05-11-16

Medical Jurisprudence

Behavioral Sciences Term
St. Georges University School of Medicine

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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

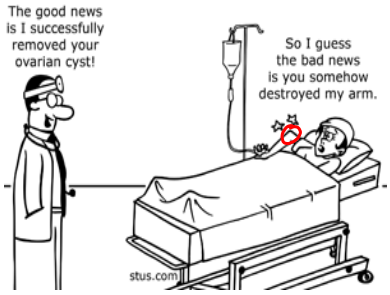
Thing speaks for itself

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

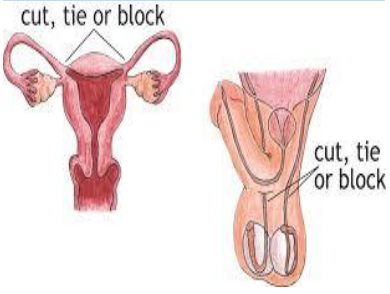
Need a specific guarantee

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

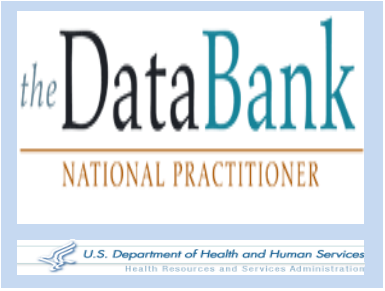
Extreme & outrageous conduct	Not just rude Not just insult, offense Outside the bounds
Severe emotional distress	Must be severe Best show with physical symptoms

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

Public reporting on quality

3. Licensing

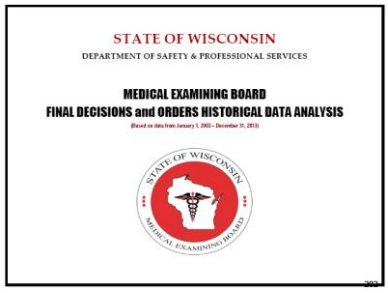
Every state has its own medical board

Bases for discipline

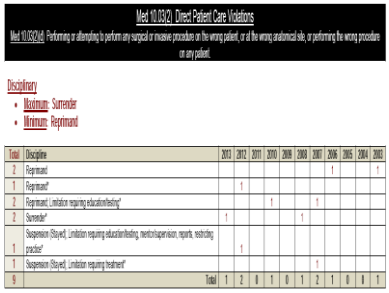
Medical board "triggers" from **other** legal obligations

- Malpractice
- Abandonment
- Informed consent

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


STATE OF WISCONSIN
DEPARTMENT OF SAFETY & PROFESSIONAL SERVICES

MEDICAL EXAMINING BOARD
FINAL DECISIONS and ORDERS HISTORICAL DATA ANALYSIS


Med 10.03(2) Direct Patient Care Violations

Med 10.03(2)(d) 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
- Maximum: Surrender
- Minimum: Reprimand

Total	Discipline	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003
2	Reprimand								1			1
1	Reprimand*		1									
2	Reprimand, Limitation requiring education/testing*				1			1				
2	Surrender*	1					1					
1	Suspension (Stayed), Limitation requiring education/testing, mentor/supervision, reports, restricting practice*		1									
1	Suspension (Stayed), Limitation requiring treatment*							1				
9	Total	1	2	0	1	0	1	2	1	0	0	1

Types of discipline

900,000 physicians

1% disciplined each year

State Medical Board Actions	2012
Total state medical board actions	9,219
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

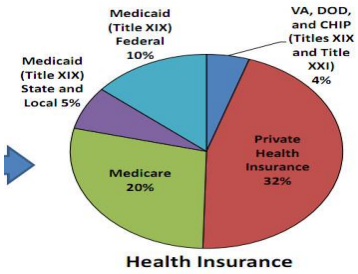
DHHS (CMS) decision about whether physician may participate in **federal healthcare programs**

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

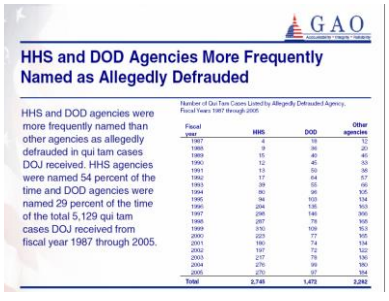


False Claims Act

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[1]
Grant program
Subsidy program
Housing
Student loan
Welfare program
Scientific
Other bribery
Non-housing loan
Highway
Veterans benefits
Overseas bribery


GAO

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.

Number of Qui Tam Cases Listed by Allegedly Defrauded Agency, Fiscal Years 1987 through 2005

Fiscal year	HHS	DOD	Other agencies
1987	4	18	12
1988	9	36	20
1989	15	40	46
1990	12	45	33
1991	13	50	66
1992	17	64	67
1993	39	55	66
1994	80	96	105
1995	94	103	134
1996	204	136	163
1997	298	146	306
1998	287	79	168
1999	370	109	153
2000	223	77	155
2001	180	74	134
2002	197	72	132
2003	217	79	136
2004	276	99	180
2005	270	97	164
Total	2,745	1,470	2,292

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 = $11,000
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

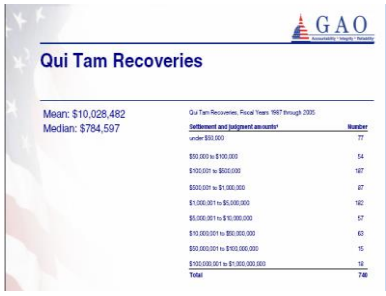
GOV lacks resources to ferret out all the fraud

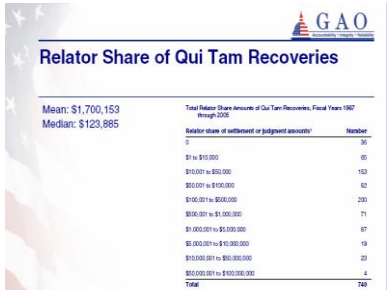
FCA often enforced by

- Insiders
- Spouses
- Former business partners
- Former (esp. **disgruntled**) employees

Recovering **on behalf of** GOV

But get a "reward"





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

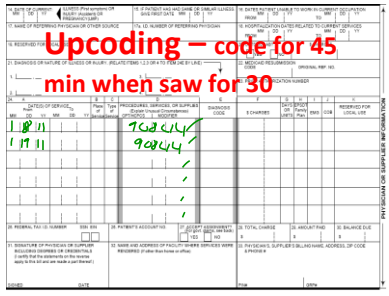
Basically, care that was never even provided

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

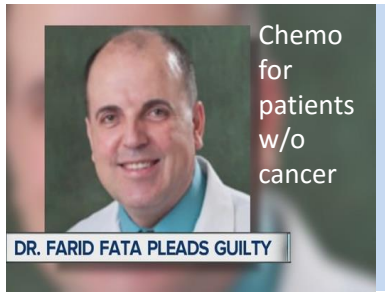


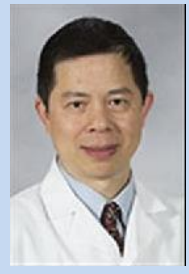
Overutilization

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

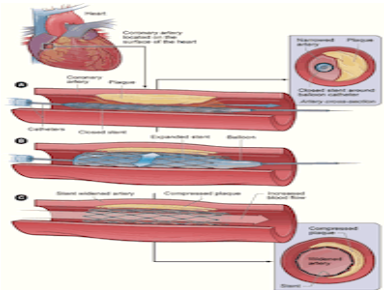
Unnecessary procedures, including removing teeth, x-rays, pulpotomies

→ $24 million settlement





Hospice for patients not terminally ill



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