

# Reflecting on the Anatomy of a Lawsuit

Are ophthalmologists prepared for a malpractice charge?

BY ERIC D. DONNENFELD, MD

I experienced a visceral reaction of shock, disgust, and disbelief in response to the guilty verdict in the case *Mark Schiffer vs Mark G. Speaker, MD, Laser and Corneal Surgery Associates, PC, TLC Laser Eye Center, Regina Zyszkowski and Drs. Farkas, Kassalow, Resnick and Associates, PC*. Supreme Court of the State of New York, County of New York. Index No. 101191-03. As a New Yorker, ophthalmologist, and refractive surgeon, I followed the case closely.

Mark Speaker, MD, and I have traveled similar terrain during the last 20 years. Both of us were trained in ophthalmology in Manhattan, completed fellowships in corneal and refractive surgery at Wills Eye Hospital in Philadelphia, and came back to New York to train residents and fellows, write peer-reviewed articles, and practice ophthalmology as clinical specialists in corneal and refractive surgery. Dr. Speaker is one of the finest and most honorable ophthalmologists and surgeons I know, and the outrageous verdict is made more so by the character assassination promulgated by the plaintiff's attorney. This case was not of a bad or a good doctor making mistakes. This case, in my opinion, involved a good doctor incurring a bad outcome; it was not malpractice. If I had seen the patient in 2000, I would have done exactly as did Dr. Speaker. It was the realization that it could have been me that drove the verdict even closer to home.

My first reaction in response to the guilty verdict was constructive. I knew I needed to be more informed regarding the issues and controversies in this case. I obtained a copy of the transcript of the trial and read it in its entirety. I next read the *Anatomy of a Lawsuit II* series in *Cataract & Refractive Surgery Today*.<sup>1-4</sup> In my opinion, the reporting is unbiased and the representation fair and accurate. The article by Peter Kopff, Esq., Dr. Speaker's attorney, is particularly enlightening, albeit troubling. The judge in this case, Alice Schlesinger, decided not to allow important and relevant information as evidence, including the fact that Mr. Schiffer had filed a previous

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multimillion dollar lawsuit, and she decided that his psychiatric records were not admissible. My estimation of the performance of this judge in this case is very low. If you have not read the *Anatomy of a Lawsuit II* series<sup>1-4</sup> from start to finish, you must; it is required reading.

I hope other ophthalmologists are experiencing same level of discomfort with the verdict of this trial as I am. Even if you do not perform refractive surgery, realize that you could be next. We should not avoid these issues but rather should do something about them. Following is my approach to dealing with some of the matters in this case.

## GOING TO TRIAL

### Ectasia: an Ongoing Problem

Our first obligation always has and always will be to our patients. We need to be better informed about controversial issues and to disseminate information in a timely fashion. There is perhaps no issue as controversial in refractive surgery as ectasia following LASIK. Widespread disagreement continues about the risk factors for ectasia and whether or not particular individual patients are good candidates for the procedure. Although this complication is rare, recognizing risk factors to reduce and perhaps eliminate postsurgical ectasia is important for all ophthalmologists. The AAO and the ASCRS deserve applause for their timely white paper on LASIK and postoperative ectasia, which addresses many of these issues.<sup>5</sup>

**Bad Outcomes: Not Necessarily Malpractice**

A misconception of many patients and malpractice lawyers is that a bad outcome equals malpractice. Unfortunately, there will always be bad outcomes in the practice of medicine. I spend a lot of time with patients preoperatively discussing the risks of surgery, and I attempt to document these discussions. For instance, if a patient has any unusual findings such as inferior corneal steepening on topography, high myopia, or high astigmatism, I pointedly discuss with the patient the specific finding and risks, and I document this conversation in the chart. Additionally, at my facility, we have an eight-page informed consent that patients receive before surgery so they have the opportunity to review the risks at their leisure.

