New Jersey Law Journal

VOL. CXCVI – NO. 13 - INDEX 868 JUNE 29, 2009 An incisivemedia publication

Medical Malpractice

Gynecological Malpractice Claims

Knowledge of female anatomy and medicine is a necessity for success

By Timothy L. Barnes and William A. Krais

A gynecologist's negligence can have a profound and lasting impact on a patient. Such negligence can result in injury to a woman's reproductive and surrounding organs, leading to infertility, impaired bladder or bowel function, or a variety of other devastating injuries. The physical and emotional toll of these injuries to a patient is, naturally, significant and often permanent.

Given the medical complexities associated with such cases, an attorney handling these claims must be familiar with the female anatomy, understand the medicine and appreciate how the medical procedures are performed. A close working relationship with one's experts is often critical to the success of complex malpractice cases such as these.

In addition, because gynecological malpractice cases often involve multiple experts, litigating them can be expensive and time-consuming. While the costs and commitment to prosecute these claims surely is extensive, a successful outcome can result in a significant award for the client.

As an introduction to this challenging area of the law, we highlight here two gynecologic procedures that often lead to litigation: dilation and curettage and Pap smear.

Barnes and Krais are members of the personal client services practice group of Porzio, Bromberg & Newman in Morristown.

Dilation and Curettage

A dilation and curettage, or D&C, is a minor procedure to scrape and collect endometrial tissue from inside the uterus. The tissue is sent to a pathologist who determines whether it is cancerous or otherwise abnormal. A D&C usually is indicated to address dysfunctional uterine bleeding or to remove a fibroid tumor, polyp, or other suspicious growth.

Dilation is the expansion of the cervix (the lower part of the uterus that opens into the vagina) to allow the passage of instruments into the uterus. Curettage involves the scraping and collecting of contents from the uterine cavity (endometrium) with a surgical instrument for pathological review. Visualization of the uterine cavity by hysteroscopy before and after the procedure helps the gynecologist determine whether the procedure was performed appropriately and whether the endometrium was treated successfully.

When performing a D&C, the gynecologist first examines the pelvis to evaluate the position of the uterus. Next, the gynecologist dilates the cervical canal with instruments that are progressively larger. The gynecologist then measures uterine depth with a blunt instrument known as a sound, which is introduced through the cervical opening to the fundus of the uterus. The gynecologist gently advances the sound until it hits the back wall of the uterus and meets with resistance. The sound is graded to indicate the depth of the canal in centimeters. Resistance usually is felt at about eight to ten cm. The gynecologist then knows not to introduce other instruments to a greater depth.

Once the physician knows the position and depth of the cavity, he or she typically introduces a polyp forceps, careful not to go beyond the depth of the sounding instrument. In the case of a polyp, the gynecologist grasps the tissue with the forceps and then uses a twisting motion to remove the tissue from the uterine wall.

Occasionally, this effort to remove tissue from the uterine wall can result in a perforation or tear to the uterus and lead to potential litigation. Another area for possible litigation is whether the physician was negligent in failing to recognize the perforation.

Many gynecologists do not believe that a perforation that occurs in this fashion is a deviation from appropriate standards of medical care. Instead, such an outcome can be the result of a thinner-than-expected uterine wall or a distorted uterine architecture that can be prone to a tear or perforation.

While simply perforating the uterus during a D&C may be a known and accepted risk of the procedure, and not malpractice, the physician's failure to recognize the perforation may be malpractice. In fact, it is critically important for the gynecologist to recognize any uterine

perforation and appropriately monitor the patient post-operatively. Perforations are most often seen during a post-operative inspection of the uterus via hysteroscopy.

In addition, a perforation that is very severe as to damage organs beyond the uterus may suggest a deviation from the standard of care. If a gynecologist inserts an instrument so that it perforates the uterine wall and continues into the peritoneum, the gynecologist can injure not only surrounding organs, such as the bladder and bowel, but also neighboring blood vessels with potentially disastrous consequences. A perforated bowel, for example, may lead to sepsis, and the patient may require another surgery to remove and repair the injured portion of the bowel. Frequently, such patients require at least a temporary colostomy to divert fecal material from the healing bowel. A thorough review of the surgical pathology report may offer clues as to whether the gynecologist not only removed uterine tissue, but tissue from surrounding organs. Again, in these cases the gynecologist must recognize and address the unintended outcome before the patient's condition deteriorates.

