

Medical Jurisprudence

05-11-16

Behavioral Sciences Term
St. Georges University
School of Medicine

Visiting Professor
Thaddeus Pope, JD, PhD

Tuesday
August 2

Segment
6 of 8

Other Liability & Licensing

Objectives

At the conclusion of this unit, the medical student should be able to answer the following 10 questions

1. When can medical malpractice be established through *res ipsa loquitor*
2. What are theories of liability other than medical malpractice

3. How can a physician avoid liability for **breach of contract**
4. How can a physician avoid liability for inadequate **pain control**

5. How can a physician avoid liability for **IIED**
6. What is **vicarious** liability

7. How does **private** regulation assure quality
8. How do **market forces** help assure quality

9. How does **licensing** assure quality
10. What sorts of conduct create liability under the **False Claims Act**

Alternative Theories of Liability

We **already** examined
Abandonment
Battery
Informed consent
Medical malpractice

Res ipsa loquitor

Normally in medical malpractice need an **expert witness** to establish the standard of care

Sometimes, rarely, there is no need for an expert witness

Res ipsa loquitor

Thing speaks for itself

Lay jury can just **infer** there was malpractice

1. Event of type that ordinarily does not occur without negligence
2. That event probably caused by DEF



2 paradigm cases
for res ipsa loquitor



Can **infer**
negligence from
the freakishly
wierd

**Breach of
contract**

Need a specific
guarantee

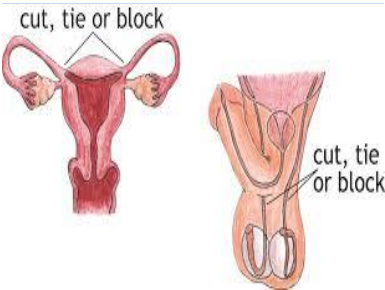
Usually in writing

Rare claim

More common
among cosmetic
clinicians



Other situations



Puffery okay
Reassurance okay

Inadequate Pain Control

Current standard of care in most jurisdictions requires that physicians adequately treat pain.

In many states, inadequate pain management of elderly patients is **“elder abuse”**

Elder abuse may expose a physician to liabilities that do not arise in a normal medical malpractice suit

May **not** be covered by a physician's malpractice insurance policy

IIED
NIED

Intentional / negligent infliction of emotional distress

2 elements

Extreme & outrageous conduct	Not just rude Not just insult, offense Outside the bounds
Severe emotional distress	Must be severe Best show with physical symptoms

May not be malpractice to make patient DNR without consent (if clearly not indicated)

But might **still** be liable for IIED if do so in a secretive, outrageous, insensitive manner

Liability for, IIED **not** be covered by insurance

Other consequences verdict or settlement



45 C.F.R. 60.7

“Each entity, including an insurance company, which makes a payment . . . for the benefit of a . . . health care practitioner . . . **must report** information . . . to the NPDB”

Vicarious Liability

Physician may have done **nothing** wrong

Someone **else** committed malpractice

Patient can always sue the person who committed malpractice

Can **also** sue physician if exercises “control” over person who committed malpractice

Employers liable for torts of employees

Surgeons often like temporary employers over staff (temporary employees)

No double recovery

If \$50,000 in damages,
can recover from **either**
culpable clinician or
supervising physician

Hospitals & entities
liable for all torts of
employees

Hospitals & entities
also liable for torts of
ostensible agents
(non-employees who
look like employees)

**Regulation of
quality OTHER
than through
tort liability**

We spent a long time on
malpractice liability

But that is **just one** legal
tool to help ensure
quality

3 other tools

Private regulation
Market forces
Licensing

1. Private regulation

Hospital credentialing

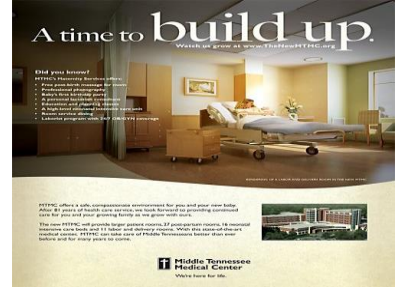
Granting, revoking,
& restricting staff
privileges

MCO Credentialing

Listing, delisting
in networks

2. Market Forces

Brag about services



Brag about outcomes



Meet Dr. Tom Kucharchik, Family Medicine

Hampton Regional Medical Center & Coastal Plains Primary Care is proud to welcome Dr. Tom Kucharchik

He is a board certified family physician who has been practicing for more than 25 years.