Finally, because I do not trust the jury system, I now have an arbitration clause in my informed consent. The arbitration agreement states that, if a patient feels I am guilty of malpractice, he has the right to present his case to an arbitration panel of trained experts rather than go to trial. I have had several patients (usually lawyers) initially refuse to sign the arbitration agreement. In such cases, I explain the issue, and, to date, no patient has refused to sign the arbitration clause; how-

ever, should a patient refuse to sign, I would not perform surgery. Several lawyers have stated that the arbitration clause may not hold up in court, but it may help avoid lawsuits.

**Expert Witnesses**

How can we be angry with the plaintiff's lawyers when in many cases our so-called colleagues are undermining our profession? I believe there are some "experts" who will testify to anything as long as they are paid their \$5,000- to \$10,000-a-day fee. I completely support testifying against physicians when malpractice has occurred. When there are large gray areas or your views are discrepant with the norm, please keep your opinion to yourself and outside of a court of law. We should not be held to today's standards in a malpractice event that took place several years ago.

The plaintiff's expert in *Schiffer vs Speaker et al*, Percy Amoils, MD, testified during the trial on cross-examination as follows:

*Question: In 1998 there was a case report of a patient in Germany that you cite as showing that people knew about post-LASIK ectasia, true?*

*Dr. Amoils: Yes.*

**SHOW ME THE MONEY: TORT REFORM IN MISSOURI**

**By John C. Hagan III, MD, FACS**

*"One of the penalties for refusing to participate in politics is that you end up being governed by your inferiors." —Plato*

The successful tort reform experience in Missouri may inspire ophthalmologists who now feel threatened or angry enough to engage belatedly in the legislative process.

For many years, we Show Me state physicians regularly took our lumps as trial lawyers, optometrists, insurance companies, and any number of other hostile special interests successfully sought to regulate, impoverish, dominate, and sue the house of medicine.

Then, a sea of change occurred.<sup>1</sup> Spurred by the crisis in malpractice insurance rates, unfair and inadequate remuneration for services, stultifying regulation, and huge, unfair jury decisions, Missouri physicians became enraged, then engaged in crafting and passing favorable laws and doing away with objectionable or harmful bills. Physicians' personal support

and financial contributions were pivotal and decisive in numerous key state elections. A record number of physicians have been elected to the legislature and are highly influential in their political parties.

In 2005, working with a consortium of insurance, business, hospital, governmental, pharmaceutical, and healthcare industry organizations, physicians passed a meaningful tort reform bill. Governor Matt Blunt signed this measure into law. We thus outfought the trial lawyers and others that wallow in the obscene profits of Missouri's tort industry. Passing insurance reform and setting fair standards for expert witness testimony are the most important physician goals of the 2006 Missouri legislative session.

Here is the short list of what is needed to pass tort reform: time and money. Ophthalmologists are frequently selfish with both. They prefer to carp in surgical lounges, at meetings, in study groups, and on the golf course. Time and

*Question: And are you saying that a single report changes the standard of care of the average physician in the United States of America?*

*Dr. Amoils: Yes.<sup>6</sup>*

In fact, there was considerable controversy on the issue of performing LASIK on patients with topographic abnormalities that continues to exist today. A case in point mentioned by Buzard et al<sup>7</sup> involved 16 eyes of patients with keratoconus who were treated with LASIK. In addition, I would argue that an ophthalmologist who does not perform or believe in LASIK cannot be an expert and should not testify in a LASIK case.

### **Avoiding Unethical Testimony**

Ophthalmologists should contact the AAO ethics committee or the state medical board regarding trial testimony. Furthermore, I believe we need a clearinghouse for expert testimony by both the plaintiff and defense so that there is someone reviewing these cases for accuracy and bias. An idea is to rotate this responsibility among committee members of the AAO or ASCRS so that experts would be responsible for reading one or two transcripts per year and reporting inaccuracies to the state medical board or the AAO ethics com-

mittee. It should not be our responsibility to deal with infractions but to recognize and perhaps publicize them as they occur.

