



ANATOMY OF A MEDICAL MALPRACTICE LAWSUIT

Notice from Plaintiff Attorney



Attorney may request to meet with physician



Attorney may request medical records



Attorney may send a legal notice of “Intent to Sue”



These may (or may not) be a “lawsuit”

If Contacted by a Plaintiff Attorney

Do Not Discuss It

Keep all information confidential until you have representation

Refer Caller to Risk Management

If your hospital has a Office of Risk Management, refer all calls to the Risk Manager

Call Malpractice Carrier

If you carry your own malpractice insurance, call your malpractice insurance carrier immediately

Initiating the Lawsuit

The Complaint

Identifies Plaintiff
Usually Patient / Family

Identifies Defendant
MD / RN / Hospital

Short and plain statement of facts that
form basis of claim against Defendant

List of Causes of Action

Causes of Action



Causes of Action

Wrongful death

Loss of a Chance

Promise to cure

Battery &
Assault

Abandonment

Breach of
confidentiality

*Respondeat
superior*

Negligent
referral

False
imprisonment

Defamation

Failure to warn

Negligent
infliction of
emotional
distress

Failure to report

Altered medical
records

Fraud &
Misrepresentation

*Res Ipsa
Loquitur*

Res Ipsa Loquitur

“The thing speaks for itself”

Requires Three conditions:

- ❖ Injury could not have occurred without negligent act
- ❖ Defendant had direct control over cause of injury
- ❖ Patient did not and could not contribute to the injury

Malpractice vs. Negligence

Malpractice

Professional misconduct or demonstration of an unreasonable lack of skill with the result of injury, loss, or damage to the patient

Negligence

Unintentional action that occurs when a person performs or fails to perform an action that a reasonable person would or would not have committed in a similar situation

Negligence

Malfeasance

Performing a wrong or illegal act

Misfeasance

Improperly performing an otherwise proper or lawful act

Nonfeasance

Failure to perform a necessary action



Duty

Dereliction

Direct or proximate cause

Damages

Negligence Requires the Four Ds



First Element of Negligence

DUTY

Plaintiff must prove there was a doctor-patient relationship

Doctor-Patient relationship establishes the legal duty to conform to a standard of conduct



Second Element of Negligence

DERELICTIO N

Provider failed to conform to the relevant
Standard of Care

- Standard of Care:
What a reasonable person would have done under the same or similar circumstances
- The applicable standard of care is provided by the testimony of experts
- But NO NEGLIGENCE if:
 - ✓ Patient recognized & accepts risks
 - ✓ There is no requirement of a perfect result



Third Element of Negligence

DIRECT OR PROXIMATE CAUSE



Cause in Fact – Plaintiff must prove defendant’s negligence caused the injury



Proximate Cause - There exists a reasonably close connection between the defendant’s conduct and the patient’s injury



Fourth Element of Negligence

DAMAGES

Compensatory Damages

Economic Damages
Non-Economic Damages

Punitive Damages

Punish defendant
Exemplary



Fourth Element of Negligence

OTHER DAMAGES

Hedonic Damages

“Loss of enjoyment of life”

