MEDMAL

A GENERAL OVERVIEW ON PA MEDICAL MALPRACTICE

AKA HOW NOT TO LOSE SLEEP, LOSE PATIENTS, YOUR JOB, YOUR CAREER, YOUR PARTNER, YOUR HOME, OR ANYTHING ELSE YOU HOLD DEAR THROUGH KNOWLEDGE, COMMON SENSE, GOOD RECORD KEEPING, FOLLOWING RULES, STAYING UP TO DATE ON MEDICAL ALGORITHMS,PAPERWORK AND REGULATIONS…

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MEDICAL MALPRACTICE IS MOSTLY NEGLIGENCE

"Conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." Restatement (Second) of Torts s/s 282 (1965)

- 1. Duty of care to another
- 2. Breach of that duty
- 3. The breach of that duty is the proximate cause of a compensable injury
- 4. That there are compensable damages or injuries

Burden on plaintiff to establish each element of the negligence action by a preponderance of the evidence…

STANDARD OF CARE

A reasonable practitioner should "exercise that degree of skill and care that would be expected of the average qualified practitioner practicing under like circumstances…"

Failure to meet the standard of care is the heart of most medical malpractice causes of action.

What is the standard of care? What is the locality rule?

Who decides if the standard of care has been met? Is the standard of care the same for generalists as specialists?

And my favorite question:

IS THE STANDARD OF CARE THE SAME AS THAT FOR PHYSICIANS AS IT IS FOR PHYSICIAN ASSISTANTS?

TEXTBOOKS TREATISES ALGORITHMS AND EXPERTS

- The standard of care (SOC) is generally beyond the scope of understanding for most lay personnel. Whether it be trial by jury or judge, they are in no position to determine if a CT should have been done on that hard belly or demented LOLs head. They rely on "scientific evidence" to determine whether the SOC has been met.
- Textbooks etc. become outdated and cannot defend themselves or answer questions. Better to get the author on the stand as an expert witness. (your side, of course)…
- For every treatise saying fibromyalgia is just somatization or depression, I can find another that counters with true soft tissue or endocrine dysfunction not related to mental health issues. Even if you have 80 and I have 20, I may fall under "respectable minority" protections. Often used with experimental or "unapproved use" of meds, etc.
- May include pharmaceutical package inserts, etc. Can be called "hearsay".
- Cook Book Medicine can potentially be discounted as well, as in show me your algorithm and I'll show you mine. While they also cannot defend themselves or explain beyond the printed boxes, **BUT:**
- Commonly accepted algorithms are gaining stature, especially very well widely utilized ones such as ACLS or HEART score calculations etc. IF everyone knows and does it, unlike what Mom taught, you probably should too…Conventional wisdom, and generally accepted medical practice are the legal buzz words. "Evidence based practice", "Practice Guidelines", etc, are the medical equivalent buzz works and what is most likely going to be used to prove that the SOC has or has not been met.

Evidence Based Guidelines:

While cook book medicine can potentially be discounted as well (show me your algorithm and I'll show you mine), **BUT:**

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"Evidence based practice", "Practice Guidelines", etc, are the medical equivalent buzz works and what is most likely going to be used to prove that the SOC has or has not been met.

An expert will be needed to explain these guidelines or algorithms, but they hold much weight with judges and juries, and explaining the nuances of medical decision making may not hold as much weight to the less medically astute who will be making the decision over whether the SOC was met….

SO YOU THINK YOU'RE AN EXPERT….

- If you wrote the book, and the treatise and the algorithm and likely have more degrees than a compass, preferably from an Ivy league school or 3, and have testified in double digit courtrooms and logged a jillion frequent flier miles testifying because you specialize in uber-preemie neonatal ICU care in a large city hospital for the last 3 decades on the East Coast, you are probably going to pass muster as an expert. If the judge agrees. And if the case is about a 24.5 wk lung damaged infant delivered in a large city hospital in New England. Seriously. Even she may not pass muster. Or agree to testify for you. And she may not be qualified at all….
- We are talking about a level of expert that must impress a jury, and mega publications, titles, degrees and experience must all be as impressive as possible, for the defense as well as the plaintiff patient. And they must be believable, be able to translate complex medical care into layman's understanding, suffer hostile cross questioning with grace and poise, not sweat, stumble, mumble or fidget, be elitist or condescending, have a completely open schedule to accommodate constant deposition and trial rescheduling, and if testifying for the plaintiff, to suffer the potential ostracization of ones medical peers…

STILL WANT TO BE AN EXPERT? BACK TO NUMBERS

- Colorado COPEC study (private Co. insurers) 2002-2009 (covers ¾ MDs and 2/3 CO. PAs)
- 34 claims against PAs (14 (41%) claims PC/EM/UCC, 50% out pt setting)
- 7/34 never progressed to malpractice suits
- 20/34 were dismissed/not pursued
- 11/34 settled before trial
- 2 are still open
- 1 went to trial….(and was successfully defended! Yeah us!)