### **Insufficient Malpractice Insurance**

The size of the verdict in this case makes it clear that surgeons need more insurance coverage. Following this case, I applied for and received an additional \$2 million in coverage for a fairly nominal cost. I have also discussed asset protection with a lawyer. In New York, I have witnessed juries treat malpractice cases as a chance to play the lottery. Although you should always consult with your attorney, regardless of the merits of your case, there are times when you should settle your case if your jury is not truly one of your peers, even if you think you did nothing wrong.

### **CONCLUSION**

As an ophthalmologist, you should contribute to organizations that support physicians, such as Ophthpac, Eyepac, and Ampac. Whether a Republican or a Democrat, as a physician, it is difficult to support a vice-presidential candidate who is a malpractice lawyer, as in the last presidential election. Support politicians who favor tort reform,

money equal power, influence, and the election/re-election of politicians. Election/re-election is the currency of the realm in the state and national capitols. You cannot assuage your conscience or buy peace of mind with a couple of hundred bucks. In the 2004 elections, our ophthalmic group raised more than \$50,000. Serious problems require serious money. Trial lawyers spent more than \$6 million in Missouri in the same 2004 elections.

Write, better yet call or meet with your state senator and representative to voice your opinion about pending legislation. Maintain this contact throughout the session. Join and support your state medical and ophthalmology associations. Become a member of the AAO, ASCRS, and AMA, and generously contribute to their Political Action Committees. These groups are not perfect, but they represent us better collectively than anything we can do as individuals. Plan on spending 1 day in your state capitol as a hall-roving physician lobbyist. It

is hard to overstate the impact you have when you meet personally with the legislators.

Educate your staff and your patients. Keep state and AMA patient education posters and pamphlets on tort reform displayed in your office. Ask your patients to contact legislators about helpful or harmful bills as they develop.

Tort reform happened in Missouri, Mississippi, and Texas. It can happen in your state, too. The biggest challenge to reward and accomplishment this 2006 legislative session is our own indifference.

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## PHYSICIAN INVOLVEMENT REAPS REWARDS: NEW TORT REFORM IN GEORGIA

By J. Trevor Woodhams, MD

Refractive surgery is becoming a new El Dorado for the tort industry. LASIK has many aspects prized by a clever plaintiff's attorney. The procedure is heavily advertised and, as such, has become widely (although incorrectly) viewed as a consumer item, even a commodity, not subject to the usual surgical reservations on liability. Also, the proof of damages from LASIK is often highly subjective, with most claims involving poor visual outcomes not particularly bad by strictly Snellen chart notation. Furthermore, LASIK's relative newness has not yet allowed generally accepted standards of patient selection to mature. The evaluation of surgical outcomes often involves complex scientific principles on which even bona fide experts are not in agreement. Additionally, there is widespread irresponsibility in the Medical expert witness field whereby the statement of unscientific opinion and even frank "opinions for sale or rent" have proliferated with no accountability. Lastly, huge payouts make the filing of even far-fetched claims a worthwhile long shot.

### NEW TORT REFORM

During February 2005, Georgia's legislative body passed SB3, or "common-sense tort reform," which was signed into law by the first Republican governor the state had elected since Reconstruction. This tort reform measure was a result of more than 10 years of uphill lobbying and educational efforts, and much of its success may be attributed to physicians finally "getting serious" about joining in the legislative process. The physicians' involvement consisted of an unprecedented degree of direct communication with legislators who were patients, visits to the State Capitol to

meet with district senators and representatives, donated funds to Medical Society lobbying groups, and, yes, even demonstrations filmed for the evening news. The bill's passage was even more remarkable, because the proposed legislation was the subject of a barrage of emotionally laden attack ads, televised stories, and negative newspaper editorials promoted or underwritten by trial lawyers' organizations and their pet "consumer protection activists."

The new law provides numerous areas of relief from the medical liability explosion that drove Georgia's largest insurer, St. Paul, out of the business entirely several years ago. The most highly publicized issue was a cap on non-economic damages of \$350,000 per negligent physician and \$700,000 per facility (eg, hospital) with a maximum total of \$1.05 million. There were, of course, no caps placed on actual financial losses directly attributed to a medically negligent incident, including medical bills, lost wages, and future rehabilitation or corrective treatment. It is hoped that this new tort reform will put a brake on the rush for "jackpot justice" (such as may have occurred in the infamous Arizona and New York LASIK cases) whereby actual financial losses can be grossly exceeded by claims for "pain and suffering" and punitive damages.

