urology were examined for outcome, procedures types, and alleged deficits in IC.

Results: Of 694 cases, 67.0% of decisions favored physicians, 25.3% resulted in damages awarded, and 7.5% in out-of-court settlements. Although perceived IC deficits did not increase the likelihood of jury awards, a high number of cases (24%) identified IC as a factor. Plastic surgery (45.1%), ophthalmology (39.6%), and otolaryngology (27.8%) litigation were among the highest to identify IC deficits. Many cases in plastic surgery and ophthalmology with alleged deficits in IC involved elective procedures. In contrast, otolaryngology had a lower proportion of elective procedures in cases with alleged deficits in IC.

Conclusions: Although perceived deficits in IC do not necessarily increase the likelihood of a negative outcome, they may play an important role in the initiation of malpractice litigation across surgical specialties. While otolaryngology had a relatively high rate of initiation involving IC deficits, it had a lower proportion of elective procedures in comparison to other surgical specialties in this analysis, suggesting elective interventions influence legal responsibility in a specialty-specific manner.

INTRODUCTION

Malpractice litigation is among the primary factors involved in the dramatic rise of healthcare costs and the resulting financial crisis affecting America’s healthcare industry. Litigation exerts its influence directly through costs such as legal defense payment, jury damage awards, and out-of-court settlements [1]. The often-substantial monetary awards given to plaintiffs in malpractice cases have forced many practicing physicians in America to have malpractice insurance. The cost of an average medical malpractice policy typically ranges to $25,000 a year and certain surgical sub-specialties (particularly statistics/gynecology and neurosurgery) paying at $300,000. Given this ever-increasing threat of litigation, studies have also shown an increase in the practice of defensive medicine, through which ancillary tests and treatments are acquired in order to protect the physician from perceived liability [2].

Recent studies have shown the indirect and direct costs of medical malpractice litigation to total $35.5 billion annually equivalent to 2.4% of total healthcare spending [3].

An often-cited factor in pursuit of malpractice litigation by patients is negligence, by the physician, of the patient’s right to informed consent (IC). Informed consent, which aims to protect the autonomous choice of the patient, is traditionally defined in terms of two components: the disclosure of information on a procedure, leading to the patient’s comprehension of this information; and authorization by the patient to proceed with treatment [4]. Disclosure includes information on the nature of a procedure, potential risks and benefits, and alternative treatments. Numerous studies and the opinion of legal experts have shown negligence in securing proper informed consent to fuel malpractice suits. Several studies have shown deficits in informed consent to be responsible for outcomes of cases in favor of the plaintiff in specialties such as plastic surgery, dermatology and dentistry [5-7]. Informed consent is of particular importance in procedure-heavy, high-risk specialties, particularly surgical sub-specialties, where complications can manifest acutely and the patient is much more likely to understand whether such risks were explained in the recent time period preceding the procedure [9].

There has been no analysis performed on the role of perceived or actual negligence of informed consent in outcomes of lawsuits in surgical sub-specialties. The primary objective of this analysis was to comprehensively examine malpractice litigation in multiple surgical subspecialties where informed consent was brought up as an issue to determine if it played an important factor in determining legal responsibility. Such information is critical in elucidating precautions that should be taken to limit liability and augment patient safety, particularly in high-risk specialties.

RESULTS

Figure 1. Search methodology for specialty-specific malpractice jury verdicts using the Westlaw database (Thomson Reuters, New York, NY). Search conducted in December 2012.

Figure 2. Frequency of cases by the year of jury verdict or settlement within each surgical specialty.

Figure 2A. Disposition of overall surgical specialty malpractice cases.

Figure 2B. Proportion of overall cases claiming alleged deficits in informed consent.

Figure 3A. Geographic distribution by state of all surgical specialty malpractice cases.

Figure 3B. Geographic distribution by state of otolaryngology specific malpractice cases.

Figure 4A. Disposition of overall surgical specialty malpractice cases.

Figure 4B. Proportion of overall cases claiming alleged deficits in informed consent.

Figure 5A. Disposition of malpractice cases by surgical specialty.

Figure 5B. Specialty specific proportion of cases claiming alleged deficits in informed consent.

Figure 6. Specialty specific disposition of cases claiming alleged deficits in informed consent.

REFERENCES