Medical School: Columbia University
 Residency: Medical University of South Carolina
 Certifications: American Board of Family Medicine

Now Scheduling Appointments for the week of June 24th
 Call: 803.943.7612

Public reporting on quality



3. Licensing

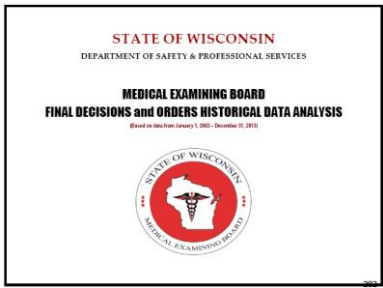
Every state has its own medical board

Bases for discipline

Medical board “triggers” from **other** legal obligations

- Malpractice
- Abandonment
- Informed consent

- Alcohol/drug
- Aiding unlicensed practice
- Incompetence
- Fail to report (crim, malpr, priv)
- Character
- Reciprocal



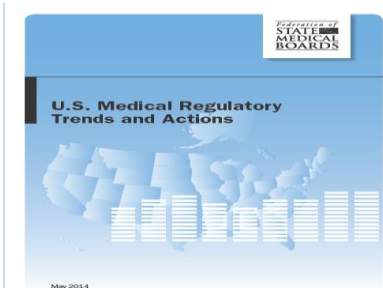
Med 10.000 Direct Patient Care Violations
Med 10.000(a) Performing or attempting to perform any surgical or invasive procedure on the wrong patient, or at the wrong anatomical site, or performing the wrong procedure on any patient.

Disciplinary

- Reprimand
- Suspension
- Revocation

Discipline	2003	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003
2 Reprimand											1
1 Reprimand			1								1
2 Reprimand, Limitation regarding education/training				1				1			
2 Suspension											
1 Suspension, Limitation regarding education/training, restriction on supervision, reprimand, restriction on practice		1									
1 Suspension, Limitation regarding treatment									1		
Total		1	2	1	1	1	1	2	1	1	1

Types of discipline



900,000 physicians

1% disciplined each year

State Medical Board Actions	2012
Total state medical board actions	9,216
Board actions by category*	
License restricted	1,480
Reprimand	1,224
Fine	995
Administrative action	949
Probation	913
License suspended	907
CME required	819
License surrendered	511
Conditions imposed	465
License revoked	299
License denied	170
Other	487

Move from
state licensing
to federal
certification

**CMS
mandatory &
discretionary
exclusions**

Separate from
license under
state law

DHHS (CMS) decision
about whether
physician may
participate in **federal
healthcare programs**

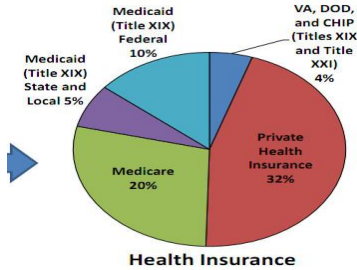
Let's move to one
final type of liability

**Fraud &
Abuse**

So far, we have
focused on
liability relating
to **patient care**



Liability relating to **billing** the USGOV



False Claims Act



Defense contractors billing Union Army

- Dead mules
- Boots with soles glued on, rather than stitched (and coming apart in the rain and mud)
- Gunpowder salted down with sawdust

Type of fraud alleged

- Health care
- Procurement
- Miscellaneous[†]
- Grant program
- Subsidy program
- Housing
- Student loan
- Welfare program
- Scientific
- Other bribery
- Non-housing loan
- Highway
- Veterans benefits
- Overseas bribery

HHS and DOD Agencies More Frequently Named as Allegedly Defrauded

HHS and DOD agencies were more frequently named than other agencies as allegedly defrauded in qui tam cases DOJ received. HHS agencies were named 54 percent of the time and DOD agencies were named 29 percent of the time of the total 5,129 qui tam cases DOJ received from fiscal year 1987 through 2005.

Fiscal Year	HHS	DOD	Other agencies
1987	4	18	22
1988	9	30	20
1989	15	40	44
1990	12	45	53
1991	13	50	48
1992	17	64	67
1993	38	50	86
1994	46	66	97
1995	84	100	134
1996	204	130	333
1997	248	140	306
1998	287	74	360
1999	330	108	438
2000	522	77	599
2001	180	74	134
2002	147	74	122
2003	217	78	150
2004	276	87	193
2005	220	87	134
Total	2,740	1,475	2,242

Any federal program

- Medicare
- Medicaid
- CHAMPUS (Tricare)
- FEHBP

Penalties

Civil penalty not less than \$5,000, not more than **\$11,000**

Plus **3 times** the amount of damages which the Government sustains

Civil penalty not less than \$11,000, not more than **\$22,000** (eff. 08/01/2016)