A second welcome area was the elimination of "joint and several liability" known in jocular legalese as *deep pockets*. By this legal mechanism, a plaintiff can collect multiple times on a full or partial assessment of damages from multiple defendants to a claim, even if a particular defendant were only tangentially involved.

Perhaps more relevant to refractive surgeons, however, was a tightening on expert witness testimony. The new law requires that

write letters, make it an issue, and educate your patients. If possible, attend Advocacy Day in Washington, DC, with the AAO. Get to know your legislators personally; they may not agree with you, but they will respect you. Vote against judges who preside over medical malpractice cases and whose actions are negligent and/or improper, and educate others to do the same. Hold political parties that nominate such judges accountable for their actions by writing to them, withdrawing your support for them, and/or voting their candidates out of office. If you suspect

unethical, biased, or negligent actions by the judge, contact advocacy agencies to see what legal avenues are available to discipline that judge. Be aggressive. Finally, be proactive in selecting your defense attorney. I actually have worked with Mr. Kopff, and he is one of the finest attorneys I have ever met. You must exercise the same care you would in choosing an attorney to defend you as you would in choosing a physician to treat you for a serious illness. In all cases, it is imperative that you select someone who will best represent your interests.

an affidavit by an expert attesting to "deviation from the standard of care" be filed along with the complaint itself. This change is significant in that plaintiff's attorneys previously had 45 days (along with endless extensions) to evaluate the merits of the case once filed, long beyond any statute of limitations had expired. It also allows the defendant to challenge the sufficiency of the affidavit at any time before the completion of the discovery process rather than only with the Answer. Hopefully, this should add some measure of protection to the actual enforcement of the principle of a statute of limitations. The statute has been widely flouted through the absence of any mechanisms for screening a complaint's validity at the time of filing.

Furthermore, Georgia State Court judges can now serve as gatekeepers during trials; they may evaluate and disallow dubious testimony (junk science) before it is presented to a jury and even reject questionable experts entirely (as is currently the case in Federal Court). The representation of debatable opinion as scientific fact is in my opinion the one area that has caused the greatest amount of legal mischief for LASIK providers. As things currently stand, to activate the tort process' trial lawyers may use semi-anonymous ophthalmologists of highly variable experience and reputation. There is absolutely no practical mechanism of accountability for dubious or even patently false statements in signed affidavits.

Another promising aspect of the legislation is a tentative first step toward the Holy Grail of tort reform: the standard of the "loser pays." According to this principle (in place in some form or another in other countries of the world), a plaintiff can be held

accountable for the costs incurred by defendants upon the failure or abandonment of a plaintiff's case. This principle can also include the rejection of reasonable offers of settlement (as determined by a later jury verdict). Although far from what is needed to truly discourage frivolous lawsuits, "shoot the moon" claims of excessive damage amounts, or "shoot now, ask questions later" filing, the new statute may avert protracted litigation and avoid a jury trial. Specifically, the statute penalizes a rejected offer of settlement made at least 30 days prior to a trial if the award at the trial is not at least 125% of the offer. Defendants are allowed to recover attorneys' fees and costs (unfortunately, this applies to only those attorney's fees incurred after the offer).

## CONCLUSION

It is still too early to tell if the new statute will discourage weak and/or speculative claims or affect actual malpractice insurance rates in Georgia. Moreover, it would be wishful thinking to assume that trial attorneys are not now actively seeking to overturn or at least undermine the law in whole or in part. One provision of the bill sensibly stipulates that, should any single aspect be found unconstitutional, the entire statute would not be invalidated. Still, this limited victory for tort reform should encourage even the most cynical physicians in other high-risk states to take up the struggle or redouble their efforts.

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The Anatomy of a Lawsuit II series did a great job of showing us the problems with the system as it exists today. Improving upon the system is up to us. ■

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