SO not much expert opportunity, but those numbers make me sleep better at night, you?

CITATIONS:

- Cox v M.A. Primary and Urgent Care 313 S.W. 3d 240 (Tenn.2010)
- Bradford v Alexander886 S.W>2nd394,397 (Tex.Ct.App.1994)
- Paris v Kreitz 331 S.E.2d 234,247 (N.C.Ct.App.1985)
- Johnson v Westfield, Mem'l Hosp.Inc.,710N.Y.S.2d 862,863 (N.Y.Sup.Ct.2000)
- Phillip v McReady 298S.W. 3d 682-89 (Tex.Ct.App,2009)
- Wilson v James WL 1107787 (Del.Super.) Feb.2010

COX V M.A. PRIMARY AND URGENT CARE (WL230242, JAN 2009)

At the state level, there are 3 Courts, (nomenclature changes state to state but Tennessee uses:)

- **Trial Court** " granted the defendant motion for summary judgement as plaintiff had failed to establish that the PA defendant violated the professional standard of care (SOC) applicable to a PA…
- **Court of Appeals**: reversed holding that the SOC applicable to PA's is the same that is applicable to physicians…
- **Supreme Court**: reversed Ct of Appeals holding that the SOC applicable to PA's is DISTINCT from that applicable to physicians… and therefore the Trial Court's summary judgement in favor of the PA is reinstated…

CASE DISMISSED! PARTY! (but what about the medicine? What was the case? What was missed ?What about the patient? What happened here?)

SOC:

- The vast if not all of medical malpractice cases require proof of negligence that is secured through expert testimony. Lay jurors and judges are not able to determine the SOC or whether is has been "breached" or violated, this requires testimony from expert witnesses. As the burden of proof lays with the plaintiff patient, it is their responsibility to locate an appropriate expert to testify that the SOC had not been met. If the expert does not meet the criteria laid out by the court to be an expert, the case may not proceed and will be dismissed in favor of the PA defendant.
- In Cox, the expert testimony lay solely in the hands of the treating cardiologist. Even more interesting, the cardiologist MD testified that the supervising physician of the PA did meet the SOC, but the PA did not…The sup MD never saw the pt…

OTHER THAN NEGLIGENCE CLAIMS: INTENTIONAL TORTS

- Informed consent, Pt must agree to the procedure and be adequately informed prior, going beyond scope of consent is also battery
- A battery occurs when someone is subjected to "non-consensual" touching that is harmful or offensive, whereas assault is an individual is placed in a position where they are in reasonable fear of non-consensual touching which is harmful or offensive.
- Assault and Battery cases. Mattocks v. Bell (D.C.App.1963) aka finger v cheek

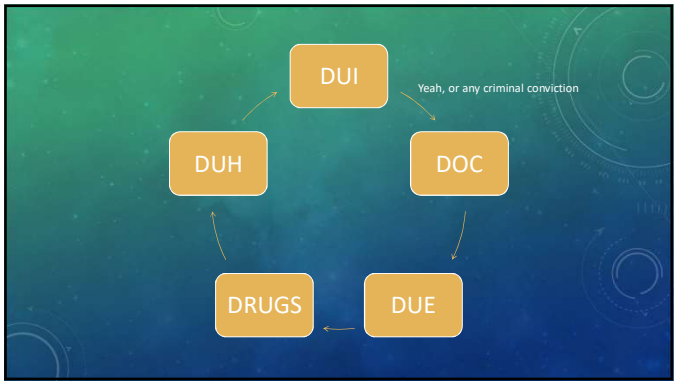
SEX AND PATIENTS

- Just don't. And your malpractice insurance is not going to cover any claim, via negligence or intentional tort, and even possibly a criminal action.
- Say good bye to your livelihood, license, lunch money and possibly even your liberty.
- Always a very bad idea and even worse plan.
- Obviously any present patient, but as this may include past patients this ice is very thin, especially if you work or do mental health/counseling. Transference is real, and so is the likely end of your practice if you just can't resist.

A NUMBERS GAME

- 94,400 2014 PA census per US Bureau Labor Statistics
- 123,000 ish by 2024
- 10,000 PAs in California
- Between 2012-2015: There were 19 formal accusations and 17 disciplinary actions

And how do we lose our licenses? Medical Malpractice? Missing the MI? Mis-dosing the metformin? Mucking up the I&D?



1. Convicted of a crime. (Or don't pay child support…)
2. Failure to maintain adequate records (Document!)
3. Failure to obtain or review medical hx (Due Diligence!)
4. Narcotics. Or how not to make new friends…
5. Do YOUR paperwork, DUH! (it expired when?)

What, nothing about missing the appy that bounced back to the ED next day? The missed fracture radiology called about? The irate patient who didn't get the Perc? What about sex? (remember assault/battery is a crime, see number 1…)