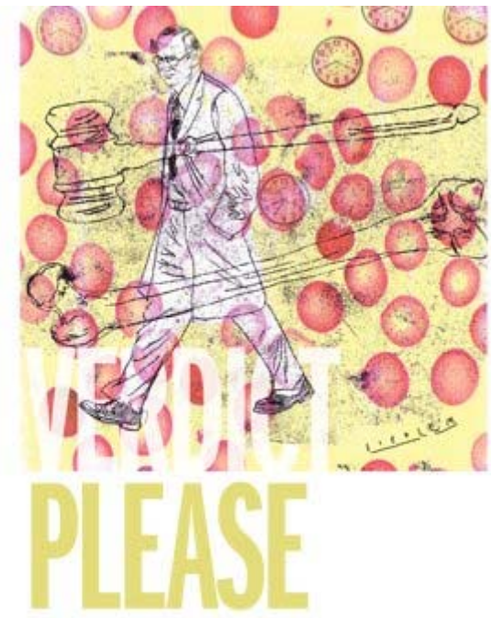
Verdict Please

BROBSON LUTZ, M.D.



Ed. Note: This first-hand account of a doctor facing a malpractice suit is offered as an example of the concerns and issues that a defendant faces. It is not intended to be a commentary on the plaintiff whose identity, and that of his attorney, are not revealed.

Every morning for one week last May, I tied my tie and set out for the day – not to see patients but to stand trial in an area state civil court. A former patient had accused me of malpractice and was having his week in court; I was Exhibit A. Malpractice complaints against physicians are common. Most are dropped along the way, a few settle and a rare one actually goes to trial. Mine was the rare one.

“Dr. Lutz committed malpractice and caused damages to my client,” began the attorney’s opening statement. He went on to say that his client, Mr. Durante, was battling fatigue and other symptoms ignored by me.

The presiding judge ran a no-nonsense courtroom with an attention to punctuality that would’ve rivaled a Japanese train schedule. It was a timely ending for a slow train five years on the tracks.

The plaintiff was an off-and-on patient for about a decade before he sued me. His mother-in-law and wife were two of my earliest and most beloved patients. Several years before the trial, his wife was diagnosed with a rare bone cancer and I arranged for her to see an orthopedic oncologist experienced in limb-sparing surgical procedures practicing outside of New Orleans.

Before he became my patient, the plaintiff was what emergency rooms term a “frequent flyer” – ankle sprains with no fractures, a painful nose from hitting it on the bottom of a pool, lightheadedness, anxiety reaction, sinus congestion, unexplained chest pain, a sensation of a bone in his throat and more.

Prior to his wife’s death, he would always update me on his medical problem du jour during his wife’s office visits. At trial, I testified that his emergency room visits had decreased from an average of almost one a year to only one in the 10 years he was my patient. This was accomplished by knowing his quirks, responding to his “urgent” phone calls, calling drugstores for his prescriptions and more or less regular office visits often scheduled by him on a same-day basis.

The malpractice complaint revolved around a series of platelet counts. Platelets are a blood component necessary for normal blood clotting. They circulate in the bloodstream and are always on-call for bleeding emergencies.

The plaintiff's attorney argued that I had “failed to inform [the plaintiff] that blood tests including mean corpuscular volume, mean corpuscular hemoglobin and platelet levels were abnormal … As a result of the malpractice of Dr. Lutz, [the plaintiff] has been placed at an increased risk of thrombosis, stroke, heart attack, leukemia, hemorrhage, myelofibrosis and other diseases and conditions.”

Discussions with the plaintiff had always been one-sided. He was obsessed with fitness and talked at length with me, my office staff and other patients in my office about his prior jogging and swimming. He would broadcast to all who could hear about his $8,000 home gym.

Over the course of several years, the plaintiff’s platelet count did indeed increase from normal to a definitely elevated level. I had previously advised him to take a daily aspirin, which is the only treatment I ever recommend for elevated platelet counts in the absence of documented complications.

After his wife’s death, the plaintiff saw an internist known by his daughter at an instant care center. He requested a Viagra prescription from her and she ordered some routine laboratory tests. His platelet count came back 757,000, which alarmed her. Instead of calling me to get his prior counts or to see what my game plan had been, she referred him to an oncologist who simply recommended what I had done – continued observation

In the meantime, the plaintiff was beside himself with Internet research. He told me that he had a relative who was a Ph.D. researcher and was looking into some sort of research treatment for him at the National Institute of Health. Meanwhile, the oncologist, no doubt attuned to his patient’s anxiety, recommended a bone marrow aspiration, which confirmed more or less what was apparent – the plaintiff had essential thrombocythemia (see Box 1).

Unlike his new instant care internist, I had followed other patients with elevated platelet counts for years. It was my practice to observe

patients and avoid painful bone marrow aspirations and specific treatment other than low-dose aspirin unless some sort of complication developed. My threshold for referring a patient to a hematologist was a platelet count of over 1 million, a number the plaintiff never approached.

