

Malpractice in Telehealth

May 6, 2021

Washington State Telehealth Collaborative

Adam Romney

Percentage of Total Visits Delivered by Telehealth

Patient's Age	Pre-COVID-19 (Jan. 1, 2020 – Mar. 17, 2020)	COVID-19 (Mar. 18, 2020 – June 16, 2020)
0-19	0.6%	35.1%
20-29	1.7%	38.6%
30-39	2.3%	38.7%
40-49	1.6%	34.7%
50-50	0.9%	30.2%
60-64	0.5%	28.4%
65+	0.1%	23.7%

“Variation in Telemedicine Use and Outpatient Care During the COVID-19 Pandemic in the United States” by Sadiq Y. Patel, Ateev Mehrotra, Haiden A. Huskamp, Lori Uscher-Pines, Ishani Ganguli, and Michael Lawrence Barnett, published in Health Affairs, Vol. 40, No. 2, February 2021

Overview

- Malpractice claims remain uncommon in telehealth
- Very few claims have resulted in trials and judicial decisions
- When claims arise, they tend to be related to missed diagnoses
- More cases involving more issues are likely to come
- Case examples

Data on Malpractice Claims in Telehealth

- In a 2019 survey published in JAMA, no reported cases of medical malpractice relating to direct-to-consumer telemedicine were found
 - Because of low risk and low acuity?
 - Because patients are advised to seek in-person care when telehealth care doesn't suffice?
 - Not attractive for litigation due to low dollar value

Journal of American Medical Association, April 2, 2019, Volume 321, Number 13, Research Letter, "Reported Cases of Medical Malpractice in Direct-to-Consumer Telemedicine"

RCW 7.70.30 – Actions for Injuries Resulting from Health Care

- A plaintiff must prove:
 - The health care provider **failed to exercise that degree of care**, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances
 - Such failure was a **proximate cause** of the injury complained of
- There are no published cases in Washington citing to RCW 7.70
 - i.e., there are no published telehealth malpractice cases in Washington

Missed Diagnoses

- When claims arise, they tend to be related to missed diagnoses
 - CRICO, a malpractice carrier in Boston, reported that 66% of telehealth-related malpractice claims between 2014-2018 pertained to missed diagnoses*
 - Not identifying a diagnosis that should have been identified
 - Not performing an evaluation that should have been performed based on the information provided by the patient
- The Doctors Company: Report on missed diagnosis claims by specialty
 - 25% cancer, 20% stroke, 20% infection, 10% orthopedic and 25% uncategorized
 - TDC recommends acknowledgement form if patients refuse to direct to in-person care

Christophe Archambault, Uptick in Telehealth Reveals Medical Malpractice Concerns, Bloomberg Law (Sept. 29, 2020), available at <https://news.bloomberglaw.com/health-law-and-business/uptick-in-telehealth-reveals-medical-malpractice-concerns>. The report was not publicly available, however, CRICO had an interview with a physician who confirmed these findings. Telemedicine in the COVID-19 Era, available at <https://www.rm.f.harvard.edu/Clinician-Resources/Podcast/2020/Telemedicine-in-the-COVID19-Era>.

Other Malpractice Issues

- Insufficient information
 - Does the telehealth modality provide the physician with the information needed to make a diagnosis or treatment decisions
 - If a physician maneuver or specialized equipment is needed, use of telehealth as a substitute can create exposure
 - Poor integration with PCP, health system offering service, patient history, etc.
- Authentication
 - Making sure the patient is the patient and the doctor is the doctor
 - Where is the patient and where is the doctor

Other Malpractice Issues

- Internet Prescribing
 - No interaction with a physician
 - Over-prescribing
 - Counter indications, lack of sufficient medical history
- Consent
 - Are generally applicable consent elements being met?
 - Telehealth specific consent?
- Privacy and data
 - HIPAA rules not waived, but civil claims still possible
 - Accuracy of data

Licensure: *Frazier v. Univ. of Miss. Med. Ctr.*, 2018 **U.S. Dist. LEXIS 182205 (S.D. Miss. Oct. 24, 2018)**

- The parents asserted a medical malpractice claim on behalf of their child against the treating providers based partially on the fact that the nurses administered medication and other care that was prescribed by a physician in another state. *Id.* at *14.
- The nurses in the patient’s home state of Mississippi accepted a prescription from a provider in Louisiana even though the Mississippi state law prohibited a physician from engaging in medicine across state lines using electronic communications. *Id.* at *16-*17.
- The plaintiffs argued that by accepting the prescription from the nurses in Louisiana, the providers “permitted, aided, or abetted an unlicensed person to perform activities requiring a license.” *Id.* (Citing Miss. Code R. 30-28-2820:1.2(D), (J), (U)).
- The defendants moved to dismiss the case, but the court held that the plaintiff could continue the case based on the allegations that the providers in Mississippi could not administer prescriptions issued by a physician who was not licensed in the state. *Id.* at *22.

Standard of Care: *White v. Harris*, 36 A.3d 203 (Vt. 2011)

- The parents of the decedent brought a medical malpractice action against the corporation that employed a psychiatrist who provided telehealth services to their child.
- The child consulted with the psychiatrist using telepsychiatry and later died by suicide.
- Although the court did not determine the corporation's ultimate liability, it held that the 90-minute session established a doctor-patient relationship.
- The court also indicated that the standard of care was the same regardless of the fact that the care was provided using telehealth.
- The court stated, "defendant's doctor assumed a duty to act in a manner consistent with the applicable standard of care as to not harm the decedent through the consultation services provided."

State Telehealth Rules: *Low Cost Pharm., Inc. v. Ariz. State Bd. Of Pharm.*, 2008 Ariz. App. Unpub. LEXIS 790 (Ariz. Ct. App. May 20, 2008)

- Low Cost Pharmacy was penalized by the State Board of Pharmacy after dispensing based on prescriptions from licensed physicians who did not conduct an in-person exam. *Id.* at *2-*3.
- The physicians would review patients' information and could follow up with patients over the phone or online before prescribing. *Id.* at *2.
- Low Cost Pharmacy brought a case arguing that the state regulations that required an in-person exam before medications were prescribed were unconstitutionally vague. *Id.* at *8.
- The court, however, held that the regulations were valid and upheld the Board's decision. *Id.* at *32-*33.
- Although this case is not a medical malpractice case, it appears in multiple articles as a leading telemedicine case and suggests that physicians should review state laws before prescribing medications without an in-person examination.

Key Questions

- Is this the right way to see this patient?
- When is it appropriate to cut a telehealth visit short and advise the patient to seek in-person care?
- Do providers have policies and protocols to help guide practitioners on these questions?
- Does our malpractice policy cover this visit?
- What is the standard of care for our location, specialization, services, etc.?