It has taken many years for RNs to achieve recognition as healthcare professionals possessing the exceptional skill and knowledge necessary to provide high-quality care. RNs need to be aware that the care they give and the documentation of that care may be reviewed by others from a legal perspective, and protect themselves accordingly by being as accurate and attentive as possible throughout each and every shift. Exposure to malpractice liability is an unfortunate consequence of modern-day nursing practice. An understanding of malpractice will assist nurses in identifying situations that may expose them to legal liability, and will hopefully lead to improved patient care.

Introduction

As the image of nurses is now that of highly skilled and educated professionals, the likelihood for individual nurses—including those with advanced practice credentials—to be named as defendants in malpractice lawsuits has been increasing, almost doubling between 1997 and 2005. Two-thirds of these were against non-advanced practice RNs. Malpractice litigation rates for advanced practice nurses are also climbing. Claims against nurse practitioners doubled between 2004 and 2008, and the average award has risen by 36% since 2004.

Medical malpractice is defined as the improper, unskilled, or negligent treatment by a physician, dentist, nurse, pharmacist, or other healthcare professional rendering professional services that result in injury, loss, or damage. Bariatric surgery is a unique specialty that bears significant risk on an entirely elective basis. In addition, many bariatric surgery programs offer self-pay rates due to the barriers in access to care by some insurance companies. The elective nature, coupled with the higher incidence of self-pay, can drive bariatric claims in the event of a complication. Therefore, it is critical for bariatric nurses to understand their role in providing the highest quality of care, and also their responsibilities in preventing a complication from becoming a claim.

Elements of Malpractice

Negligence is defined as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.” There are four elements of negligence that must be considered before determining whether an action will lie for negligence.

1. Duty: standard of care;
2. Breach: violation of duty of care;
3. Causation: the conduct brings actual harm to patient;
4. Damages: there must be evidence of actual injury.

Some examples of causes of harm to patients that can result in injury and determine negligence include medication errors, lack of teamwork, failed communication, practicing outside the scope of practice, incomplete or inaccurate documentation, inappropriate delegation, and lack of recognition of critical signs and symptoms. Breach of these duties is defined as failure to meet the standard of care that a “reasonably” prudent nurse would deliver. Patient injury resulting in long-term adverse effects could result from this failure, which in turn could lead to malpractice claims.

Six key areas have been identified for nursing negligence and are summarized as the failure to:

1. Follow standards of care;
2. Use equipment in a responsible manner;
3. Communicate;
4. Document;
5. Assess and monitor;
6. Act as a patient advocate.

Standards of care

Standards of conduct are based upon what the “reasonable practitioner” would do in like circumstances. It requires the practitioner to exercise the degree of skill and care that would be expected of the average qualified practitioner practicing under like circumstances. The American Nurses Association describes a standard as an “authoritative statement defined and promoted by the profession by which the quality of practice, service or education can be evaluated.” The nursing
standards of practice describe a competent level of nursing care as demonstrated by the critical thinking model known as the nursing process. The nursing process includes the components of assessment, diagnosis, outcomes identification, planning, implementation, and evaluation. Clinical pathways, such as those required by the center of excellence designation process, serve to support providing the highest level standard of care; for example, ambulating on day of surgery and utilization of sequential compression devices as the standard of care to prevent deep vein thrombosis and or pulmonary embolus.

Use of equipment

The nurse has a duty to understand the intended use of equipment and use that equipment in a responsible manner. Non-adherence to recommended procedure for maintenance puts a nurse who uses such equipment at risk in the event of an adverse outcome or patient injury. In addition, it is the duty of the nurse to seek out equipment training if there is not a comfort level for the necessary competency. Clinical equipment should be monitored and clinical competencies assessed at minimum annually to verify the safe and responsible use of equipment in clinical patient care areas.

Communication

Effective communication and teamwork are essential for the delivery of high quality, safe patient care. Communication failures are an extremely common cause of inadvertent patient harm. The complexity of medical care, coupled with the inherent limitations of human performance, make it critically important that clinicians have standardized communication tools, create an environment in which individuals can speak up and express concerns, and share common “critical language” to alert team members to unsafe situations. Communication weaknesses cause malpractice claims. There are multiple layers where unintentional weak communication causes a “cumulative communication breakdown.” A few examples are physician to staff, manager to staff, staff to staff, and manager and staff to patients and family. Communication is of the utmost importance in nursing. Nurses educate their patients about their condition and progress, communicate with the physicians about their patients’ status in order to maintain appropriate standards of care, communicate with other nurses at shift change, communicate in delegation or supervision, and communicate to other departments and facilities.