Nominal Damages

Token payment awarded by court

Attorney Fees

Usually awarded to prevailing party

Court Costs

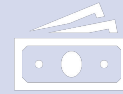
Usually awarded to prevailing party



California Medical Injury Compensation Reform Act



Unlimited economic damage compensation



Non-economic damages capped at \$250,000



Model for legislative reform at state level



Premiums in California rose much slower

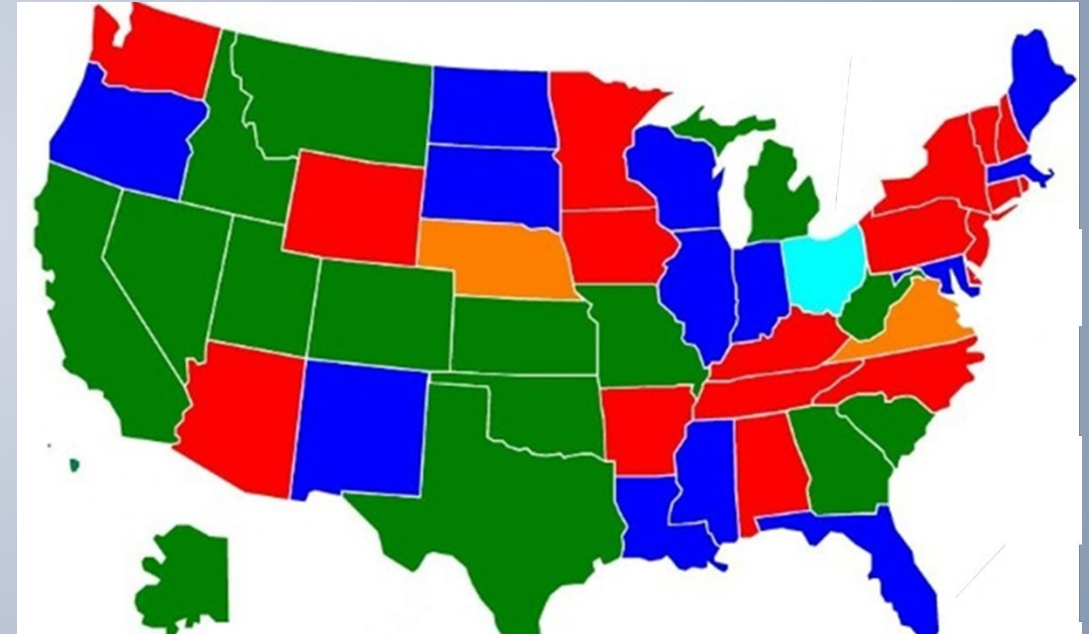
Non-Economic Caps in United States

Red: No Cap

Green: \$250,000 to \$400,000

**Blue: \$500,000 to
\$1,000,000**

Orange: \$1,000,000 or more





DEFENSES

Affirmative Defenses

Denial

Assumption of risk

Contributory negligence

Comparative negligence

Statute of limitations

Res Judicata



DEFENSES

Denial

Most common defense

Plaintiff must prove all elements of wrongful or negligent act

Usually requires testimony of expert witness

Jury determines if Defendant caused injury and is liable



DEFENSES

Assumption of Risk

Plaintiff understood risk involved

Plaintiff chose to accept risk

No recovery if plaintiff voluntarily
accepted risk

Signed document shows patient
authorized procedure, understood
risks, & consented to treatment



DEFENSES

Contributory Negligence

Plaintiff's conduct contributed to injury

Complete bar to recovery of damages

Plaintiff will receive no monetary damages



DEFENSES

Comparative Negligence

Like contributory negligence

Plaintiff's own negligence helped cause the injury

Not a complete bar to recovery

Allows Plaintiff to recover damages based on proportion of Defendant's fault



DEFENSES

Statute of Limitations

Plaintiff loses right to sue if lawsuit not filed by deadline (2-6 yrs)

Discovery Rule – extends S of L until plaintiff actually or *reasonably should have* discovered injury

Statute of Repose – an absolute deadline (e.g., ten years) after which lawsuit cannot be filed

Statute of Limitations may be different for minors



DEFENSES

Res Judicata

“The thing has been decided by judgment”

Once the Court decides a case, Plaintiff cannot bring new lawsuit on same subject



DISCOVERY

Peer Review Documents

Not discoverable in most states

Protected by state statute so protection may vary

Court may order “in camera” examination of documents (rare)

Exception: Voluntary disclosure by third party



DISCOVERY

Medical Records

Medical records are discoverable

General rule: Do not alter medical records

May correct mistake in record but label “Addendum”, sign, date; do not change original text

Metadata of electronic medical records (“EMR”) are discoverable



DISCOVERY

Expert Witness

Participate with the selection process

Choose truly independent expert - no friend/relative, regular contact

Choose expert with quality credentials

Choose an expert with medicolegal experience

Expert should be contacted only by defense attorney



DISCOVERY

Testimony

Vitally important – prepare thoroughly

Meet with defense attorney

Read before and after deposition

Mentally prepare for deposition testimony

Dress and demeanor are important



ALTERNATIVE DISPUTE RESOLUTION

Method other than court trial to settle dispute

Arbitration – settling dispute without a judge; decision is binding

Mediation – Opinion of third party for non-binding decision



SETTLEMENT

Authority to settle often lies with the Defendant

Differs from typical lawsuits where insurer has final settlement authority

Settlement reported to National Practitioner Databank

TRIAL



Preponderance of the Evidence

One side must demonstrate a greater weight of evidence than the other side





TRIAL

Possible Outcomes

Voluntary dismissal by Plaintiff

Dismissal by judge with prejudice

Summary judgment motion granted

Settlement (ADR)

Trial and jury verdict

Appeal by Plaintiff or Defendant



Golden Rules

- Prevention is better than the best outcome
- Relate well to your patients
- Keep good medical records
- Document informed consent discussions
- Don't trust patients to follow through on referrals
- Track test results (tickler system)
- Chart when ordering medications



Golden Rules

- Avoid diagnosing on the telephone
- Never “fix” medical records (“spoliation”)
- Spend sufficient time with patients
- Listen carefully to patient/family concerns
- Explain honestly but carefully after an adverse event
- Care deeply whether patients like you as their doctor