Pap Smears

While negligence during a D&C can result in injury to the uterus and possibly surrounding organs, negligence associated with a Pap smear may result in the delayed diagnosis of cervical cancer, potentially depriving the patient of an opportunity for an earlier diagnosis and treatment when the prognosis is best.

A Pap smear, or cervical cytology screening, is a test done to detect the presence of a malignant or a premalignant lesion in the ectocervix. As with D&C cases, knowledge of the female anatomy is crucial to the successful handling of these cases. The cervix is the lower portion of the uterus. When performing a Pap smear, which usually is part of a pelvic exam, the physician scrapes cells from the ectocervix (outside) and swabs cells from the endocervix (inside). Those cells are placed on a slide and in a solution and then sent to a lab for evaluation by a pathologist.

Attorneys handling such cases also must be aware of the progression of cellular changes from pre-invasive to cancerous. Most cervical cancers begin in the transformation zone, where the ectocervix and endocervix meet. These cancers do not start abruptly but instead develop and progress slowly from precancerous to squamous cell cancer. Because squamous cells cover the endocervix, squamous cell cancers comprise 80-90 percent of all cervical cancers, and usually arise in the transformation zone. The remaining 10-20 percent of cervical cancers are adenocarcinoma and begin in the mucous-producing glands of the endocervix.

Currently, the American Cancer Society recommends that all women undergo cervical cancer screening within three years of the onset of sexual relations, but no later than age 21. After initial screening, typically Pap tests should be repeated annually. For women over 30 who have had three consecutive negative test results, the Pap test may be repeated every two to three years.

The human papilloma virus (HPV) is recognized as the most significant risk factor for developing cervical cancer. HPV is a group of many viruses that is passed usually by sexual contact. While often benign, two of the viruses are associated with a high risk for developing cervical cancer. The Pap test detects changes in cervical cells that are caused by HPV.

Most labs use the "Bethesda system" for describing a Pap test result. Those descriptions range from the benign, *e.g.*, Atypical Squamous Cells of Undetermined Significance (ASCUS), which typically signifies HPV, to the more insidious, including Low-grade Squamous Intraepithelial Lesions (LSIL), which encompasses mild dysplasia, or abnormal cell growth, and High-grade Squamous Intraepithelial Lesions (HSIL), which includes moderate and severe dysplasia and carcinoma in situ.

The type of follow-up necessary for an abnormal Pap smear depends largely on the degree of abnormality. Follow-up may be as simple as a repeat Pap test. However, it may also include a colposcopy with directed biopsy where, under magnification, the physician removes tissue and sends it to the lab for analysis. Further treatment includes a loop electrosurgical excision procedure, or LEEP, during which an electrical current is used to remove abnormal cervical tissue. A cone biopsy, during which a wedge of the cervix is removed, may also be used. Other therapies include cryotherapy, which involves freezing abnormal tissue, and laser therapy, which involves destroying abnormal tissue with a laser.

The medical-legal implications of cases involving Pap smears generally relate to the delayed diagnosis of cervical cancer. This may occur, for example, when a lab makes an error in interpreting or reporting the results of the Pap test, causing the gynecologist to rely on a false negative report. In those cases, a patient may have a precancerous condition that could be treated easily. Instead of undergoing appropriate treatment or follow-up, the patient may not be seen until the next regularly scheduled Pap test a year or two later. By then, the condition may have progressed from precancerous to cancerous, requiring more invasive treatment and diminishing the patient's prognosis.

The same scenario occurs when the gynecologist fails to follow up on a properly interpreted and reported abnormal Pap test. Instead of instituting appropriate treatment, the physician delays, during which time the patient's condition progressively worsens. Again, when the diagnosis is made perhaps years later, the treatment will be more invasive and the prognosis worse.

Conclusion

Gynecological malpractice cases require not only significant legal experience, but also knowledge of the anatomy and medicine. This knowledge, supported by well-founded expert opinions, should provide the basis for a successful litigation. ■