Any task delegated to unlicensed assistive personnel (UAP) or another healthcare provider must be “right” in six ways:

1. Right task: the task must be appropriately delegable for the specific patient;
2. Right person: the right employee must delegate the right task to the right person to be performed on the right patient;
3. Right time: the task must be completed at a specific time;
4. Right information: the UAP must be provided with clear, concise instructions about the task, including its goal, limitations, and expectations;
5. Right supervision: appropriate monitoring, evaluation, intervention, and feedback must be provided for the task;
6. Right follow-up: ensuring that the delegated task was done properly by following up.

Often, delegation of the simple act of obtaining vital signs can be the root of a complication leading to a claim. If a task is delegated, for example vital signs, and the licensed provider does not follow up to identify fever and tachycardia—classic signs of a leak—then there is liability exposure. It is the responsibility of the RN to evaluate the vital signs. Further, if the findings are not then communicated to the advanced practice medical provider, there could be a significant delay in the diagnosis and treatment of a leak—which is directly related to the patient’s outcome.

Documentation

Nursing documentation must be objective and comprehensive, and must accurately reflect the status of the client and what has happened to him or her. It is important to maintain comprehensive, streamlined documentation. Always document contemporaneously, never altering a medical record. Document all communications with family and other clinicians. Document all rationale for a change in medical therapy. Do not document any disagreement with the plan of care. Always use the appropriate occurrence reporting system. Provide thorough documentation when notifying the physician of a change in the patient. Additionally, document when no orders have been received. The RN has an obligation to the patient not to accept inaction from the physician. Follow the appropriate chain of command until concerns are appropriately addressed. It is better to act in the best interest of the patient and potentially avoid later facing a claim. While it is often uncomfortable to do so, preventing an adverse outcome is also in the best interest of the medical team.

Assess and monitor

The first phase of the nursing process—assessments by the nurse—must include critical thinking and adhere to hospital policy. It is important for the nurse to remain flexible to alter their schedule when the patient’s condition warrants this change, and perform an assessment as often as required.

Patient advocate

Patient advocacy is an essential component of the RN’s professional role. Three core attributes of the concept of
patient advocacy are identified: (1) safeguarding patients’ autonomy; (2) acting on behalf of patients; and (3) championing social justice in the provision of healthcare.9

Discussion

Bariatric surgery presents unique challenges given the unique nature of the procedure and the financial investment on the part of patients who may or may not have insurance benefits for the procedure and offer to pay cash. While some hospitals offer “fixed fees” to protect the patient in the event of a complication and/or offer such insurance programs against complications, there is a still a risk for financial devastation.

Consider this case scenario. A patient post Roux-en-Y gastric bypass is ready for discharge on day 3. Postoperative upper gastrointestinal (UGI) series was normal, and the patient is discharged home. The last set of vitals show a heart rate of 100 bpm, and temperature of 99.9°F. The patient is instructed to call the physician with increasing heart rate and temperature >101.5°F.

Twenty-four hours later, the patient has a fever of 102°F and heart rate of 120 bpm, and is complaining of abdominal pain. The patient is admitted through the emergency department, and a leak is discovered. The patient is taken to the ICU, where she subsequently recovers after a week-long hospital stay. This has incurred additional medical expense and has now forced her to be out of work longer than anticipated. Pathways indicate that patients should not be discharged with a temperature above 98.6°F. Is there liability in this case?

Yes—the nurse violated the standard of care by discharging the patient with a temperature greater than what is identified and documented in a pathway as the standard of care.

Yes—the nurse did not communicate the temperature to the physician to allow for the physician to make a decision regarding the appropriateness of the discharge.

These two issues would definitely be brought under review in the event of a claim, and nursing actions could actually drive judgment in favor of the patient, regardless if the nurse is named in the lawsuit or not. The decision to name the nurse would be decided by the patient and the plaintiff’s attorney.

Conclusion

There is an element of risk to nurses practicing in today’s healthcare environment, and nurses must be familiar with the potential liability and how to avoid liability associated in this environment. Managing human risks will never be 100% effective. Human fallibility can be moderated, but it cannot be eliminated.10 Lawsuits are not about bad outcomes. They are not about bad relationships. They are about expectations. When handling error, we often forget to tell the patient and family that we are sorry—not that you are sorry that you made a mistake, but that you are sorry that something bad happened to them. The single most common thing that patients and families raised when they came to the legal office was that nobody even said, “We’re sorry.”11 Medical malpractice claims continue to rise as consumers of healthcare are better informed and expectations are greater. The nurse, therefore, has a significant opportunity to remain informed of the best approach to decrease their potential liability while providing optimal safety and care. Good communication between providers and healthcare recipients in addition to quality and safety measures are essential for limiting the incidence of malpractice claims.

Disclosure Statement

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References


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