Failure to diagnose retained sponge

by Wendy Kaliszewski

Presentation and physician action
A 55-year-old woman was admitted to a hospital in New Mexico for a colostomy reversal. The surgeon attempted to perform the surgery laparoscopically due to the patient’s dense adhesions, but the surgery was converted to an open procedure. The surgery took more than 12 hours. Due to an incorrect sponge count, the surgeon ordered an x-ray at the time of closure.

The x-ray images were sent electronically to a radiologist in Texas. The radiologist could not tell with certainty from the electronic images whether or not a sponge was present on the films. As such, he called the hospital and asked to speak to someone in the operating room about the case. He was put in contact with a person (he could not recall his or her name) in the OR. This person told the radiologist the missing sponge had been found on the floor and then the person abruptly hung up the phone.

The radiologist subsequently dictated a note indicating that no lap sponge was detected on the images. The electronic images of the plain film were not definitive for the presence or absence of a sponge. The patient made poor progress following surgery.

A CT scan of the abdomen was performed one week after the surgery. The presence of a foreign body was detected within the abdomen and the patient was taken back to surgery. A retained lap sponge was removed. Following this surgery, the patient was found to have a recto-vaginal fistula. It was ultimately repaired requiring a colostomy. The patient has fully recovered.

Allegations
A lawsuit was filed against the radiologist, the hospital in New Mexico, and the surgeon who performed the colostomy reversal. The plaintiff’s attorney alleged that the radiologist and surgeon failed to recognize the presence of a retained surgical sponge. The radiologist told his defense counsel that because the sponge had been reported as found, he did not recommend a CT scan. There was no need to further investigate whether a sponge had been retained. It was also alleged that the retained sponge caused the patient to undergo additional surgery resulting in complications, prolonged hospitalization, and unnecessary pain and suffering.

This closed claim study is based on an actual malpractice claim from Texas Medical Liability Trust. This case illustrates how action or inaction on the part of the physicians led to allegations of professional liability, and how risk management techniques may have either prevented the outcome or increased the physician’s defensibility. An attempt has been made to make the material less easy to identify. If you recognize your own case, please be assured it is presented solely to emphasize the issues of the case.
Legal implications

Two radiologists — who were serving as independent consultants — reviewed the radiograph film. One of the consultants indicated that he did not see a radiopaque marker that would confirm a retained sponge. The other consultant was unable to read the copies of the electronic image.

The defendant surgeon said that he relied on the radiologist’s negative x-ray report in making his decision to close the patient. Another radiologist interpreted the film and found no evidence of a radiopaque marker; however, he identified the foreign body on the CT scan.

Risk management considerations

According to the radiologist, he made two calls to the OR and spoke with someone on the second call. The person told the radiologist that they had already found the sponge on the floor. The radiologist said that if this person had told him the sponge was still unaccounted for, he would have recommended a CT scan because the film was not definitive for the presence or absence of a sponge. Unfortunately, the radiologist did not document this conversation. Also he did not document his concern about the images or his thoughts about a CT scan. Once it was removed from the patient, the sponge was not sent to pathology and the hospital could not find the images of the CT scan that eventually identified a foreign object.

It is imperative that phone calls with staff members or physicians are thoroughly dictated in the report. Documenting these phone calls will ensure accuracy and provide increased defensibility should an adverse outcome occur. Additionally, physicians should not only document their discussion, but also who they spoke with. It would have been beneficial in this case to have the name of the OR staff member the radiologist spoke with in order to verify the conversation.

The American College of Radiology Practice Guideline for Communication of Diagnostic Imaging Findings, has created guidelines — not rules or requirements — for creating a diagnostic imaging report. Two guidelines would apply to this case:

• Clinical issues: the report should address or answer any specific clinical questions. If there are factors that prevent answering of the clinical question, this should be stated explicitly.

• Impression (conclusion or diagnosis): follow-up or additional diagnostic studies to clarify or confirm the impression should be suggested when appropriate.

The lawsuit was filed in New Mexico and was subject to the tort laws of New Mexico. The Texas radiologist was not afforded cap protection in New Mexico (as he is in Texas) unless he had paid to be listed as a “qualified provider” in New Mexico. The radiologist was not classified as such.

