Course Outline and General Information

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Summary of Course
This course focuses on the tort of medical malpractice and will cover: the history and evolution of medical malpractice in the United States; the effect of malpractice and malpractice litigation on access to and cost of health care; the law of informed consent; determination of the standard of care; theories of professional negligence under traditional and integrated delivery systems; defenses to alleged malpractice; and allowable damages. Because malpractice is a state common law tort, many of the cases will be drawn from recent Washington case law. In addition to typical malpractice actions, the class will also briefly consider a number of miscellaneous torts that may be alleged in the health care context, such as false imprisonment, wrongful commitment, intentional infliction of emotional distress, and actions brought by third parties. The course will conclude with a discussion of some contemporary issues arising in medical malpractice law: liability of alternative care providers, telemedicine liability, and malpractice issues arising at the end of life.

Required Texts


Course Pack B -- This Course Pack includes several recent cases, articles, excerpts from texts, legislation and regulations.

Both sets of course readings are available for purchase at RAMS Copy Center, 4144 University Way N.E., 206-632-6630. Since RAMS conservatively estimates the number of copies it makes, anticipating course drops, you may wish to call ahead to ensure that a copy is immediately available. RAMS assured me that they will turn a copy request around within a day.

Class Participation
An essential component of this course will be your active and voluntary participation in class discussion. If necessary, I will call on students to solicit participation in class discussion.

Course Grade
Your course grade will be based upon a 3 hour, closed book final examination.
COURSE OUTLINE

I. History and Evolution of Medical Malpractice
   A. The First Malpractice Crisis 1835-1865
   B. The Waning Acceptance of "Providence"
   C. The 20th Century Pursuit of Scientific Progress
   D. The Malpractice Crisis of the 1970s
   E. Malpractice in 2003

II. The Types and Elements of a Malpractice Action

III. The Physician-Patient Relationship
   A. The Traditional Rule: A "Contract" between the Patient and the Providers
   B. The Beginning, the End, and the Limits of the Professional Relationship

IV. Actions Based on Failure to Provide Informed Consent
   A. Evolution of Informed Consent Doctrine
   B. The Scope of the Informed Consent Obligation
   C. The Materiality Requirement
      1. Disclosing Physician Conflicts of Interest
      2. Disclosure of Physician Experience and Competence
      3. Disclosure of Procedure Risk and Prognosis
      4. Exceptions to the Duty to Disclose
   D. "Informed Refusal": Respect for the Patient’s wishes
   E. Informed Consent and the Institutional Provider
      1. Role of the Institutional Standard Consent Form
      2. Consent in the Research Setting

V. Medical Negligence Actions: Breach of the Standard of Care
   A. Defining the Standard of Care
   B. Evidence of Negligence
      1. Medical Evidence
      2. Expert Medical Testimony
      3. Effect of Bad Result
      4. Inadmissible and Undiscoverable Evidence
      5. Medical Practice Guidelines
      6. Peer Review
   C. Res Ipsa Loquitur
   D. Strict Liability
   E. Standard of Care: Nurses

VI. Defending Malpractice Claims
   A. The "Respectable Minority" Exception
   B. Clinical Innovation
   C. Good Samaritan Acts
   D. Contributory Fault of the Patient
E. The Statute of Limitations
   1. Delayed Discovery
   2. The Effect of Minority
   3. Exceptions to the Statute of Limitation
   4. Fraud and Concealment: Effect on Tolling

VII. Damages
A. Informed Consent & the "Benefits" Doctrine
B. Noneconomic Damages
C. Punitive Damages
D. Loss of Reduction of a Plaintiff’s Chances of Survival
E. Fear of the Future
F. Multiple Defendants: Joint and Several Liability
G. The Role of Malpractice Insurance

VIII. Institutional Liability: Hospitals
A. Traditional Hospital Immunity Provisions
B. The Vicarious Basis for Hospital Liability
   1. Respondeat Superior
   2. Ostensible Agency
C. Nondelegable Duty\Inherent Function
D. Corporate Negligence