Plus **3 times** the amount of damages which the Government sustains

You submit a false claim for \$200 procedure

Treble damages =	\$600
Penalty =	<u>\$11,000</u>
TOTAL =	\$11,600

Possible Medicare **exclusion**

Domino cascade effect of sanctions

- Criminal
- Civil
- Federal
- State
- Administrative/regulatory
- Private
- State licensure board

**Big GOV
priority**

Over \$30 billion and counting

High penalties

Easy proof

Who prosecutes

- DOJ
- CMS OIG
- State AG
- Private whistleblower





GOV lacks resources to ferret out all the fraud

FCA often enforced by
 Insiders
 Spouses
 Former business partners
 Former (esp. **disgruntled**) employees

Recovering **on behalf of** GOV
 But get a “reward”

GAO
Government Accountability Office

Qui Tam Recoveries

Mean: \$10,028,482
 Median: \$784,597

Settlement and judgment amounts*	Number
under \$50,000	77
\$50,000 to \$100,000	54
\$100,000 to \$500,000	187
\$500,000 to \$1,000,000	87
\$1,000,000 to \$5,000,000	142
\$5,000,000 to \$10,000,000	57
\$10,000,000 to \$50,000,000	63
\$50,000,000 to \$100,000,000	15
\$100,000,000 to \$1,000,000,000	18
Total	748

GAO
Government Accountability Office

Relator Share of Qui Tam Recoveries

Mean: \$1,700,153
 Median: \$123,885

Relator share of settlement or judgment amounts*	Number
0	65
\$1 to \$10,000	65
\$10,000 to \$50,000	153
\$50,000 to \$100,000	82
\$100,000 to \$500,000	200
\$500,000 to \$1,000,000	71
\$1,000,000 to \$5,000,000	87
\$5,000,000 to \$10,000,000	19
\$10,000,000 to \$50,000,000	22
\$50,000,000 to \$100,000,000	4
Total	748



Recovery Audit Contractors
www.cms.hhs.gov/RAC

What's prohibited

31 U.S.C. § 3729(a)(1)(A)
 Any person who — knowingly presents, or causes to be presented, to . . . a false or fraudulent claim for payment or approval . . . is liable to the United States Government

3 basic elements

1. **Claim** – submitted for payment by USGOV
2. **False** or fraudulent
3. Person **“knew”** (probably) false

Falsification Overutilization

Falsification

Basically, care that was never even provided

Overutilization

Basically, care that may have been provided but was not medically warranted

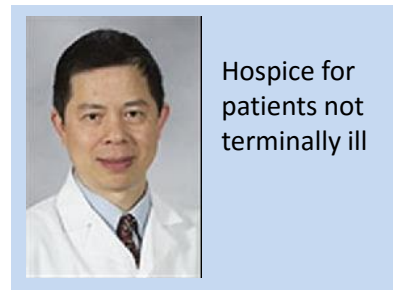
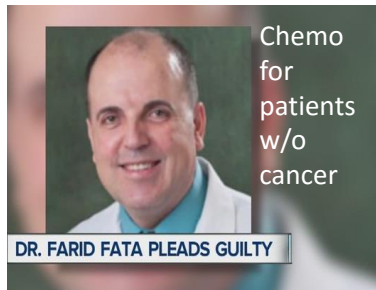
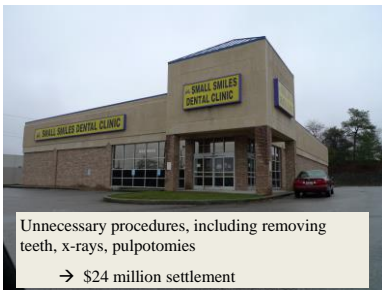
Falsification

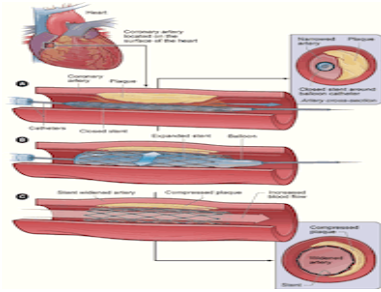
- Billing for services **never** performed
- Billing for brand-named drugs when generic drugs used
- Physician billing for service provided by RN, PA

<p>Upcoding – code for 45 min when saw for 30</p>	
<p>1. NUMBER OF DENTIST VISITS - PREVIOUS YEAR (12/1/14 TO 11/30/15)</p>	<p>2. NUMBER OF DENTIST VISITS - CURRENT YEAR (12/1/15 TO 11/30/16)</p>
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Overutilization

Procedures were provided
Were billed under correct code
BUT procedures were not medically necessary





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