

REFRACTIVE SURGERY

Steer Clear of LASIK Lawsuits

BY LORI BAKER SCHENA, CONTRIBUTING WRITER

These days, it is difficult to pick up a newspaper without hearing about another patient filing a LASIK malpractice suit. While some ophthalmologists attribute the rise in lawsuits simply to an increase in the number of procedures performed, others point to problems with informed consent, comanagement, aggressive marketing and aggressive trial attorneys, some of whom “specialize” in refractive surgery.

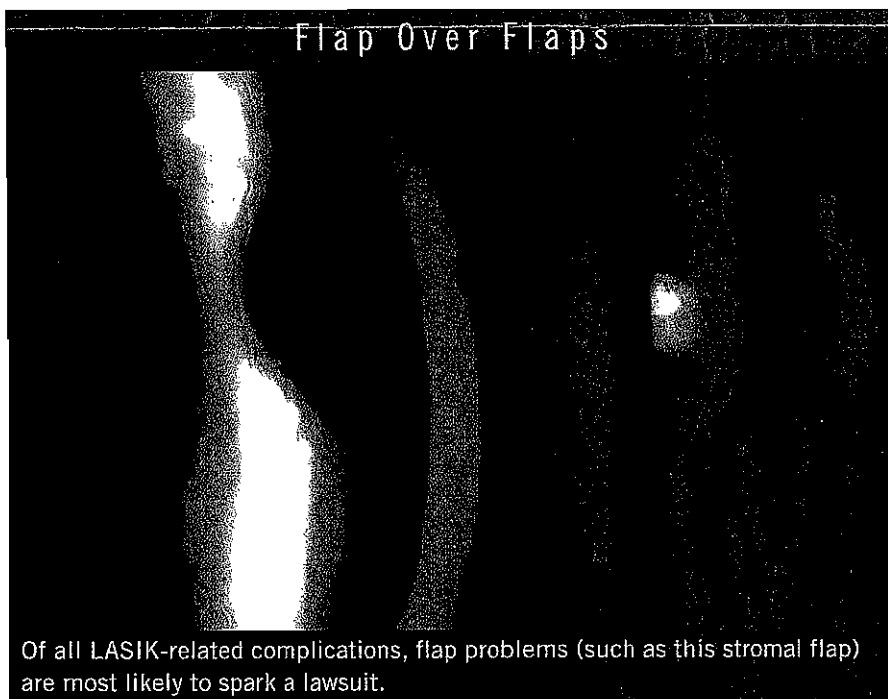
The good news is that most cases never make it to trial. The bad news? Even one claim, win or lose, can be psychologically devastating to a clinician. Fortunately, there are many steps physicians can take to lower their risk of being named in a claim or lawsuit.

Scope of the Trend

Paul Weber, JD, vice president of legal and risk management at the Ophthalmic Mutual Insurance Company (OMIC), offered some statistics about the prevalence of LASIK claims and lawsuits. An estimated 1.5 million LASIK procedures are performed annually. Additionally, 40 percent of the more than 3,000 ophthalmologists insured by OMIC perform LASIK.

Since 1998, OMIC insureds have been involved in approximately 140 LASIK claims and lawsuits. As of July 2003, the largest LASIK indemnity payment was over \$400,000, which was settled this year. The largest payment before that for OMIC had been \$118,000, which occurred in 2001, Mr. Weber said.

“Overall, our LASIK payment aver-



ages around \$51,000. The average indemnity payment on all OMIC cases is approximately \$131,000. We only settle about 23 percent of all the claims and lawsuits. About 92 percent of cases do not go to jury trial, and of those that end up in a courtroom, a good 80 percent of the juries render a verdict for the defendant ophthalmologist,” said Mr. Weber.

Lawsuit Risk Factors

Richard L. Abbott, MD, professor of ophthalmology at the University of California, San Francisco, serves as chairman of the underwriting committee for OMIC. He recently completed a study analyzing 100 consecutive lawsuits

involving LASIK and PRK to determine whether there are specific factors that put ophthalmologists at risk for being sued.¹ “It appears the biggest problem is fairly aggressive marketing, which results in patients having very high expectations of surgery,” Dr. Abbott said. “If they don’t understand the risks and the reality of what their vision may eventually be, and if they get angry and upset enough, they will sue. Interestingly, in LASIK cases, the lawsuit is often filed quite rapidly following surgery because the expectations are so high.”

Another problem is inadequate informed consent. Comanagement issues are challenging as well. “If the patient sees the optometrist prior to

surgery and does not interact with the ophthalmologist before the day of surgery, the discussion about risks, complications and benefits may not be adequate," he said. "If there is a good outcome, there is rarely a legal problem. But if there is an unexpected outcome, the surgeon hasn't established a relationship with the patient or the problem cannot be fixed easily, that patient may seek legal help and the lawyers will examine the informed consent process."