IX. Liability & Integrated Delivery Systems
A. What is an Integrated Delivery System
B. Vicarious Malpractice Liability
C. Corporate Negligence
D. Managed Care Design Defects and Liability
E. Role of ERISA

X. Miscellaneous Torts and Causes of Action
A. Intentional Torts in Malpractice
B. False Imprisonment and Wrongful Commitment
C. Infliction of Mental Distress
D. Physician Duties to Third Parties

XI. Alternative Medicine: What Standard?

XII. Telemedicine Liability

XIII. Emerging Malpractice Issues Arising at the End of Life
COURSE SYLLABUS

The following syllabus outlines the course, reading assignments and sets forth a preliminary timetable. It is possible, if not likely, that we will amend the timetable during the course. However, this outline should serve as rough guide as you plan your reading and study schedule. The reading assignments should be read prior to our coverage of that portion of the outline in class.

CP-A = Course Pack A
CP-B = Course Pack B

Week of January 6
I. History and Evolution of Medical Malpractice
   A. The First Malpractice Crisis 1835-1865
   B. The Waning Acceptance of "Providence"
   C. The 20th Century Pursuit of Scientific Progress
      Reading Assignment:
      CP-A: 1-3
      Introduction
   D. The Malpractice Crisis of the 1970s
      Reading Assignment
      CP-B: 9-43
      Robinson, The Medical Malpractice Crisis of the 1970's: A Retrospective, 49 Law & Contemp. Probs. 5 (Spring 1986)
   E. Malpractice in 2003
      Reading Assignment
      CP-A: 4-17
      Excerpts: Committee on Quality of Health Care in America, Institute of Medicine, To Err is Human: Building a Safer Health System (2000)
      Notes
      CP-B: 44-49F
      Localio, Relation Between Malpractice Claims and Adverse Events Due to Negligence, 325 New Eng. J. Med. 245 (1991)
II. The Types and Elements of a Malpractice Action

Reading Assignment
CP-B: 1-2
RCW § 7.70.010-040

Week of January 13

III. The Physician-Patient Relationship

A. The Traditional Rule: A "Contract" between the Patient and the Providers

Reading Assignment
CP-A: 18-20; 146-160
St. John v. Pope, 901 S.W.2d 420 (Tex. 1995)
Tunkl v. Regents of the University of California, 60 Cal. 2d 92, 383 P.2d 441 (1963)
Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951, 938 P.2d 903, 64 Cal. Rptr. 2d 843 (1997)
CP-B: 50-51H

B. The Beginning, the End, and the Limits of the Professional Relationship

Reading Assignment
CP-A: 21-28
Notes
CP-B: 52-71
Jewson v. Mayo Clinic, 691 F.2d 405 (8th Cir. 1982)
IV. Actions Based on Failure to Provide Informed Consent

A. Evolution of Informed Consent Doctrine

Reading Assignment
CP-A: 175-184

Notes
CP-B: 3-5; 72-97
RCW §§ 7.70.050 - 7.70.065.

B. The Scope of the Informed Consent Obligation

Reading Assignment
CP-A: 185-203
Johnson v. Kokemoor, 545 N.W.2d 495 (Wis.1996)
Arato v. Avedon, 858 P.2d 598 (Cal. 1993)
Matthies v. Mastromonaco, 733 A.2d 456 (N.J. 1999)

Notes
CP-B: 98-130

C. The Materiality Requirement

1. Disclosing Physician Conflicts of Interest

Reading Assignment
CP-B: 131-142
Neade v. Portes, 739 N.E.2d 496 (Ill. 2000)

Handout:
Moore v. The Regents of the University of California, 51 Cal. 3d 120, 793 P.2d 479 (1990)

2. Disclosure of Physician Experience and Competence

Reading Assignment
CP-B: 143-144

3. Disclosure of Procedure Risk and Prognosis

Reading Assignment
CP-B: 145-164
Backlund v. Univ. of Washington, 137 Wash. 2d 651, 975 P.2d 950 (1999)