I had been taught this approach decades ago but after being sued, I feared that maybe I hadn't kept up to date. I pulled out my current edition of Harrison's Principles of Internal Medicine: "Perhaps no other situation in clinical medicine has caused otherwise astute physicians to intervene inappropriately more often than thrombocytosis … It is commonly believed that a high platelet count must cause intravascular stasis and thrombosis; however, no controlled clinical study has ever established either association … the focus should be on the patient, not the platelet count …"

A wait-and-watch policy was not only within the acceptable standard of care, it appeared to be the preferred policy.

A ittle over two months after first seeing the oncologist, the plaintiff was taking anagrelide, a potent and highly promoted drug that decreases platelet count by selectively poisoning their bone marrow precursors. I wasn't surprised that the oncologist prescribed this drug. I have long been weary of the "more is better" school of some oncologists dating back to the ill-conceived high-dose chemotherapy treatment of women with breast cancer followed by "rescue" bone marrow transplants. Some treatments are obviously selected not on what's best for the patient but on what some drug company is currently pushing or a therapy that maximizes reimbursement for the oncology practice.

When there's a malpractice complaint in Louisiana, a medical review panel consisting of three physicians and an attorney chair reviews the case. In my submission to the panel, I documented my office's chart codes and how we transmit lab results to patients. Two of the three doctors on the panel voted that I "should have discussed an abnormal finding with the patient but that not discussing the result did not cause the patient any damages." The third doctor, who had not been selected by me, concluded that it was not below the standard of care for an internist to follow this patient as I did.

My attorney sent me the opinion with the bad news: "As a result of the panel opinion, plaintiff will likely file suit in the near future." Sure enough, he did.
Several months before trial his attorney offered to "settle" the case for $90,000. My attorney responded: "Please be advised that Dr. Lutz is not interested in settling this matter. I look forward to seeing you at the upcoming trial." Closer to trial the settlement offer had dropped to around $48,000.

At the trial, the plaintiff testified with great recall that I never told him his platelet count was elevated. I later testified that I had no independent recollection of any such discussion occurring years previously but that it's my usual practice to discuss such abnormalities with patients.

When cross-examined by my attorney, the plaintiff became belligerent. He yelled at my attorney. Later while I testified, he had an outburst and had to be controlled by his attorney. The next morning before the jury filed back in, the judge admonished him to keep quite or be removed him from the courtroom. He apologized profusely.
His internal medicine witness was his new primary care physician who acknowledged that she knew nothing about the standard of care for the treatment of essential thrombocythemia. The only other physician he called was his prior oncologist who came out of recent retirement to testify for a hefty fee in advance. An internist who had ruled against me in the panel proceedings was on-call to testify against me for $7,000, but his attorney decided not to call him.

My attorney called two expert witnesses on my behalf. The first was an internist who testified that it was indeed proper to monitor an increasing platelet count. The second was trained not only as an oncologist but also as a hematologist. He testified that in the absence of symptoms and unless the platelet count goes much higher, he usually recommends only low-dose aspirin for patients with essential thrombocythemia. He added that the specific drugs used to reduce elevated platelet counts are expensive, act on the bone marrow and have undesirable adverse effects.
Indeed, after beginning anagrelide, the plaintiff developed an eye problem as his platelet count had dropped. He blamed this on my delay in sending him to a specialist even though listed adverse effects for his platelet lowering drug included stroke and vision changes.

In a mere 20 minutes after the jury deliberations began, my attorney's cell phone rang to summon us back to the courthouse. There was a verdict but the jury needed another 30 minutes or so to finish their court-provided lunch.

The judge read the verdict. By a vote of 12 to zero, I was found not guilty and the plaintiff's lawsuit was dismissed. It was a sweet victory but the years and time devoted to reach this point had still taken a drain. I now understand why some physicians quit clinical practice early. Almost every physician I know who has practiced over 10 years has been sued at least once with the exception of medical school faculty who rarely provide volumes of hands-on care.

One Sunday afternoon a few weeks later, I was at a plant show Uptown and talked to one of the jurors. Once a trial is over jurors are free to discuss what happened behind previously closed jury room doors.

"The jury did not believe that that Durante had proven any damages. Your records could have been better but we didn't think you did anything wrong," said the former jury member.

“One of the women on the jury said ‘How could he have been tired? He had $8,000 worth of exercise equipment and was asking for Viagra. Those men are something else.’”

The result: My former patient played a legal pinball machine and lost, but while justice is sweet, it isn’t cheap. The plaintiff and defense expenses of the trial and the process leading up to it cost over $100,000. Because of the number and cost of such suits in Louisiana, the malpractice insurance company I had at the time stopped insuring physicians in Louisiana.

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