What Can Go Wrong

Steven E. Wilson, MD, director of corneal research at the Cole Eye Institute, Cleveland Clinic, cowrote a peer-reviewed article on LASIK complications and their etiology, prevention and treatment.²

"I would say that flap complications are the No. 1 problem associated with LASIK [that are linked to lawsuits], even though other mild complications, like transient dry eye, are more common," Dr. Wilson pointed out. "This includes partial flaps, buttonhole flaps and thick flaps where the eye develops ectasia. Another common issue is whether the patient was an appropriate candidate in the first place—for instance, were the pupils too big for the level of correction and the ablation zone used? Glare and halos are common and can be from aberrations from the surgery."

As for dry eye, said Dr. Wilson, "there has never been a study that proves LASIK produces chronic dry eye. Some patients have low-grade underlying problems that don't get picked up at the preoperative exam because they are so subtle. The dry eye gets worse over time, even without surgery. But people sue because they link the dry eye to the surgery. In other instances, the dry eye is a transient condition that clears up in six to nine months."

Creative Claims

Because it is often difficult to prove clinical negligence in a LASIK lawsuit case, some plaintiffs and their attorneys are turning to creative claims to obtain damages. Greg Werre, JD, of Bonne, Bridges, Mueller, O'Keefe & Nichols in Los Angeles, has specialized in the medical malpractice defense of oph-

thalmologists since 1990. One case he tried about a year ago took a unique approach to the LASIK malpractice suit.

"Not only did the plaintiff claim professional negligence, but the attorney also claimed a violation of the California Consumers Legal Remedies Act. The plaintiff contended that the doctor as well as the laser center had deceptively provided information to the plaintiff in order to acquire the patient's consent for surgery," Mr. Werre noted. "This creative claim provided a vehicle enhancing the plaintiff's opportunity to claim punitive damages."

The case was tried for three weeks, and the jury found that the defendant was not negligent in the care and treatment provided, and that there was no violation by the doctor or the laser center.

Seven Steps to Take

Ophthalmologists can take several steps to protect themselves from lawsuits. Dr. Abbott recommended the following:

1. Always put the patient's interests first. If you have a patient with a complication or an unexpected outcome, pay attention to that patient and refer him or her appropriately. This will help minimize the risk of a patient filing a suit.

2. Understand basic risk management. This involves documenting everything in the medical record, including discussions and the fact that a thorough informed consent took place.

3. Create a strong informed consent document. Be sure your patients understand that LASIK is an invasive, surgical procedure that carries risk, and that complications may occur even in the best of hands.

Greg Tiemeier, JD, of Tiemeier and Hensen, PC, a Denver firm that specializes in complex litigation and medical malpractice, provided additional tips:

4. Don't offer guarantees. "If the LASIK surgery doesn't work, even if it is guaranteed, the money that is returned doesn't make patients happy," Mr. Tiemeier said. Guarantees also raise expectations on the predictability of the surgery, which is unrealistic.

5. Call it what it is—surgery. "By calling LASIK a procedure, you actually turn the surgery into a commodity.

Offering coupons, deep discounts or two-for-one deals creates a false sense of security that this is a procedure without risks. Help patients understand that things can go wrong."

6. Pay attention to unusual complaints.

"I see this in high-volume practices. A person comes in and there is something wrong, but the problem is either ignored or given routine treatment. Don't try to fit a square peg in a round hole for patients with unusual problems. Pay attention to them."

7. Don't blame patients. "Don't blame bad results on patients," Mr. Tiemeier said. "Treat patients instead with kindness and concern. And remember communication is vital."

It Takes a Toll

Lawsuits take a toll, even when the ophthalmologist wins the case. Dr. Abbott remarked, "These lawsuits have an enormous impact on ophthalmologists. When a doctor is involved in a lawsuit, it is devastating and it totally consumes them. Even if the lawsuit is frivolous and thrown away, just the fact that a claim or lawsuit is filed implies a challenge to their abilities as a doctor."

1 To be presented during a keynote address at the Refractive Surgery Subspecialty Day meeting, Friday, Nov. 14, at 1:40 p.m.

2 Ambrosio, R. Jr. and S. E. Wilson. *J Refract Surg*, 2001;17:350-379.

Key Resource

Chances are good most ophthalmologists may face a claim or lawsuit. According to Dr. Abbott, statistics hold that "if you practice for 35 years, you have a 95 percent chance of having a lawsuit or claim filed against you. However, on the plus side, less than 50 percent of those who get sued will have any indemnity paid by the malpractice carrier."

Mr. Weber encouraged physicians who may be worried about a potential suit to call OMIC early. OMIC insureds are encouraged to contact Anne Menke, RN, PhD, at 800-562-6642, ext. 55, with questions or concerns.