4. Exceptions to the Duty to Disclose

Reading Assignment
CP-B: 165-174
Week of January 20 (**Note: No class on Jan. 20—MLK Holiday**)

D. "Informed Refusal": Respect for the Patient’s wishes

*Reading Assignment*

CP-B: 175-185


E. Informed Consent and the Institutional Provider

1. Role of the Institutional Standard Consent Form
2. Consent in the Research Setting

*Reading Assignment*

CP-A: 204-206

Notes

CP-B: 186-194

45 CFR 46.116 - 46.117

Week of January 27

V. Medical Negligence Actions: Breach of the Standard of Care

A. Defining the Standard of Care

*Reading Assignment*

CP-A: 29-39

Nowatske v. Osterloh 198 Wis. 2d 419, 543 N.W.2d 265 (1996)
Klisch v. Meritcare Medical Group, Inc., 134 F.3d 1356 (8th Cir. 1998)

Notes

CP-B: 195-234

Gates v. Jensen, 92 Wash. 2d 246, 595 P.2d 919 (1979)

B. Evidence of Negligence

1. Medical Evidence
2. Expert Medical Testimony
3. Effect of Bad Result
4. Inadmissible and Undiscoverable Evidence
5. Medical Practice Guidelines
6. Peer Review

*Reading Assignment*

CP-A: 40-72

Tompkins v. Bise, 910 P.2d 185 (Kan. 1996) [group with White]
Chapel v. Allison, 785 P.2d 204 (Mont. 1990)

Notes
Note: The Use Of Medical Practice Guidelines
Claypool v. Mladineo, 724 So.2d 373 (Miss. 1998)

Notes
CP-B: 235-279
Jackson v. Buchman, 996 S.W.2d 30 (Ark. 1999)

Week of February 3
C. Res Ipsa Loquitur
D. Strict Liability
E. Standard of Care: Nurses
   Reading Assignment
   CP-A: 77-80
   CP-B: 280-317

Week of February 10
VI. Miscellaneous Torts and Causes of Action
   A. Intentional Torts in Malpractice
      Reading Assignment
      CP-B: 318-323
   B. False Imprisonment and Wrongful Commitment
      Reading Assignment
      CP-B: 324-334
      Collins v. Straight, Inc., 748 F.2d 916 (4th Cir. 1985)
   C. Infliction of Mental Distress
      Reading Assignment
      CP-A: 207-210
      CP-B: 335-366
      Johnson v. Verrilli, 511 N.Y.S. 2d 1008 (Sup. Ct. 1987)
      Berger v. Sonneland, 144 Wash.2d 91, 26 P. 3d 257 (2001)
D. Physician Duties to Third Parties

*Reading Assignment*

CP-A: 211-216


Notes

CP-B: 390-411


Trahan v. McManus, 728 So.2d 1273 (La. 1999)

Handout

RCW § 71.05.120

**Week of February 17 (***No Class Feb. 17—Pres. Day Holiday***)

VII. Defending Malpractice Claims

A. The "Respectable Minority" Exception

B. Clinical Innovation

C. Good Samaritan Acts

D. Contributory Fault of the Patient

*Reading Assignment*

CP-B: 175-185 (review); 412-460

Henderson v. Heyer-Schulte Corp. of Santa Barbara, 600 S.W. 2d 844 (Tex. Civ. App. 1980)


McKenna v. Cedars of Lebanon Hosp., 155 Cal. Rptr. 631 (Ct. App. 1979)


Brown v. Dibbell, 595 N.W. 2d 358 (Wis. 1999)

E. The Statute of Limitations

1. Delayed Discovery

2. The Effect of Minority

3. Exceptions to the Statute of Limitation

4. Fraud and Concealment: Effect on Tolling
Reading Assignment
CP-B: 6; 461-513; 145-152 (review)

RCW § 4.16.350.
Winbun v. Moore, 143 Wash. 2d 206, 18 P.3d 576 (2001)