Disposition

Based on the documentation issues and the out-of-state venue with no cap protection, the case was settled on behalf of the radiologist.

Source


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The area of law that deals with these kinds of events is referred to as employment practices liability. Typical allegations in employment practices lawsuits include harassment, discrimination, FMLA violations, hostile work environment, and wrongful termination. Employment practices claims are not only embarrassing, but can also be expensive to defend or settle. Insurance that covers these types of claims is called employment practices liability insurance (EPLI).

The good news for TMLT policyholders is that beginning February 1, 2013, EPLI will be added to all policies at no extra charge. Policyholders will begin receiving information about this new coverage as they renew their policies.

**EPLI claim statistics**

Approximately 100,000 employment-related claims were filed through the Equal Employment Opportunity Commission (EEOC) in 2012, totaling $364 million paid to claimants (excluding awards through litigation). Approximately 30,500 discrimination claims were filed with the EEOC and Fair Employment Practices Agencies (FEPA) in 2012. ¹

Regarding the types of claims, there were three notable increases in recent years:

**Discrimination based on religion**

- 3,790 in 2010
- 4,151 in 2011
- an increase of 9%

**Retaliation**

- 36,258 in 2010
- 37,344 in 2011
- an increase of 3%

**Discrimination based on national origin**

- 11,304 in 2010
- 11,833 in 2011
- an increase of 4.6%

The cost of settlements and verdicts from employment-related claims can be huge. For example:

- In 2009, Wal-Mart settled a race bias suit for $17.5 million. ²
- In 2008, New York City paid more than $20 million to settle a racial discrimination suit filed against their Department of Parks and Recreation. ³
- In 2003, California’s public pension fund paid $250 million to settle an age discrimination suit. ⁴

**TMLT’s EPLI coverage**

Beginning February 1, 2013, all TMLT policies will include an EPLI endorsement. The endorsement covers several kinds of alleged, wrongful employment practices including:

- violation of any federal, state, local, or common law, prohibiting any kind of employment-related discrimination;
- harassment, including any type of sexual or gender harassment as well as racial, religious, sexual orientation, pregnancy, disability, age, or national origin-based harassment and including workplace harassment by non-employees;
- abusive or hostile work environment;
- wrongful discharge or termination of employment, whether actual or constructive;
- breach of an implied employment contract or promissory estoppel (an understanding based on a previous action or statement);
- breach of an actual or written employment contract as long as another wrongful employment practice is also alleged;
- wrongful failure or refusal to hire or promote, or wrongful demotion;
- wrongful failure or refusal to provide equal treatment or opportunities;
- employment termination, disciplinary action, demotion or other employment decision that violates public policy or the Family Medical Leave Act or similar state or local law;

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Liability coverage ... continued from page 3

- defamation, libel, slander, disparagement, false imprisonment, misrepresentation, malicious prosecution, or invasion of privacy;
- wrongful failure or refusal to adopt or enforce adequate workplace or employment practices, policies, or procedures;
- wrongful, excessive, or unfair discipline;
- wrongful infliction of emotional distress, mental anguish, or humiliation;
- retaliation, including retaliation for exercising protected rights, supporting in any way another’s exercise of protected rights, or threatening or actually reporting wrongful activity of an insured such as violation of any federal, state, or local “whistle blower” law;
- wrongful deprivation of career opportunity, negligent evaluation or failure to grant tenure;
- violation of the Uniformed Services Employment and Reemployment Rights Act; or
- negligent hiring or negligent supervision of others, including wrongful failure to provide adequate training, in connection with training.

Limits of liability are $50,000 per claim (including both defense costs and indemnity payments) with a $5,000 deductible. The yearly aggregate limit is also $50,000.

A claim must be reported to TMLT as soon as practicable, but no later than 60 days from the date the policyholder becomes aware of the claim. Policyholders can also report circumstances they believe might lead to a claim.

For more information about EPLI coverage visit our web site or contact your underwriter at 800-580-8658.

Sources


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