Week of February 24
VIII. Damages
A. Informed Consent & the "Benefits" Doctrine
B. Noneconomic Damages
C. Punitive Damages
D. Loss of Reduction of a Plaintiff’s Chances of Survival
E. Fear of the Future
F. Multiple Defendants: Joint and Several Liability

Reading Assignment
CP-A: 161-174
Martin v. Richards, 192 Wis. 2d 156, 531 N.W.2d 70 (1995)
Guzman v. St. Francis Hospital, 623 N.W.2d 776 (Wis. 2000)

Notes
CP-B: 514-554; 7
Harbeson v. Parke-Davis 98 Wash.2d 460, 656 P.2d 483 (1983)
BNA Health Care Daily, Plan Entitled to Recover All Proceeds of Malpractice Settlement, Dec. 7, 1998
RCW § 4.22.070

G. The Role of Malpractice Insurance

Reading Assignment
CP-B: 565-579
Medical Malpractice Joint Underwriting Association of Rhode Island v. Rhode Island Insurers Insolvency Fund, 703 A. 2d 1097 (R.I. 1997)
B. Rice, SOS; When a Malpractice Insurer Sinks, How do its Doctors Survive? 75 Med. Econ. 188 (1998)
Week of March 3
IX. Institutional Liability: Hospitals
   A. Traditional Hospital Immunity Provisions
   B. The Vicarious Basis for Hospital Liability
      1. Respondeat Superior
      2. Ostensible Agency
   C. Nondelegable Duty/Inherent Function
   D. Corporate Negligence

Reading Assignment
CP-A: 84-96
   Clark v. Southview Hospital & Family Health Ctr, 628 N.E.2d 46 (Ohio 1994)
   Brickner v. Normandy Osteopathic Hospital, Inc., 746 S.W.2d 108 (Mo. App. 1988)

CP-B: 580-612F
   Tanya Albert, Liability crisis reaction: Doctor-owned insurance fills gap,
   AMNews (Dec. 23/30, 2002)
   http://www.ama-assn.org/sci-pubs/amnews/pick_02/prl11223.htm

American Health Line, Hospitals and Health Systems: Massachusetts

X. Liability & Integrated Delivery Systems
   A. What is an Integrated Delivery System
   B. Vicarious Malpractice Liability
   C. Corporate Negligence
   D. Managed Care Design Defects and Liability
   E. Role of ERISA

Reading Assignment
CP-A: 114-145
   Jones v. Chicago HMO Ltd. of Illinois, 191 Ill.2d 278, 730 N.E.2d 1119 (2000)

   Notes
   U.S. Healthcare, Inc. v. Bauman, 193 F.3d 151 (3d Cir. 1999)

   Notes
   Note: Corporate Practice
CP-B: 613-671; 131-142 (review)
   Wickline v. California, 239 Cal. Rptr. 810 (Ct. App. 1986)
Bast v. Prudential Insurance Co., 150 F. 3d 1003 (9th Cir.1998), *cert.
denied* 528 U.S. 870 (1999)

**Week of March 10**

XI. Alternative Medicine: What Standard?

*Reading Assignment*

CP-A: 1: 73-76

Murphy v. Nordhagen, 588 N.W.2d 96 (1998)

Notes

CP-B: 672-715

Kerkman v. Hintz, 418 N.W.2d 795 (Wis. 1988)


D. Studdert et al., Medical Malpractice Implications of Alternative Medicine, *JAMA* (Nov. 11, 1998)

XII. Telemedicine Liability

*Reading Assignment* - To Be Distributed


XIII. Emerging Malpractice Issues Arising at the End of Life

*Reading Assignment*: Available at http://www.law.washington.edu/courses/mastroianni/B505/assignments.html

Gaddis vs. United States

A Prescription for the Pain: The Emerging Standard of Care for Pain Management

New Type of Suit: Pain Treatment

Doctor Guilty of Elder Abuse for Under-treating Pain